

**ARBITRATION DECISION NO.:**

381

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Commerce

**DATE OF ARBITRATION:**

September 23, 1991

**DATE OF DECISION:**

October 11, 1991

**GRIEVANT:**

Mark Miller

**OCB GRIEVANCE NO.:**

07-00-(91-05-27)-0121-01-14

**ARBITRATOR:**

Harry Graham

**FOR THE UNION:**

Joe Ealey

**FOR THE EMPLOYER:**

Valerie Butler

**KEY WORDS:**

Removal  
Failure to Account For  
Absences  
Personality Conflict  
Failure to Correct Behavior

**ARTICLES:**

Article 24 - Discipline  
§24.01-Standard  
§24.02-Progressive  
Discipline  
Article 25 - Grievance  
Procedure  
§25.01-Process

**FACTS:**

The grievant has been employed for thirteen years by the Division of Real Estate in the Ohio Department of Commerce. For much of his tenure with the Department he was regarded as a satisfactory employee. Commencing in April, 1990 his work performance began to deteriorate. In little more than a year he compiled

a record of three written reprimands, a three day and a fifteen day suspension. The grievant's two suspension were grieved but the grievances were denied at arbitration. Finally, in the period from December 27, 1990 through April 5, 1991 there occurred a total of eighteen incidents which prompted the employer to discharge the grievant. Those incidents involved the failure of the grievant to inform his supervisor of his whereabouts during the day, his taking of an extended lunch hour without permission and his attendance at various meetings without permission. As those incidents occurred and the employer sought an explanation of the grievant's whereabouts, his explanation was generally not forthcoming. In due course, the employer came to view the grievant's behavior as being unacceptable and discharged the grievant on May 10, 1991.

#### **EMPLOYER'S POSITION:**

The State insists that the grievant has demonstrated a pattern of behavior indicative of a disregard for reasonable work rules that have been effect for many years. The grievant's detailed work history indicates 18 instances of leaving his work area without permission within a four month period of time. Except for two of these absences, the grievant did not respond to the direct order of his supervisor to explain his absences from the work site. This type of behavior is completely unacceptable according to the State. In its view, the rules of conduct of the Department have been violated repeatedly by the grievant. Given the grievant's record, the State insists that its discharge of the grievant was proper.

#### **UNION'S POSITION:**

The union points out that the grievant has thirteen years of service with the State. Until he incurred the reprimands and suspensions which preceded his discharge he was an exemplary employee. In his entire tenure with the State he has had only one instance of discipline prior to the sequence of events which culminated in his discharge. The union contends that the grievant's supervisors are out to get him. Under previous supervisors the grievant was not required to make precise accounting for his time. He was able to go to the law library and attend meetings without having to make an explanation. These activities were not whimsical or a waste of time. Rather, they were in furtherance of the State's business. The union believes that this dispute involves a personality conflict. The grievant does not get along with his supervisors nor they with him. Discharge is not an appropriate penalty in these circumstances.

#### **ARBITRATOR'S OPINION:**

The evidence of the grievant's failure to account for his time away for the office either on the log sheet or in subsequent explanation to his supervisor is irrefutable. Only a person oblivious to his activity could have continued it in complete disregard of the consequences. The grievant had advance knowledge of the possible consequences of his activity. The State acted properly in the administration of discipline. The written warnings were followed by two suspensions. The grievant is a professional person. He has every expectation that he will be accorded a great deal of freedom to perform his tasks in a professional manner. Nonetheless, he works in an organization that has rules and with people whose task it is to enforce these rules. The flagrant disregard of the reasonable requirements of the State concerning the recording of absences from the office and requiring an explanation for those absences is just cause for the grievant's removal.

#### **AWARD**

The grievance is denied.

