#422

STATE OF OHIO AND OHIO CIVIL SERVICE

EMPLOYEES ASSOCIATION LABOR

ARBITRATION PROCEEDING

---

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF HIGHWAY SAFETY

-and-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO

GRIEVANCE: Rosalyn Majors Sherrod - Discharge

OCB Case No.: 15-01-890707-02-01-09

---

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: May 14, 1990

1-5-90

APPEARANCES

For the Employer

| | |
|---|---|
| Kevin Winters | Chief, Traffic Crash Record Section |
| Ann Philpott | Office Manager |
| Richard Corbin | Department of Highway Safety |
| John Tornes | Advocate |

For the Union

| | |
|---|---|
| Rosalyne Majors Sherrod | Grievant |
| Carol Swigley | Union Steward |
| Bob Steel | Staff Representative |
| Dana Braddy | Staff Representative |

## INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, the Ohio Department of Highway Safety, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on January 5, 1990 at the office of the Ohio Civil Service Employees Association, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would/would not submit briefs.

## ISSUE

Was the Grievant, Rosalyne Majors Sherrod, terminated for just cause? If not, what shall the remedy be?

## PERTINENT CONTRACT PROVISIONS

ARTICLE 2 - NON-DISCRIMINATION

Section 2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83 - 64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation. Nor shall either party discriminate on the basis of family relationship.

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

Section 2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement.

...

(Joint Exhibit 1, Pgs. 2-3)

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

Section 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file);
B. Written reprimand;

C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

...

Section 24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline employer representatives who violate this section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action.

...

Section 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

(Joint Exhibit 1, Pgs. 34-37)

## JOINT STIPULATIONS

Date of Hire: 05/14/84
Classification: Statistician 1 FARS Analyst
List of Disciplines:

| | | |
|---|---|---|
| 01/10/85 | Verbal reprimand | Tardy |
| 08/01/85 | Written reprimand | Tardy |
| 09/30/85 | 2nd written reprimand | Tardy |
| 05/07/86 | 1 day suspension | Tardy |
| 12/16/86 | 3 day suspension | Tardy |
| 10/22/87 | Verbal reprimand | Productivity |
| 12/01/87 | Verbal reprimand | Absenteeism |
| 12/11/87 | Written reprimand | Absenteeism |
| 01/04/88 | Written reprimand | Productivity |
| 03/14/88 | 5 day suspension | Tardy |
| 04/19/88 | 1 day suspension | Absenteeism |
| 10/13/88 | 10 day suspension | Tardy |
| 05/19/89 | 5 day suspension | Absenteeism |
| 06/30/89 | Termination | Absenteeism |

## CASE HISTORY

Rosalyn Majors Sherrod, the Grievant, was employed as a Statistician I - FARS Analyst, at the Ohio Department of Public Safety - Traffic Crash Records Section (TCRS), the Employer, at the time of the incidents in question. She served in this capacity for approximately five years prior to her removal. The Grievant was the primary analyst for the Fatal Accident Reporting System (FARS). This program is federally funded and deals with the uniform coding of fatal crashes that occur within the State of Ohio. As the primary analyst, the Grievant processed data involving fatal accidents, driver histories, vehicle histories, blood alcohol results, and death certificate information. Once these data are compiled, statistical reports are generated and distributed to law enforcement agencies and other interested institutions.

For a number of years the Employer has employed a unique attendance control system which consists of several components. One component deals with A.M. tardiness (Employer Exhibit 2) and has been fashioned to correct the habits of those employees who are excessively late for work. Excessive tardiness is defined as an accumulation of more than 30 minutes of late starting time during any two pay periods. Another component deals with absenteeism; which has been uniquely defined and implemented in light of the previously mentioned tardiness policy. Here, absenteeism has been defined as being late from a break or lunch period.

These incidents, in turn, are considered as leave without pay occurrences. The final component deals with Incentive Time Requests. Kevin Winters, the Chief of the Section, implemented this procedure during 1986. If the data entry operators encode in excess of 10% of the expected production goal, each receives an additional 3 hours and 20 minutes that can be used in lieu of existing leave requests. Several preconditions have to exist, however, before Incentive Time will be properly authorized. These requests require prior notification and must be taken in a minimum of 15 minute increments. The policy, moreover, provides that any employee reporting late, either in the morning or lunch hour, without prior notification or request, will be considered in violation of the other attendance control programs (Employer Exhibits 6(A), (B) and (C)).

The record indicates that the Grievant had a checkered attendance history. On April 11, 1988, a termination proceeding was held in abeyance contingent on a change in the Grievant's behavior. The Grievant, moreover, agreed to be at work on time and to perform her duties in a professional manner (Joint Exhibit 7).

