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In the Matter of Arbitration      *
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Between                           *
                                  *  Case No.: 02-03-
OCSEA/AFSCME Local 11             *  (88-09-22)-0051-01-09
                                  *
and                               *  Before: Harry Graham
                                  *
The State of Ohio, Department of  *
Administrative Services           *
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Appearances: For OCSEA/AFSCME Local 11:

Allyne Beach
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For The State of Ohio:

Robin Thomas
Office of Collective Bargaining
65 East State St.
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on May 9, 1989 before Harry Graham. At that hearing both parties were provided complete opportunity to present testimony and evidence. Post hearing statements were filed by the parties. They were exchanged by the Arbitrator on June 12, 1989 and the record was closed on that date.

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

> Was Cynthia Lewis removed for just cause? If not, what shall the remedy be?

Background: The outline of the events which give rise to this proceeding may be simply stated. In the period from January through June, 1988 the Grievant, Cynthia Lewis, was employed as a Secretary in the office of the Deputy Director of the Public Works Division of the Department of Administrative Services. In that time span she made great use of the various leaves available to her. A total of 167.5 hours of approved leave was used. This included 72 hours of leave without pay. The paid leave time involved sick leave, personal leave and vacation time. During the six month January - June, 1988 period the Grievant made it clear to her supervisors that she was experiencing problems of a personal and marital nature and that she sought the leave in order to resolve them.

In the course of that time period the Employer came to regard Ms. Lewis' behavior at work as unsatisfactory. On June 7, 1988 and June 16, 1988 her supervisor, Erin Miller, attempted to discuss her shortcomings with Ms. Lewis. In the course of those meetings the Grievant was unresponsive in the opinion of the State. Consequently, Ms. Miller determined that a suspension would be appropriate in an effort to correct the Grievant's behavior. A pre-disciplinary meeting was held on June 27, 1988 which was attended by the Grievant and her Union steward. A three day suspension was determined upon by the Employer. Before that suspension was served Ms. Lewis commenced upon a period of extended absence. This began

on June 29, 1988. That absence was not approved by the Employer. The State regarded that Ms. Lewis had abandoned her job. On July 21, 1988 Ms. Lewis applied for leave. Her request indicated she sought leave for the period commencing on July 16, 1988 through August 14, 1988. In the "Remarks" section of the leave application the Grievant indicated she was making application for disability leave. That application was disapproved by the appropriate management officials.

On July 22, 1988 the Grievant's supervisor as of that date, Valerie Blosser, requested that Ms. Lewis be removed from State service. It was her view that Ms. Lewis had been absent without leave. Hence, she had abandoned her position with the State. Ms. Blosser pointed out that a request for leave on July 6, 1988 for the period June 30, 1988 to July 5, 1988 had been denied. Ms. Lewis had been informed by Erin Miller on July 6, 1988 that she was on an unapproved absence. A second leave request covering the period July 6, 1988 to July 15, 1988 had been disapproved. All requested leave had been denied by the State. As the Grievant had not reported for work the State considered that she had abandoned her job.

In fact, the Grievant returned to work on August 15, 1988. This marked her first day on the job since June 29, 1988. The pre-disciplinary conference specified in the Agreement was held on August 19, 1988 at which time removal was determined upon. That removal was to be effective on

September 15, 1988. Ms. Lewis was ultimately separated from State service. A grievance protesting her discharge was promptly filed. The parties agree that it is properly before the Arbitrator for resolution on its merits.

Position of the Employer: As is to be expected, the State asserts that Ms. Lewis' removal was for just cause. In the first half of 1988 she used a great amount of leave. That leave was approved, but use of leave to the extent used by the Grievant is extraordinary. In effect, Ms. Lewis' had converted her full-time position to a part time job with the State. The leave provisions of the Agreement do not contemplate that situation. The Grievant made her supervisors aware of her domestic difficulties. In an effort to assist with their resolution leave was made available to her. Notwithstanding the consideration shown to her by supervision, Ms. Lewis' work was unsatisfactory. Thus, prior to the events under review in this proceeding she received a verbal reprimand on May 12, 1988 for poor work and a bad attitude while on the job. Further discussions with the Grievant in June, 1988 resulted in sharp retorts by Ms. Lewis. She used profanity in responding to the criticism of supervisors. The Employer should not be required to retain in its employ a person who manifests such unusual and aggressive behavior it asserts.