#### **TEXT OF THE OPINION:**

In the Matter of Arbitration  
Between

**OCSEA/AFSCME Local 11**

and

**The State of Ohio,  
Department of Commerce**

**Case Number:**  
07-00-(91-05-27)-0121-01-14

**Before:**  
Harry Graham

**Appearances:**

**For OCSEA/AFSCME Local 11:**  
Joe Ealey Staff Representative  
OCSEA/AFSCME Local 11  
1680 Watermark Dr.  
Columbus, OH. 43215

**For Department of Commerce:**  
Valerie Butler  
Office of Collective Bargaining  
65 East State St.,  
16th Floor  
Columbus, OH. 43215

**Introduction:**

Pursuant to the procedures of the parties a hearing was held in this matter on September 23, 1991 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. No post hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument.

**Issue:**

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

"Was the Grievant terminated for just cause? If not, what shall the remedy be?"

**Background:**

The Grievant in this dispute, Mark Miller, has been employed for thirteen years by the Division of Real Estate in the Ohio Department of Commerce. His work site is in the Cleveland, OH. office. For much of his tenure with the Department he was regarded as a satisfactory employee. Commencing in April, 1990 his work history in the opinion of the Department began to deteriorate. In little more than a year he compiled a record of three written reprimands, a three day and a fifteen day suspension. The culmination of this sorry sequence of events is the discharge under review in this proceeding.

Mr. Miller's disciplinary record may be summarized as follows:

4/11/90 a written reprimand for absence from his work station without permission

4/30/90 a written reprimand for insubordination and AWOL

5/4/90 a written reprimand for AWOL and insubordination

11/6/90 a three day suspension for neglect of duty, insubordination and AWOL

1/5/91 a fifteen day suspension for insubordination and AWOL.

The three and fifteen day suspensions were grieved. The grievances were processed through the procedure of the parties to arbitration. The arbitrator sustained the action of the Employer in those cases and denied the grievances in their entirety.

In the period from December 27, 1990 through April 5, 1991 there occurred a total of eighteen incidents which prompted the Employer to discharge the Grievant. Those incidents involved the failure of the Grievant to inform his supervisor or her designee of his whereabouts during the day, his taking of an extended lunch hour without permission and his attendance at various meetings without permission. As those incidents occurred and the Employer sought explanation of the Grievant's whereabouts, explanation was generally not forthcoming. In due course the Employer came to view the Grievant's behavior as being unacceptable. The discharge under review in this proceeding occurred on May 10, 1991.

That discharge was protested in the Grievance procedure of the parties. No resolution of the dispute was reached in the various steps of the procedure and it is now before the Arbitrator for final determination.

### **Position of the Employer:**

The State insists that the Grievant has demonstrated a pattern of behavior indicative of disregard of reasonable work rules that have been in effect for many years. Mr. Miller's detailed work history indicates the following:

#### Leaving the Work Area Without Permission

12-27-90	12:30PM - 1:30PM
2-13-91	3:22PM - 5:00PM
2-14-91	8:00AM - 8:00AM
2-14-91	1:20PM - 1:50PM
2-15-91	1:20PM - 2:30PM
2-20-91	1:05PM - 1:45PM
2-21-91	9:30AM - 11:00AM
2-26-91	8:00AM - 8:45AM
2-26-91	1:00PM - 2:00PM
2-27-91	12:45PM - 1:15PM
3-08-91	2:00PM - 2:50PM
3-12-91	1:00PM - 1:50pm
3-29-91	1:00PM - 5:00PM
4-01-91	4:00PM - 5:00PM
4-02-91	1:40PM - 2:15PM
4-03-91	1:15PM - 2:55PM
4-04-91	8:00AM - 9:30AM
4-05-91	12:45PM - 3:00PM