On October 13, 1988, the Grievant was suspended for 10 days for tardiness policy violations during the pay period of August 15-26, 1988. It should be noted that the suspension was not the initially administered discipline. The Employer originally terminated the Grievant but modified the penalty as a consequence of the following last chance agreement:

"...

I, Rosalyne Majors, do hereby agree to the following conditions of employment to be in effect for a probationary period of one year from the date of the signing of this agreement.

1. Any further incident which violates the tardiness policy in effect at the time of the occurrence will warrant immediate dismissal.

2. I agree to meet minimum performance standards of the Department of Highway Safety/Traffic Crash Records Section. Mr. Kevin Winters, Chief, and I will meet to discuss levels of production. Failure to meet the standards will result in disciplinary action.

3. I understand that I will receive a ten (10) day suspension in lieu of termination for my latest violation of the tardiness policy during the pay period of August 15-26, 1988.

_____ 10-13-88

Rosalyne Majors

_____ 10-13-88

William M. Denihan
Director"

(Joint Exhibit 8)

The Grievant's attendance problems persisted during 1989. On May 15, 1989, William M. Denihan, the Director, converted a termination recommendation into a five-day suspension. In addition, he articulated the following reinstatement conditions:

"...

Since your last discipline, your attendance and performance has not improved: you have exhausted all new sick leave; you continue to accumulate leave without pay; and you continue to be tardy on a regular basis.

Therefore, I have reached the following decision regarding your further employment at the Department of Highway Safety. These conditions will be in effect until further notice.

1. Your productivity is to improve continually so that 60 days from today the Federal Fatal Accident Reporting System

(FARS) portion of the fatal crash records section is current. Thereafter, you are to maintain a current file. Current is interpreted to mean that all new cases are on file within 30 calendar days of receipt of the crash report form. Current also means that all pending (incomplete) cases are complete within 60 days of receipt of the crash report form. Any case which you attempt to complete that cannot be completed in the stated period must be reported to your supervisor, Kevin Winters, along with a valid written explanation. Failure to comply will cause for termination.

2. Any further abuse of leave or use of unapproved leave without pay will be cause for immediate termination. If you have any serious illness which precludes your attendance on a regular basis, you must inform me. I do not wish to invade your privacy but if you offer illness as an excuse for attendance I am requiring a physician's statement be submitted with the nature and extent of your ailment listed. The only legitimate excuse for absence which may be considered is serious illness or injury accompanies by a physician's verification. Failure to comply is cause for immediate termination.

3. Any further violation of the tardiness policy, will be cause for immediate termination. The last chance agreement signed October 15, 1988 is still in effect. Please note that while the current tardiness policy does not discipline for late return from lunch or breaks, any late return will necessitate a request for leave without pay for the time not worked which will be considered under number 2 above.

4. You are hereby suspended for five working days (40 hours) without pay beginning 7:30 a.m. on Monday, May 22, 1989 and ending 4:15 p.m. Friday, May 26, 1989 for neglect of duty, excessive absenteeism, excessive tardiness and abuse of sick leave.

This letter serves as a last chance warning in the areas of attendance, tardiness and performance. It will remain in effect until further notice. Failure to comply with the standards set forth above will be cause for immediate termination.

Sincerely,

WILLIAM M. DENIHAN
Director"

(Joint Exhibit 9)

On May 18, 1989, the Grievant; Carol Swigley, her Union Steward; Ann Philpott, the Office Manager; and Winter held a

meeting to review the Denihan document (Joint Exhibit 9). Winter testified that the document was read with specific emphasis placed on the conditions of employment specified in the letter. All of the participants indicated that they understood the contents and the conditions. The Grievant was verbally advised, as well, about future attendance requirements. Any use of unapproved leave without pay, regardless of how small, such as returning late from lunch, would result in termination under Item No. 2 of the Denihan letter. Also, any request for leave coverage, via the use of vacation time to cover illness, would require a physician's statement per Item No. 2 (Employer Exhibit 3).

The Grievant returned to work on May 30, 1989 after serving the five-day suspension. Once again, it appears that the Grievant experienced some attendance difficulties. On Monday, June 12, 1989, the Grievant requested, and received, one hour of vacation time from 12:48 P.M. to 1:48 P.M. (Joint Exhibit 3). The Grievant, however, signed-in late by two minutes at 1:50 P.M. (Joint Exhibit 5(A)). The next day, on June 13, 1989, the Grievant requested in advance twenty-one minutes of Incentive Time and arrived to work at 7:51 A.M. (Joint Exhibit 5(B)). The Grievant, however, returned late from lunch by four minutes as she signed in at 12:34 P.M. (Joint Exhibit 4).

On June 30, 1989, the Grievant was informed that her employment was terminated at the close of the business day. This decision was formalized after a pre-discipline meeting was held earlier in the day.

