

ARBITRATION DECISION NO.:

569

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation
Northwood Garage, Lucas County

DATE OF ARBITRATION:

March 14, 1995

DATE OF DECISION:

March 27, 1995

GRIEVANT:

Gregory Hurst

OCB GRIEVANCE NO.:

31-02-(94-08-05)-0017-01-06

ARBITRATOR:

Harry Graham

FOR THE UNION:

Lois Haynes

FOR THE EMPLOYER:

Edward A. Flynn

KEY WORDS:

Removal
Just Cause
FMLA
Credentials of Medical
Provider

ARTICLES:

Article 24 - Discipline
§ 24.01 - Standard

FACTS:

The grievant was employed with the Ohio Department of Transportation as a Highway Maintenance Worker 2. In the spring of 1994, the grievant's wife began experiencing medical problems and the grievant subsequently requested use of leave under the Family and Medical Leave Act of 1993 (FMLA) in order to care for his wife and his children. In order to qualify for leave under FMLA, employees are required to supply evidence supporting the need for leave. The grievant provided documentation from a Licensed Psychological Clinical Counselor. The counselor documented the problems that the grievant and his wife were experiencing. Management challenged this documentation on the grounds that the counselor did not

definitely state that the grievant should be on leave to care for himself and his wife. Management neither approved nor denied the leave.

As a result of the medical problems, the grievant found it necessary to be off work. Since the grievant's leave was not approved by management and he had exhausted his leave accruals, management considered the grievant to be on unauthorized leave.

Management also believed that the grievant was moonlighting as a landscape contractor during his leave and therefore, believed that the grievant had abandoned his job and had engaged in dishonesty in requesting leave under FMLA. The grievant was subsequently discharged.

EMPLOYER'S POSITION:

Management believed that the grievant's discharge was for just cause because he continually failed to supply documentation to support his request for leave under FMLA. Management also challenged the counselor's credentials on the grounds that he was not a licensed medical practitioner under its definition.

In addition, management believed that the grievant was involved in a landscape business and the grievant was also building a new home for his family. Based on an internal investigation, management also believed that the grievant was working on his new home or conducting his landscape business during periods for which he requested leave.

As the grievant did not provide sufficient justification for his requested leave and abused the leave policy, management asserted that the grievance should be denied.

UNION'S POSITION:

The union believed that the grievant did not abuse management's leave policy because the grievant was never in receipt of a written order to return to work. In addition, the union stated that leave under the FMLA was never disapproved or approved by management. Management simply failed to act on the grievant's request for leave and since the grievant was faced with family medical problems and had to care for his wife and children, he had no option but to take a leave of absence from work.

The union also claimed that the employer may not rely upon any notion that the counselor was not a health care practitioner to support its denial of leave in this situation. Mr. Frankenburg was licensed as a clinical counselor and also possessed a Ph.D. in clinical psychology. Therefore, management's challenge to his credentials was without merit. Additionally, Mr. Frankenburg provided documentation on the grievant's condition as well as on the grievant's wife's condition. The grievant was willing to provide additional information but management never requested it.

Finally, the union pointed out that the grievant did visit his new house from time to time while on leave and that he could not have been expected to stay at his wife's side every minute of every day. The union, therefore, requested that the grievance be sustained.

ARBITRATOR'S OPINION:

The arbitrator held that the grievant satisfied the criteria needed for leave under the FMLA due to the fact that documentation was provided regarding the medical problems suffered by the grievant and his wife.

The arbitrator also stated that management could not take refuge by asserting that the counselor was not a health care provider and that his communication to management was worthless. This was supported by the fact that the counselor's resume showed that he was about to receive a Ph.D. in clinical psychology and he had completed substantial course work in the field.

The arbitrator agreed with the Union that the grievant was not required to be at his wife's side every minute of the day and it was not unreasonable for the grievant to visit the construction site of his new home from time to time. Therefore, the arbitrator held that the grievant's discharge was wrongful.

AWARD:

The grievance was sustained and the grievant was restored to his employment with ODOT, receiving wages, benefits, and health insurance that he would have received but for the incident. The arbitrator also held that if any interim earnings were received by the grievant from the Unemployment Compensation system, they could be used by management to offset its liability to the grievant.

TEXT OF THE OPINION:

In the matter of Arbitration
Between

OCSEA/AFSCME Local 11

and

**The State of Ohio,
Department of Transportation**

Case Number:

31-2-(8594)-17-01-06

Before: Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

Lois Haynes
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For Department of Transportation:

Edward A. Flynn
Labor Relations Officer
Department of Transportation
37 West Broad St., 3rd floor
Columbus, OH. 43215

Introduction: Pursuant to the procedure of the parties a hearing was held in this matter on March 14, 1995 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue: The parties agree upon the issue in dispute in this proceeding. It is:

Was the Grievant terminated for just cause?

