

**ARBITRATION DECISION NO.:**

544

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Mental Health  
Pauline Warfield Lewis Center

**DATE OF ARBITRATION:**

May 10, 1994

**DATE OF DECISION:**

May 25, 1994

**GRIEVANT:**

Ann Johnson

**OCB GRIEVANCE NO.:**

23-13-(93-08-27)-0741-01-04

**ARBITRATOR:**

Mollie Bowers

**FOR THE UNION:**

Penny Lewis

**FOR THE EMPLOYER:**

Rita Surber

**KEY WORDS:**

Removal  
Just Cause  
Absence Without Leave  
Falsification of Documents  
Neglect of Duty  
Credibility  
Employee Assistance Program

**ARTICLES:**

Article 9 - Ohio Employee Assistance Program  
    § 9.04 - Employee Participation in Ohio EAP  
Article 24 - Discipline  
    § 24.01 - Standard  
    § 24.09 - Employee Assistance Program

**FACTS:**

The grievant was a Custodial Worker at Rollman Psychiatric Institute from May of 1987 until August of 1990 when she was transferred to the Pauline Warfield Lewis Center. The grievant had received prior

discipline on four separate occasions due to attendance-related problems.

On March 5, 1993 the grievant was issued an Order of Removal for a violation of HR-101 Tardiness/Falsification of sign-in sheet. As a result, the grievant entered into an Employee Assistance Program Participation Agreement on March 11, 1993. The grievant appeared for her first intake assessment. She, however, did not appear for her second intake assessment. Furthermore, the grievant stated she could not start treatment until June 7 due to her scheduled vacation. She did not appear on June 7, but did appear on June 8.

The incident which gave rise to Management's decision to remove the grievant occurred on June 12, 1993. This incident was the alleged falsification of the Sign-In Sign-Out Sheet by the grievant. The second Order of Removal was prepared for the grievant in August due to the grievant's failure to comply with the EAP agreement and the finding that the grievant was guilty of Neglect of Duty and Dishonesty in her actions on June 12, 1993.

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

Management contended that it had just cause for the grievant's termination because the grievant failed to comply with the EAP agreement entered into on March 11, 1993. Furthermore, Management alleged that the grievant allegedly falsified her reporting time on the Sign-In Sign-Out Sheet dated June 12, 1993. Management stated that this discipline was appropriate, given the grievant's past history of progressive discipline.

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

The Union asserted that there was no just cause for the grievant's termination and no just cause for the reinstatement of the Order of Removal, because prior to the grievant entering into the EAP agreement she was already in counseling. Furthermore, Management also lacked just cause for the incident that occurred on June 12, 1993. The Director of Housekeeping gave testimony concerning this incident. However, her testimony is irrelevant due to the fact that she had left when the grievant had arrived. Therefore, she could not know whether the time written on the Sign-In Sign-Out Sheet was accurate.

The Union also asserted that Management's reasons for the grievant's termination were not supported by the record. Accordingly, the Union requested that the grievant be reinstated, with full back pay, and be made whole in every respect.

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

The Arbitrator found that the grievant was terminated for just cause. The grievant did not fulfill the terms of the EAP agreement which was the basis for holding the March 5 Order of Removal temporarily in abeyance. Additionally, she did not attempt to make use of EAP's services before her June 1 vacation. Lastly, the grievant did not report to the EAP on the date she indicated she would. Rather, she did not appear until June 8. Thus, the Arbitrator concluded, Management had the right to terminate the grievant because the grievant's actions indicated that she did not plan to fulfill the terms of the EAP agreement. The Arbitrator also concluded that Management had sustained its burden of proof that there was just cause based on the incorrect time she placed on the Sign-In Sign-Out Sheet.

In reaching her decision, the Arbitrator considered the grievant's past disciplinary record which demonstrated a history of attendance-related problems. The Arbitrator found the grievant to be a less credible witness because of her past disciplinary record. Based on the above discussion, the Arbitrator found that there was just cause for the grievant's discipline and that discharge was the appropriate penalty for the alleged offense.

#### **AWARD:**

The grievance was denied.