The Union cannot argue that the State did not follow

progressive discipline in this situation. Ms. Lewis was informed on June 27, 1988 that a three day suspension was to be imposed. Before that suspension could be served she began her period of unauthorized leave which commenced on June 29, 1988. It is improper for the Union to assert that as no suspension was served by the Grievant that progressive discipline did not occur. The suspension would have been served if Ms. Lewis had reported to work as scheduled.

During July, 1988 Ms. Lewis' supervisors, Erin Miller and Valerie Blosser, informed her via telephone that her job was in jeopardy and that the State regarded her as being absent without leave. In spite of being placed upon clear notice by the State of her tenuous hold on employment, the Grievant did not return to work. The State asserts that her record must be regarded as indicating that Ms. Lewis abandoned her position. Consequently, it urges the grievance be denied.

When in July, 1988 Ms. Lewis submitted an application for disability leave, that application was denied. In spite of being informed that the leave was denied Ms. Lewis somehow came to believe that the leave had been approved. On July 20, 1988 Valerie Blosser clearly informed the Grievant that she was not on approved leave and that the State considered her to be AWOL. The following day the Grievant appeared at the office with a completed application for leave. Ms Blosser

once again told her that she had not been approved for leave and that she was AWOL. On July 22, 1988 Ms. Blosser recommended the Grievant be discharged. The required pre-disciplinary meeting was scheduled to be held on August 19, 1988. On August 15, 1988 the Grievant returned to work. She had been absent without leave since June 29, 1988. At the conclusion of the pre-disciplinary conference removal was recommended, to be effective September 15, 1988. Recognizing that events subsequent to the decision to terminate do not bear directly upon the decision, the State points to continued problems with Ms. Lewis in the period from mid-August to mid-September, 1988. When her conduct of personal business on work time was called to her attention Ms. Lewis invited the State to fire her.

The Employer argues that Ms. Lewis' personal problems do not provide any grounds for mitigation. The State was aware that she was experiencing domestic difficulties, though not to the extent later revealed on the record. It attempted to accommodate her problems by providing leave regularly in the period January - June, 1988. When the Grievant failed to apply for leave but absented herself from work without authorization the State was provided ample grounds for discharge.

No responsibility rests with the State to provide assistance for people experiencing personal or domestic

problems. The Employer operates an Employee Assistance Program. (EAP). It encouraged the Grievant to avail herself of its services. Ultimately, she declined to do so. The State has no authority to force employees to utilize the services of the EAP. The Union cannot be permitted to argue that somehow the State is responsible for Ms. Lewis problems and her failure to seek assistance in the EAP. Recourse to that service is the employee's decision, not that of the State. That she did not use the EAP was her own doing. Article 24, Section 24.08 provides that potential discipline may be deferred if an employee elects to participate in the EAP. Ms. Lewis did not make that election.

The record indicates that the State made every effort to accommodate the Grievant. During the first half of 1988 she was provided extensive time off work, in paid and unpaid status. At some time the Employer must be permitted to terminate an employee who has demonstrated she cannot function in the work environment. That point was reached in this situation. As this is the case, the State urges the grievance be denied.

Position of the Union: The Union points to the circumstances surrounding Ms. Lewis' discharge. Events in her personal life had conspired to induce in her the psychological condition of depression. In the Spring of 1988 her marriage began to disintegrate. Her husband, an alcoholic, attempted suicide in

April, 1988. As their marital status deteriorated he beat the Grievant. During this period as well Ms. Lewis was ill with pneumonia. These events reduced her ability to cope with the everyday stresses of life. Her precarious mental state was given additional stress by events in the Summer of 1988. Her son became very ill with a mysterious malady, finally diagnosed as parasitic infection. On August 8, 1988 the Grievant's father was admitted into a hospital in Columbus after experiencing a serious heart attack. Standing alone these facts provide ample grounds for concluding that mitigating circumstances exist to warrant setting aside the discharge in this case. Contrary to the State, the Union urges that in determining whether or not just cause exists for discharge, arbitrators take account of mitigating circumstances. One of the most eminent arbitrators in the nation, Jonathan Dworkin, did just that in a decision involving these parties. (Case No. G 87-2358, Tim Tabol).