If not, what shall the remedy be?

Background: Much of the factual background prompting this arbitration is not a matter of dispute between the parties. The Grievant, Gregory Hurst, has been a Highway Maintenance Worker in the employ of the State for approximately 14 years. At the time of his discharge he was classified as a Highway Maintenance Worker 2 and was working out of the Northwood Garage in Lucas County, OH. There is one instance of discipline on Mr. Hurst's record. At some time (no date was furnished to the arbitrator) he received an oral reprimand.

Mr. Hurst is married. In the Spring of 1994 his wife began experiencing mental difficulties. On occasion these made it difficult or impossible for her to carry out the daily tasks associated with life. Included among these were care for three young children. The presence of Mr. Hurst was required at home. In April, 1994 Mr. Hurst used personal leave to absent himself from work. He also inquired about use of the Family and

Medical Leave Act of 1993. (FMLA) The Employer responded that in order to use leave under FMLA it would be necessary for Mr. Hurst to supply evidence supporting the need for such leave. In response, Mr. Hurst provided a document from one John B. Frankenburg, M.S. LPCC. The initials LPCC stand for Licensed Psychological Clinical Counselor. Mr. Frankenburg detailed Ms. Hurst's psychological problems. It also noted that Mr. Hurst was suffering from depression. This material was regarded by the Department as insufficient to prompt it to grant leave under the FMLA. Without detailing each and every internal communication within the Department, supporting documents were provided by Mr. Hurst to the District 2 Headquarters in Bowling Green. They were forwarded for guidance and action to ODOT Headquarters in Columbus. Personnel in Columbus were equivocal. They were concerned that the material from Mr. Frankenburg did not definitively state that Mr. Hurst should be on leave to care for his wife and himself. They were also concerned that Mr. Frankenburg's status under the statute was unclear. That is, he was not a licensed medical practitioner as defined by the Department. In the final analysis, ODOT never approved or denied Mr. Hurst's application for leave.

As Spring, 1994 progressed Mr. Hurst found it necessary to be off work. When his leave balances were exhausted he failed to report. On some days he called-in to indicate he would not be at work. On other days he did not call-in to report his absence. As leave had not been approved for his absences the Department recorded them as "Unauthorized Leave."

In the course of these events the Department had determined that Mr. Hurst moonlighted as a landscape contractor. He was also building a new residence...An investigation satisfied the Department that during some of the time he was absent Mr. Hurst was working in the landscape business or on his new home. It determined upon discipline. On July 25, 1994 Mr. Hurst was discharged. It was the view of the Department that Mr. Hurst had engaged in job abandonment and dishonesty in requesting leave under FMLA. That discharge was protested in the grievance procedure of the parties. It was not satisfactorily adjusted and the parties agree it is now properly before the Arbitrator for resolution on its merits.

Position of the Employer: The fundamental reason prompting the Employer to discharge Mr. Hurst was his continual failure to supply information to support his request for leave under FMLA. As early as May 3, 1994 Mr. Hurst was informed by the Department that it regarded the documentation supporting his leave request to be inadequate. He was directed to submit additional information. When additional information was provided by the Grievant on May 13, 1994 it too, was regarded as being inadequate. In addition, the material submitted was vague. It did not specifically indicate he had to be off work to care for his wife. Under such circumstances the Department was justified in denying leave and ultimately, imposing discipline.

In late May, 1994 Mrs. Hurst experienced an accident which resulted in "whip lash." The Grievant sought time off to care for his wife. He was directed to supply medical evidence. Such evidence as he supplied was, like the evidence dealing with his need to assist his wife during her mental problems, vague. It made no direct reference to any requirement that he be off work. Under those circumstances the denial of leave was justified according to the Employer.

As the events of Spring, 1994 unfolded the Department came to learn that the Grievant was involved with a landscape business. He was also building a new home for his family. The Department was suspicious that his requests for time off represented a ruse. It felt that they might be serving to cover-up time spent in the landscape business and at his new home site. An internal investigation was conducted. Hurst was surreptitiously observed for several days. To the satisfaction of the investigator he was working on his new home or in his landscape business during periods for which he had requested leave. The Department concluded he was abusing his approved leave and the leave he had requested. Its investigation was disinterested. It was conducted by a veteran of the Ohio State Highway Patrol, an experienced investigator. It should be credited. As the Grievant neither provided sufficient justification for his requested leave and abused leave as well, the Department asserts his grievance should be denied.