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

#### **IN THE MATTER OF THE ARBITRATION BETWEEN:**

**Pauline Warfield Lewis Center**

-and-

**OCSEA/AFSCME, Local 11****Grievance No.:**

23-13-930827-0741-01-04

**Grievant:**

Ann Johnson

**ARBITRATOR:**

Mollie H. Bowers

**APPEARANCES:****For the State:**

Rita Surber, Human Resource Administrator

**For the Union:**

Penny Lewis, OCSEA Area Representative

The Ohio Civil Service Employees Association/American Federation of State, County and Municipal Employees, Local 11, AFL-CIO (hereinafter, "the Union") brought this case to arbitration to protest, as without just cause, the removal of Ann Johnson (hereinafter "the Grievant") by the Pauline Warfield Lewis Center (hereinafter, "the Center" or "the Management"). The Hearing was held on May 10, 1994, at 10:00 a.m. in Conference Room 703 at the Office of Collective Bargaining, 106 North High Street, Columbus, Ohio. Both parties were present and were represented at the Hearing. They stipulated jointly that this case is properly before this Arbitrator. The parties had a full and fair opportunity to present testimony and evidence in support of their case and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the parties both made oral closing arguments.

**ISSUE**

The parties stipulated jointly that the issue to be decided is: Did the Pauline Warfield Lewis Center remove Ms. Johnson for just cause? If not, what shall the remedy be?

**BACKGROUND**

At the outset of the Hearing, the parties stipulated to certain facts as follows. The Grievant was hired as a Custodial Worker, PCN 124242.0 at Rollman Psychiatric Institute on May 4, 1987. She worked there until August of 1990, when, as a result of a merger, she was transferred to the Center. The Grievant was on a leave of absence from September 21 to December 3, 1991. Her prior discipline, on which no grievances are pending, includes: (1) a verbal reprimand, dated March 19, 1991, for "Neglect of Duty due to excessive tardiness and Failure to follow established calling in procedure" (JX-3); (2) a written reprimand dated May 3, 1991, for the same reasons as stated in item (1) (JX-4); (3) a two working days suspension, dated August 30, 1991, for "Neglect of Duty" resulting from tardiness and/or AWOL on nine occasions between May 5, and July 14, 1991. (JX-5) ; and (4) a six day suspension, dated June 19, 1992, for "Neglect of Duty" as a result of

numerous attendance related problems which "constitutes a pattern of abuse." (JX-6)

Another undisputed fact is that an Order of Removal of the Grievant was signed by Michael F. Hogan, Ph.D., Director of the Department of Mental Health, on March 5, 1993. (KX-2) The reason stated for this action was that the Grievant had been found guilty of the charge that, "During the period of October through December, 1992, your McBee cards indicates (sic) violation of HR-101 Tardiness/Falsification of sign-in sheet." The parties agree that the Grievant was afforded due process rights with respect to this discipline including a pre-disciplinary conference, Union representation, and an opportunity to rebutt the charge against her. The testimony and evidence of record also shows that Management decided to hold this discipline in abeyance by acting in accordance with the collective bargaining agreement (JX-1), Articles 9.04 and 24.09.

The parties agree that the Grievant knowingly and voluntarily entered into an Employee Assistance Program Participation Agreement on March 11, 1993. (JX-8) With the Grievant's written permission, Sanford Weinberg, Executive Director, Ohio Employee Assistance Program (hereinafter, "the EAP") gave testimony about her compliance with the aforesaid Agreement. He, in essence, testified to the following: (1) the Grievant kept her initial appointment on March 23, 1993, and appeared for her first intake assessment on April 5, 1993; (2) she did not appear for her second intake assessment on April 7, 1993; (3) the Grievant was present for an intake assessment on May 13, 1993, but stated that she could not start treatment until June 7, 1993, because of a scheduled vacation, and (4) she failed to appear on June 7, but did appear on June 8, two or three days before the ninety day Agreement was due to expire. (JX-8) Based upon this record, Mr. Weinberg opined that the Grievant failed to comply with the Agreement. This testimony was un rebutted.

Mr. Weinberg further stated that, based on his recollection of the intake report of May 13, 1993, he believed "the initial assessment was favorable" in terms of the Grievant's prospects for overcoming the problems she discussed with her EAP Counselor. That testimony is corroborated by a letter, dated June 28, 1993, from F. Abdul-Haqq, Ph.D., LPCC, CAS, at the EAP to "Ms. Suber" (sic). (MX-3) This letter also corroborates Mr. Weinberg's testimony that the Grievant did not keep an appointment with her Counselor (date unspecified) because of "her scheduled vacation plans." (MX-3)

The incident which gave rise to Management's decision to remove the Grievant occurred on June 12, 1993. There is no dispute that the Grievant's scheduled work hours on Unit/Ward A were 6:30 a.m. to 3:00 p.m. Jean Harris, Director of Housekeeping, gave un rebutted testimony that the Grievant called her at 6:35 a.m. to report that she had car trouble. There is no disagreement between the testimony provided by Ms. Harris and that of the Grievant that the latter stated she would be at work as soon as she could, "by 7:00 a.m.," if at all possible. Given this information, Ms. Harris testified that she arranged for Eddie Bostic, a Custodian of nineteen years, to wait in the laundry for the Grievant to arrive so that he could give her keys to the Janitorial closet on Unit A. <sup>[1]</sup> Ms. Harris stated that she left the Center at 6:45 a.m. and had not seen the Grievant before she left. She further testified, and Mr. Bostic confirmed, that he left the laundry at 7:00 a.m. to perform duties he was assigned on Unit G.