The Union points out that the State did not notify the Grievant that her absence constituted grounds for her removal. No guidelines exist in the Department to give her any reason to believe that discharge could result from her absences in the Summer of 1988. In fact, as the State had been accommodating in the past the Grievant had every reason to believe that her absence would be approved. The Employer was aware that Ms. Lewis was experiencing domestic

difficulties, though it was unaware of their true extent and magnitude. At no time did the State inform her that failure to report to work would result in discharge. As Ms. Lewis was never told that failure to report would imperil her continued employment, the Employer may not resort to discharge in this case in the Union's opinion.

As the Union reads the record the State failed to meet its obligation to impose progressive discipline. At Article 24, Section 24.02 a schedule of discipline is set forth. In fact, Ms. Lewis was given a verbal reprimand on June 17, 1988. A three day suspension and discharge were imposed concurrently. This is not permitted by the Agreement according to the Union.

In fact, performance evaluations of the Grievant conducted before the onset of her domestic difficulties show her to be a very satisfactory employee. If she is returned to work there is every reason to believe she will once again function well. In the circumstances of this situation, what was required of the State was assistance, not discipline, of Ms. Lewis. Yet, notwithstanding the extraordinary domestic problems confronting her, the State moved to discharge. In the circumstances of this case, the Union urges that the requisite "just cause" was absent. Thus, it seeks an award restoring Ms. Lewis to employment with full back pay.

Discussion: The Grievant's record of employment in the period

January, 1988 through her discharge in September, 1988 indicates that she failed to meet the most fundamental obligation of an employee to the employer: that of regular attendance. Her status had become one of a part-time, not a full-time employee. When the employer is paying wages for a full-time employee but receiving the product of a part-time employee it is furnished with bona fide grounds for discipline.

In this situation, the Employer did not act precipitously. It walked the extra mile in an effort to accommodate Ms. Lewis and keep her in its employ. The record of leave provided to her in the period through June, 1988 is indicative of that fact. Time off was sought and granted profusely. Only when the Grievant disappeared from the work site for an extended period did the State move to terminate her continued employment. On their face, Ms. Lewis' actions in not informing the State of her plans for extended absence and her failure to secure permission for that absence provide ample grounds for discharge.

The assertion of the Union that the State did not follow the principles of progressive discipline set forth in the Agreement is incorrect. Suspension followed reprimand. That the suspension was not served does not alter the fact that it had been imposed. Obviously the events that give rise to this proceeding intervened and prevented the suspension from being

served. The Grievant was provided ample notice that the State regarded her attendance as unsatisfactory.

Similarly, when the Union argues that as the State did not inform Ms. Lewis that she faced the possibility of discharge if her attendance did not improve mandates the action be overturned, it is in error. Only a person oblivious to the work environment could fail to comprehend that attendance is the sine-qua-non of holding a job. The State is not required to inform employees of the obvious precondition to retention of employment, that attendance at work is mandatory. Ms. Lewis was well aware that the State regarded her attendance to be a problem.

In addition, the Union's assertion that the State somehow failed to prompt Ms. Lewis to have recourse to the Employee Assistance Program mandates that the discharge be overturned is unpersuasive. Article 24, Section 24.08, contains the word "elect." The employee must "elect" to participate in the EAP. Ms. Lewis did not make that election. The State lacks contractual authority to require employees participate in the EAP. Had Ms. Lewis done so, the "serious consideration to modifying the ... disciplinary action" contemplated by the Agreement might have occurred. By her own action, or more accurately, inaction, Ms. Lewis deprived the State of the opportunity to modify the discharge penalty.