Position of the Union: The Union hotly disputes that the Grievant either abused leave or was dishonest in any manner. Preliminary to consideration of the FMLA the Union points out that the Grievant was never in receipt of a written order to return to work. He did not disobey such an order because one was never

received. Nor was leave under the FMLA ever disapproved. Neither was it approved. The State simply did not act on his application for leave. Mr. Hurst was confronted with a serious family situation. He had to take care of his wife and children. Under the circumstances, he had no option but to absent himself from work according to the Union.

The Union points to documentation supplied by Mr. Frankenburg in support of Mr. Hurst's application for leave. It indicates that Ms. Hurst "is experiencing major depression." She "is suffering from serious psychological symptoms." In his letter, (Employer Exhibit 4) Mr. Frankenburg indicates Ms. Hurst was taking three different medications commonly used in the treatment of depression. This was supported by a note from Ms. Hurst's physician attached to Mr. Frankenburg's letter. Ms. Hurst was taking Prozac, Zanex and Feoriset. In an earlier letter, (Employer Exhibit 2) Mr. Frankenburg had supported Mr. Hurst's request for time off to care for his wife and himself. This was reiterated in his later letter, Employer Exhibit 4.

The Employer may not rely upon any notion that Mr. Frankenburg is not a health care practitioner to support its denial of leave in this situation. He is a licensed clinical counselor. As of April, 1995 he will possess a Ph.D. in clinical psychology. He is in private practice as a clinical psychologist. At the time the Hurst family was referred to him he was associated with Dr. Lurley Archambeau, MD, a psychiatrist. Under the terms of Mr. Hurst's medical plan, HMO Health Ohio, Dr. Archambeau sent the Hurst's to Mr. Frankenburg. Under these circumstances he must be considered to be a health care provider in the Union's view.

The US Department of Labor has issued interpretive bulletins concerning the FMLA. Union Exhibit 7 is one such notice. It indicates that:

"A covered employer must grant an eligible employee up to a total of 12 workweeks of unpaid leave during any 12 month period for one or more of the following reasons: to care for an immediate family member (spouse, child or parent) with a serious health condition (Emphasis in original)"

Mr. Hurst's situation in the Spring of 1994 falls squarely within those for which the statute provides leave.

The Department of Labor has issued its Part 825 of the Code of Federal Regulations which provide definitions and interpretations of the FMLA. It provides that a "health care provider" is to include "clinical psychologists." "Physical or mental disability" means "a physical or mental impairment that substantially limits one or more of the major life activities of an individual." Those definitions apply to Mr. Frankenburg and Ms. Hurst respectively.

Under Section 825.305 of the Rules the Employer may require a person seeking to utilize leave to provide certification for the need for such leave from the health care provider. Such certification was provided in the form of the letters from Mr. Frankenburg. Documentation was also supplied from Dr. Schneider. At all times Mr. Hurst was willing and told the Department he was willing, to provide any additional information it desired. Nothing was ever asked of him. Section 825.307 permits the Employer to seek a second and third opinion regarding the need for family leave. The Employer never did so. If it doubted the information supplied about Mrs. Hurst's condition it had available means to make its own determination. It never sought any information that might have led to confirmation or contest of the information provided by the Grievant, Mr. Frankenburg or Dr. Schneider.

The investigator who tracked Mr. Hurst's whereabouts during June, 1994 erred in some respects. One of the contractor's personnel working on Mr. Hurst's new house bears a remarkable resemblance to the Grievant. This is shown in Union Exhibit 8, two photographs of the construction worker. One photograph includes the Grievant and the construction worker. It is obvious they bear a great physical similarity. Similarly, when it was reported that Mrs. Hurst and her a small child were at various locations on June 7, 1994 evidence and testimony is to the contrary. Mrs. Hurst and her daughter were at the daughter's pre-school for the year-end ceremony. This is indicated by Union Exhibit 9, a Certificate of Appreciation given to Mrs. Hurst on that day for her support of the pre-school program. Mr. Hurst admits to having visited his new residence from time-to-time while off work. It is his view and that of the Union that he cannot be expected to stay at his wife's side every minute of every day. For the well-being of both of them, some time apart was necessary. The evidence certainly does not support a conclusion that Mr. Hurst was using leave to advance

his personal affairs.

As the Department is required to provide leave in situations such as that confronted by Mr. Hurst in the Spring of 1994 and as no abuse of that leave occurred, the Union urges the Grievance be sustained and that the Grievant be restored to employment with a make-whole remedy.