Joint Exhibit 10 is the Sign-In Sign-Out Record for June 12, 1993. It shows that the Grievant wrote that she signed in at 6:45 a.m. There is no dispute between the parties that the Grievant lived "downtown." They do disagree on how much time it would take her, even at top speed assuming she used the expressways, to have reached the Center even if, as the Grievant claims, her car started immediately after she placed the call to Ms. Harris.

There is not dispute between the parties that, sometime after the Grievant reached the Center, on June 12, 1993, she paged Mr. Bostic to bring her the keys. They further agree that Mr. Bostic delivered the keys to the Janitorial closet on Unit A at or about 9:25 a.m. <sup>[2]</sup> The parties, positions are at variance about what transpired between the Grievant's alleged arrival at the Center at 6:45 a.m. and the agreed upon supplication of the keys to the Grievant by Mr. Bostic at or about 9:25 a.m. that morning.

Ms. Harris testified that the following day, June 13, 1993, she checked the Sign In Sign Out Record for the previous day. (JX-10) Her testimony is un rebutted that she inquired of the Grievant whether she made "an honest mistake" in recording her sign in time on June 12. The Grievant acknowledged stating that there was no mistake. Ms. Harris testified that she would have taken no action against the Grievant if she had admitted to making a mistake in recorder her sign in time on June 12.

The parties disagree about what happened at the meeting between the Grievant and Ms. Harris on June 13. The Grievant testified that she arrived at the Center at 6:45 a.m. and, when questioned about this by Ms. Harris, she "left out." Joint Exhibit 12 contains a contemporaneous statement written by Mr. Bostic. He gave un rebutted testimony that he was present at the meeting between Ms. Harris and the Grievant, and that the Grievant did not simply leave the meeting, but rather said "Dame it i know what time i got here the day of 6:13-93."<sup>[3]</sup>

An Order of Removal was prepared for the Grievant on August 10, by Dr. Hogan. (JX-7) The reasons given for this action were as follows:

"The original order of Removal signed March 5, 1993 was held in abeyance pending your voluntary participation in the Employee Assistance Program (EAP) for ninety days. Based upon information received from the EAP Intake Coordinator, you provided reports that you did not keep your appointment due to your vacation which started June 1, 1993. The original EAP Agreement was signed by you on March 11, 1993 and you did not attend a session until June 8, 1993.

The reason for this action is that you have been found guilty of Neglect of Duty and Dishonesty in the following particulars to wit: On June 12, 1993, you phoned your supervisor, Ms. Jean Harris at about 6:35 a.m. and informed her you would be late for work because your car would not start. Ms. Harris informed you that she was leaving and Mr. Bostic would be at the sign-in area until 7:00 a.m. with your keys. This act is in violation of HR-101."

The Order also gives an account, paralleling the testimony given by Ms. Harris, about what transpired at the meeting on June 13. Based upon information obtained from Mr. Bostic about the time that the Grievant arrived at work or when he delivered the Janitorial keys to her at 9:25 a.m., Management made the determination that the Grievant should be removed from service with the Center (JX-7).

These are the events which gave rise to the case before this Arbitrator for decision.

### **CONTENTIONS OF THE PARTIES**

#### **Management Position:**

According to Management, it had just cause for the Grievant's termination on two grounds. First, Management points to the fact that the Grievant failed to comply with the EAP agreement she entered into on March 11, 1993, which resulted in an Order of Removal, dated March 5, 1993, being held in abeyance. It contends that she "clearly understood" that failure to complete this agreement would cause the termination to be reinstated as discipline.

Second, Management maintains that the termination is warranted because the Grievant falsified her reporting time on the Sign In Sign Out Report for June 12, 1993. It is management's position that the discipline of termination is appropriate for this offense given the Grievant's past history of progressive discipline.

There can be no doubt, Management contends, that the circumstances of this case were fully and fairly investigated, and that there are no factors which mitigate the penalty imposed. The Management, therefore, asks that the discipline be upheld and that the grievance be denied as the outcome of this proceeding.

#### **Union Position:**

The Union asserts that there is no just cause for the Grievant's termination. It contends that she was already in counseling when the EAP agreement was entered into and while it was in effect. The Union, therefore, maintains that the Center lacked just cause for reinstating the Order of Removal, dated March 5, 1993.