Related to these absences from the work site is the failure of the Grievant to request leave for them with the exception of the March 29, 1991 absence. In addition, the Grievant did not respond to the directive of his supervisor to submit leave forms for those absences with the exception of the March 29, 1991 date. Nor did

the Grievant respond to the direct order of his supervisor to explain his absence from the work site for all of those absences with the exception of those of February 13 and March 29, 1991. This type of behavior is completely unacceptable according to the State. In its view the rules of conduct of the Department at Memo 6.01, Rule 11 and 2 b and 2 c proscribe the type of activity in which the Grievant engaged. On numerous occasions as set forth above Mr. Miller left the work area without permission. When asked to explain his absence from the office he consistently declined to do so. The record indicates that the State acted to correct what it regarded as deficiencies in the Grievant's behavior. It issued the written reprimands and suspensions alluded to above. They did not serve to alter the behavior of Mr. Miller. He continued to absent himself from the office without permission or explanation. The suspensions were contested at arbitration and found to be proper. Given that record the State insists that its action in this proceeding was proper as well. Accordingly, it urges that its action in discharging the Grievant be upheld.

### **Position of the Union:**

The Union points out that the Grievant has thirteen years of service with the State. Until he incurred the reprimands and suspensions which preceded his discharge he was an exemplary employee. In his entire tenure with the State he has had only one instance of discipline prior to the saga of events which culminated in his discharge. In the Union's view, a good employee does not suddenly become a prime candidate for discharge. There exists a ready explanation for the sequence of disciplinary actions including the two prior suspensions and the discharge under review in this proceeding. The Grievant's supervisors, Sylvia Keberle and Adam Tonti, are out to get him. A review of the pattern of work in the Cleveland office indicates that it was conducted in an informal fashion in past years. Under prior supervisors the Grievant was not required to make precise accounting for his time. He was able to go to the law library and attend meetings without explanation or account. These activities were not whimsical or a waste of time. Rather, they were in furtherance of the State's business. Under the administration of Ms. Keberle and Mr. Tonti the Grievant was expected to account for his time and secure permission for absence from the office. Habits of many years are difficult to break. He did not greet the new regime enthusiastically.

The Grievant's record is not as bleak as is portrayed by the State. In fact, he has explained some of his absences from the office. (Union Exhibits 3 and 4). This dispute involves a personality conflict. The Grievant does not get along with his supervisors nor they with him. Discharge is not an appropriate penalty in these circumstances. Consequently, the Union urges the Grievant be reinstated with a make-whole remedy.

### **Discussion:**

It is unarguable that the Grievant compiled a poor work history in the year preceding his discharge. That the Union took his two suspensions to arbitration and that the arbitrator found them to be justified is given great weight by this Arbitrator. It is apparent that for whatever reason a pattern of failure to account for time out of the office and insubordination developed in the months preceding Mr. Miller's discharge from State service.

The evidence of Mr. Miller's failure to account for his time away from the office either on the office log sheet or in subsequent explanation to his supervisor is irrefutable. To term it copious is an understatement. Only a person oblivious to his activity could have continued it in complete disregard of the consequences. Mr. Miller had advance knowledge of the possible consequences of his activity. The State acted properly in administration of discipline. Written warnings were followed by two suspensions. What more could the State have done to call to Mr. Miller's attention the fact that it viewed his behavior as being unacceptable?

Mr. Miller was consistently asked to explain his absences from the office. With minor exception, he did not comply. The requirements for documentation were not unreasonable. They were not burdensome. The Grievant is a professional person. He has every expectation that he will be accorded a great deal of freedom to perform his tasks in a professional manner. Nonetheless, he works in an organization that has rules and people whose task it is to enforce those rules. The flagrant disregard of the reasonable requirements of the State concerning recording of absence from the office and requiring an explanation for those absences

subject the Grievant to discipline.

The record indicates the Grievant has been disciplined. Written reprimands and two suspensions of increasing severity have not served to induce the Grievant to alter his behavior. What further measure can the Employer be expected to take in this situation other than discharge?

The Grievant has thirteen years of service with the State. By all accounts he has been a fine employee for most of that period. That he has opened himself to discharge is a tragedy. By failing to alter his behavior after receipt of the great amount of discipline that preceded his discharge, the Grievant has brought this sad situation upon himself.

**Award:**

The grievance is DENIED.

Signed and dated this 11th day of October, 1991 at South Russell, OH.

Harry Graham  
Arbitrator