On July 7, 1989, the Grievant contested the removal decision by filing a grievance. The grievance contained the following Statement of Facts:

"...

On June 30, 1989 Rosalyne Majors employment was terminated. The Union and employee feels (sic) this termination is discriminatory and that the employer has been harassed by management and treated differently from other employees from the same section.

..."

(Joint Exhibit 2)

A Step III hearing was held on July 24, 1989. Marlaina Eblin, the Labor Relations Administrator, found that the Employer met the tests of just cause and did not violate the Agreement (Joint Exhibit 1). The grievance was also denied at Step IV based on a similar analysis (Joint Exhibit 2).

The Parties were unable to settle the above-mentioned matter. Since neither Party raised any objections regarding procedural nor substantive arbitrability, this grievance is properly before the Arbitrator.

## THE MERITS OF THE CASE

### The Position of the Employer

It is the position of the Employer that it did have just cause to discharge the Grievant for excessive absenteeism. The Employer maintained that the decision was implemented in light of proper just cause principles; substantial level of proof was

obtained; the decision was not clothed with any personal animus; and the administered penalty was commensurate with the proven offense.

The Employer asserted that the Grievant was properly placed on notice concerning the probable consequences associated with her misconduct. Specific attention was placed on the last chance warning promulgated by Director Denihan on May 15, 1989. Certain particulars contained in the document were thought to be of great importance: use of unapproved became without pay; submission of a physician's statement if illness precluded her attendance; and any late return from lunch or breaks would necessitate a request for leave without pay. Any violation of these particulars, Denihan noted, would be cause for immediate dismissal (Joint Exhibit 9). Winters testified that the Grievant was properly notified of these particulars in a meeting held on May 18, 1989. Also, these particulars were reviewed at the meeting and the Grievant acknowledged that she understood the particulars (Employer Exhibit 3). Winters emphasized that he specifically warned the Grievant that any late return from lunch would be cause for immediate termination. The Employer, moreover, claimed that the Grievant was fully aware of the sign-in and sign-out procedures, as well as the well-established Incentive Time guidelines (Employer Exhibits 6(A), (B) and (C)).

It was alleged that the Grievant's actions on June 12, 1989 and June 13, 1989 clearly violated the particulars previously specified. On June 12, 1989, she returned to the office two

minutes late after requesting and receiving one hour of vacation time. The sign-in and sign-out sheets (Joint Exhibit 5) documented this occurrence. The request for Incentive Time was viewed as inappropriate. Advance notice was not provided by the Grievant, although she did have twenty-four minutes of Incentive Time available. On June 13, 1989, the Grievant arrived back from lunch four minutes beyond the established break period. Again, the late sheet (Joint Exhibit 4) signed by Grievant documented this occurrence. This lateness behavior necessitated the use of leave without pay; a direct violation of the last chance warning letter (Joint Exhibit 9).

The Employer asserted that the Grievant failed to provide any mitigating circumstances to justify her behaviors. She admitted that she never attempted to get supervisory approval before going to the restroom. Also, she never provided any physician's statement supporting her contention that she experienced difficulties during her pregnancy. Such a statement was required per the conditions specified in Denihan's last chance warning letter (Joint Exhibit 9).

The implemented penalty was thought to be commensurate with the offenses. The Employer asserted that the penalty was not solely based on the June 12, 1989 and June 13, 1989 offenses. Rather, the penalty was further supported by the totality of the Grievant's present and prior conduct. This included the Grievant's attendance history (Joint Exhibit 6); a prior last chance agreement regarding tardiness (Joint Exhibit 8); and prior

suspensions dealing with attendance related misconduct. Those various last chance and suspension attempts were viewed as progressive; but proved to be futile in terms of modifying the Grievant's behavior.

The severity of the Grievant's attendance difficulties was underscored by the conduct engaged in after she was officially charged with the offenses. The Grievant, more specifically, engaged in additional incidents of tardiness and excessive behavior.

Harassment charges raised by the Union were thought to be unsubstantiated. The conditions specified in the Denihan letter (Joint Exhibit 9) were not thought to be motivated by any type of harassment motive. Rather, they were thought to be reasonable in light of the Grievant's prior behavior, and a sincere attempt to salvage the Grievant.

The Position of the Union

It is the position of the Union that the termination of the Grievant for excessive absenteeism was not for just cause. Two basic arguments were offered by the Union in support of this premise. One argument was based upon the reasonableness of the implemented penalty, while the other dealt with a number of discrimination and harassment allegations.