According to the Union, the Management also lacked just cause to terminate the Grievant for the incident that occurred on June 12, 1993. It points out that Ms. Harris had left when the Grievant arrived so she could not know whether the time written on the Sign In Sign Out Report was incorrect. The Union also relies on

the Grievant's testimony to show that she could perform work and use her cart on Unit A without having access to the Janitorial closet. This means, the Union maintains, that the time she paged and/or received keys from Mr. Bostic is irrelevant to the Grievant's arrival time on June 12. The reason the Grievant was docked two hours pay and this discipline initiated, the Union argues, is that she refused to falsify the Sign In Sign Out Report by changing her arrival time on June 12, from 6:45 to 7:45 a.m. as requested by Ms. Harris.

The Union maintains that neither one nor both of the reasons given by management for the Grievant's termination has been supported by the record. Accordingly, it asks that she be reinstated, with full back pay, and be made whole in every respect as the outcome of this case.

### **DISCUSSION**

After carefully considering the record in its entirety, the Arbitrator finds that Management has sustained its burden of proving that the Grievant was terminated for just cause. This conclusion is based partly on the fact that the Grievant did not fulfill the terms of the EAP agreement which held the Order of Removal, dated March 5, 1993, in abeyance. There is no dispute that she knowingly and voluntarily signed that agreement. The document does not contain any caveat which exempts the Grievant from compliance if she is receiving counseling from another source. Additionally, the record clearly shows that she made no meaningful effort to avail herself of the EAP's services even **before** the intervention of her vacation on June 1. Finally, the Grievant did not even report to the EAP on the date she indicated, June 7 after her vacation, but rather appeared on June 8. The Arbitrator concludes that the Grievant's intent was evidenced by her actions, or lack thereof, and thus, that Management has the right to terminate her in accordance with the Order of Removal, dated March 5, 1993.

With respect to the incident that occurred on June 12, 1993, the Arbitrator noted that the Grievant was penalized two hours pay for lateness so that matter shall not be revisited in this decision. It is appropriate, however, to consider whether or not Management had just cause for terminating the Grievant based on the time she placed on the Sign In Sign Out Report for the subject date. The Arbitrator concluded that sufficient credible evidence and testimony was supplied by Management to sustain its burden of proof.

One factor the Arbitrator considered in reaching this conclusion was the Grievant's past disciplinary record which shows a history of attendance related problems. Given this history and the Grievant's testimony about what transpired on June 12, the Arbitrator deemed her to be a less than credible witness. It was not possible to accept that her vehicle started immediately after the Grievant spoke to Ms. Harris or that she could have arrived at the Center in ten minutes at any speed or on any roads. These explanations were circumstantially convenient, but not persuasive in terms of the outcome of the case.

The Grievant's lack of credibility was reinforced by her testimony vis-a-vis that of other witnesses about why she allegedly delayed until at or about 9:20 a.m. to obtain the keys from Mr. Bostic and whether or not she could perform her work on Unit A without the keys to the Janitorial closet. Since none of these witnesses had anything to gain from the outcome of this case, but the Grievant did, the Arbitrator concluded that her testimony about her sign in time was self-serving and not credible.

In reaching a decision, the Arbitrator also considered that Ms. Harris gave the Grievant an opportunity change her entry on the Sign In Sign Out Report. Thus, Management did not act hastily, nor was it arbitrary and capricious, in determining what discipline should be meted out to the Grievant. Finally, no evidence of mitigation was presented.

On the basis of the foregoing analysis, the Arbitrator has found that there was just cause for the Grievant's discipline and that discharge is the appropriate penalty for the offense alleged.

### **AWARD**

The grievance is denied.

MOLLIE H. BOWERS, Ph.D.  
Arbitrator

Date: May 25, 1994

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[1] There is no dispute between the parties that all employees have "FW" keys which give them access to Unit A. There is also no dispute, as confirmed by the testimony of Union Witness, Renee Hearne, Registered Nurse, Unit A, for almost nine years, that she has never accessed the Janitorial closet on this unit and that a separate key, which Mr. Bostic was to give to the Grievant, was required for this purpose for "safety reasons".

[2] The record is uncontroverted that the Grievant could not have obtained the keys to the Janitorial closet on Unit A on her own volition on the date in question.

[3] Mr. Bostic testified that his written statement was incorrect that he received a page from the Grievant at "9:20 a.m. on Sunday [June 13, 1993]" At the Hearing, he corrected this statement to mean June 12. No objection or rebuttal to this correction was made by the Union or the Grievant.