Arguments made by the Union concerning mitigation might

be considered in light of the decision of Arbitrator Jonathan Dworkin in Cedar Coal Co. (79 LA 1028). In that case, which is strikingly similar to this dispute, Arbitrator Dworkin considered the case of an employee who had quit his employment with the Company while undergoing stress associated with marital discord. In determining that the Grievant did not have the choice to rescind his quit the Arbitrator was of the view that "Anxiety is a common disease in our society, and its presence does not, in and of itself, excuse sufferers from responsibility for their voluntary acts." It would be easy to adopt the view of Arbitrator Dworkin and apply it to this case. The feature that distinguishes this dispute from the one before that eminent neutral is the fact that Ms. Lewis never actually submitted her resignation to the State. She did not explicitly quit.

Consideration must be given to several other factors involved in this dispute. The performance evaluations on the record (Union Ex. 12) indicate that Ms. Lewis had received satisfactory ratings. The most recent rating (3/12/87) was somewhat higher than her initial evaluation. In both instances the evaluator viewed her performance to be satisfactory. Brenda Russell, the initial evaluator each time, indicated her view that Ms. Lewis would be an asset to the department. Obviously events intervened that precluded that evaluation from being realized.

The unfortunate confluence of events that occurred in Ms. Lewis's domestic life during 1988 do not need repetition. They were sufficiently troubling to her that her mental stability was called into question. Union Exhibit 15, the report of Dr. Pat Semmelman who evaluated Ms. Lewis' mental state, indicates that under the circumstances of her domestic life "it would have been nearly impossible for her to function effectively on the job." Certainly normal regard for her continued employment with the State would prompt a conclusion that the Grievant should have at the minimum contacted the Employer. That she did not do so is attributable to what Doctor Semmelman characterizes as her "frantic and desperate state of mind...." (Union Ex. 15). Dr. Semmelman also opines that in her state of mind it is likely that Ms. Lewis "either didn't remember, half heard or misinterpreted the procedures she needed to follow in order to take a leave from her employment." Acknowledging that Ms. Lewis contributed to her difficulties, Dr. Semmelman also indicates that her behavior is typical of the spouses of alcoholics and battered women. Ms. Lewis was both the spouse of an alcoholic and had been beaten by her husband.

This situation represents the paradigm of a case where there is found an element of fault on both sides. The Grievant erred by not contacting the Employer prior to absenting herself in June, 1988. By proceeding to discharge

in the face of circumstances confronting Ms. Lewis, the Employer imposed an excessive penalty.

What is called for in this situation is a balancing between the Employer's legitimate expectation that its employees will report regularly and be fit to work at the tasks associated with their job and the presumably transistory inability to work or follow the proper procedures to apply for leave developed by the Grievant as a result of the circumstances she faced in 1988.

Award: Based upon the proceeding discussion the grievance is SUSTAINED in part and DENIED in part. The Grievant is to be placed on an unpaid leave of absence from September 15, 1988, the date of her discharge, to September 5, 1989. Examination of Union Exhibit 15, the report of the consulting psychologist, Dr. Pat Semmelman, does not provide evidence that the Grievant is capable of returning to work in the environment from which she left. Dr. Semmelman indicates that she is capable of "low stress work ... where she works more with machines than with people." No arbitrator should arrogate to him or herself the authority to create or restructure the positions established by an employer. Hence, this award is conditional in nature. If the Grievant supplies evidence satisfactory to the State that she is capable of resuming her former position by September 5, 1989 she is to be reinstated to her former position or an analogous one. If

no such evidence is forthcoming it must be determined that she has voluntarily quit her employment with the State. If the Grievant provides evidence satisfactory to the State that she has recovered her health sufficiently to perform the tasks associated with her position her return to work should be probationary in nature with respect to attendance. During the first year she is on the job her absence rate is not to exceed the average for her co-workers. Should the Employer determine that Ms. Lewis attendance is unsatisfactory it may impose discipline according to Article 24, Section 24.02 C or D as it sees fit, subject to recourse to the Grievance Procedure. No back pay is due the Grievant under any circumstance.

Signed and dated this 3rd day of July, 1989 at South Russell, OH.

Harry Graham
Arbitrator