Discussion: Eligibility for leave under the Family and Medical Leave Act is couched in mandatory terms. The U.S. Department of Labor indicates that an employer "must" grant leave to an eligible employee. Leave is available "to care for an immediate family member (spouse, child, or parent) with a serious health condition." (Union Ex. 7). It cannot be doubted that in the Spring of 1994 Mrs. Hurst was suffering from a "serious health condition." Employer Exhibits 2 and 4 amply attest to that. Mr. Frankenburg noted that both Mr. and Mrs. Hurst "had been reporting symptoms of depression and stress overload." (Employer Exhibit 2). He expanded upon that note subsequently. In Employer Exhibit 4 he indicates that "She (Mrs. Hurst) is experiencing major depression; recurrent. Also, she has developed acute stress anxiety attacks and nervousness." He continued to observe "In summary, I wish to be very clear in stating that Susan (Mrs. Hurst.) is suffering from serious psychological symptoms." No doubt can exist that the Department was aware in the Spring of 1994 that Mrs. Hurst as well as her husband, were experiencing severe problems.

The Department cannot take refuge by asserting that Mr. Frankenburg was not a health care provider and that his communication to the Department was worthless. The Definitions used for purposes of the FMLA indicate that among those persons to be considered health care providers are "clinical psychologists" (Employer Exhibit 3). Mr. Frankenburg's resume, Union Exhibit 5, shows him about to receive a Ph.D. in "clinical psychology." His resume is admittedly unclear as to the difference between a "clinical counselor," a "psychotherapist" and a "clinical psychologist." However, there is no doubt whatsoever that Mr. Frankenburg is a "clinical psychologist" based upon the course work and the degree he is about to receive. In addition, Employer Exhibit 3 shows that the definition of "needed to care for a family member ... encompasses both physical and psychological care." There can be no doubt that the Grievant sought time off work to care for his wife who was experiencing mental problems. It is not believable that the Department was ignorant of that fact in the Spring of 1994. Mr. Hurst was entitled to leave under FMLA.

The Arbitrator cannot conclude that Mr. Hurst was engaged in a fraudulent attempt to secure FMLA leave. Mr. Hurst was observed securing sod and mulch from a garden supplier in Maumee. He was not observed using those materials in his business. His explanation, that they were for use around his home and that of his Mother-in-Law is unrebutted. There is no testimony or evidence to the contrary.

At the hearing the Grievant freely acknowledged that he had visited the site of his new home under construction. It is not reasonable for the Employer to expect that every waking and sleeping moment of every day off work be spent in the company of his spouse. It was not shown that the Grievant falsely applied for FMLA leave in order to assist in the construction of his new dwelling.

The report of the investigator into Mr. and Mrs. Hurst's activities (Employer Exhibit 17) is open to question. For instance, it indicates Mrs. Hurst to be around the family residence at Keller Rd. at 11:00 a.m. on June 7, 1994. Mrs. Hurst testified that at that hour she was attending the pre-school graduation of her daughter. This is attested to by Union Exhibit 9, the Certificate of Appreciation extended to her on that date by the Acorn Valley Preschool. Similarly, while it is not regarded as significant by this Arbitrator that Mr. Hurst was at his new home site, even the details of that are open to question. Union Exhibit 8 is a set of photographs of the site. They include a picture of Mr. Hurst and a construction worker. The resemblance is uncanny. The investigator forthrightly identified Mr. Hurst at the arbitration hearing. This does not produce the conclusion that she correctly identified him at each visit to the work site.

Award: The grievance is sustained. The Grievant is to be restored to his employment with the Ohio Department of Transportation. He is to receive all wages and benefits he would have received but for this incident. The Grievant is to promptly supply the Employer with such evidence as it may require of interim earnings, if any. Such interim earnings and any payments made to the Grievant from the Unemployment Compensation system may be used by the Employer to offset its liability to the Grievant. All seniority that would have been earned but was not due to this incident is to be credited to the Grievant. All other payments

he would have received but did not, such as payments from health insurance are to be made to the Grievant. All record of this incident is to be expunged from the personnel file of the Grievant.

Signed and dated this 27th day of March, 1995 at South Russell, OH.

HARRY GRAHAM

Arbitrator

HARRY GRAHAM, ARBITRATOR

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July 29, 1995

Ms. Rachel Livengood

Office of Collective Bargaining

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Columbus, OH. 43215

Mr. John Porter

OCSEA/AFSCME Local 11

1680 Watermark Dr.

Columbus, OH. 43215

Re: OCSEA/AFSCME Local 11 and State of Ohio, Department of Transportation, Greg Hurst Discharge Dispute, Case Number: 31-02-940805-0017-01-06

Dear Ms. Livengood and Mr. Porter:

This will confirm the contents of our recent telephone conversation regarding the remedy in the case captioned above. As part of the remedy contemplated in my award the Grievant, Greg Hurst, is to be restored to employment at the site from whence he was discharged.

Sincerely,

Harry Graham