For a number of reasons, the Union asserted that the Employer violated Section 24.05 because the penalty was unreasonable and not commensurate with the offenses and used

solely for punishment. First, although the Grievant was charged with excessive absenteeism, she in fact was tardy for a total of six minutes. As such, the Employer mislabeled the offense, and as a consequence, the Grievant did not expressly violate the particulars contained in the Denihan warning (Joint Exhibit 9). Second, the six minute violation was thought to be de minimus and exaggerated for the sole purpose of rationalizing an excessive and unwarranted penalty. Third, the Grievant proffered extenuating circumstances for her tardiness which were not taken into consideration when determining the penalty to be administered. The Grievant, on both occasions, had to use the bathroom for health purposes after she arrived in the building in a timely manner. Her pregnant condition engendered bladder difficulties which required her immediate attention. The Employer's reasoning was further viewed as deficient because Philpott testified that there were no restrictions on restroom usage. Last, the Employer should have factored the Grievant's years of service and good performance history (Employer Exhibit 1) into the penalty assessment process.

The Union opined that the Employer's decision was tarnished because it violated Sections 2.01, 2.02 and 24.03. These various provisions deal with different forms of discrimination and supervisory intimidation. It was alleged that the Grievant violated Section 2.01 by discriminating against the Grievant by not allowing her to use her Incentive Time credits to cover her late returns from lunch. Other employees were purportedly

allowed to use Incentive Time after the fact to cover lateness occurrences. Similar arguments were raised as justification for the Section 2.02 and Section 24.03 violations. The Grievant's past grievances were thought to be the real reasons behind the present disciplinary actions. Also, Management representatives harassed and intimidated the Grievant even though the duration and frequency of tardiness occurrences were minor and uneventful.

## THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, it is my judgement that the Employer had just cause to remove the Grievant for excessive absenteeism. It appears that the incidents on June 12, 1989 and June 13, 1989 served as the justifiable "last straw." That is, her attendance history and these two incidents demonstrate that further efforts at corrective discipline would be futile.

The Grievant's attendance record evidences a complete disregard for the efforts engaged in by the Employer to correct her absenteeism and tardiness difficulties. From May 2, 1986 to her effective removal date, the Grievant experienced an excessive number of tardiness and leave without pay occurrences (Joint Exhibit 6). The Grievant, moreover, was consistently and progressively disciplined. She was placed on notice regarding deficient job performance areas on April 11, 1988 (Joint Exhibit 7). During the same calendar year, the Grievant served a ten-

day suspension in lieu of discharge for a series of tardiness occurrences. She also agreed to a specific Last Chance Agreement regarding future tardiness activities and entered an Employee Assistance Program (Joint Exhibit 8). The Employer continued to evidence a great deal of patience and corrective tendencies when it once again issued a five-day suspension in lieu of discharge on May 15, 1989. This suspension was based upon the Grievant's neglect of duty, excessive absenteeism, excessive tardiness and abuse of sick leave (Joint Exhibit 9).

The Grievant's actions on June 12, 1989 and June 13, 1989 specifically violated particulars contained in Denihan's warning letter (Joint Exhibit 9) and served as the "last straw" which justifiably led to the Grievant's removal. By returning late from lunch on June 12, 1989, and by exceeding the one hour vacation leave provided on June 13, 1989, the Grievant was in unapproved leave without pay status. She, moreover, failed to provide a physician's statement documenting her excuses for these absences. These violations contradicted particulars contained in Items 2 and 3 of the Denihan letter (Joint Exhibit 9).

The Grievant was properly forewarned of these particulars and that failure to comply was cause for immediate termination. Winters reviewed these items with the Grievant and her Union Steward in excruciating detail on May 18, 1989 (Employer Exhibit 3). The Grievant's testimony further bolstered the Employer's notice argument. Under cross-examination she acknowledged that she was aware of particulars contained in Denihan's letter (Joint

Exhibit 9); that she had to be in the office on time rather than the building, that if she returned late from lunch it would result in an unauthorized absence; and that a doctor's slip was required for any unapproved leave occurrences.

The Employer consistently applied its Incentive Time procedures (Joint Exhibit 6(A), (B) and (C)) when it refused to comply with her request. The request, more specifically, was not tendered in advance on June 12, 1989 but was initiated after the fact. Carol Swigley, the Union Steward, and other Employer witnesses testified that this bank could be readily credited as long as the Employer was provided with reasonable advance notice. The Grievant was well aware of this practice because she legitimately utilized this procedure on June 13, 1989. On this date, she called the office in advance and was granted twenty-one minutes of Incentive Time.

Nothing on the record, moreover, indicates that the Employer applied the advance notice requirement in an inconsistent manner. All other employees had to abide by the same procedural standards before any requests were granted by the Employer. The Union, more specifically, failed to provide any evidence or testimony indicating that other employees were able to apply Incentive Time credits after the fact.

It is also readily apparent that the Grievant arrived late on these two occasions; she admitted that she was late. The sign-in and late sheets (Joint Exhibits 4 and 5) were completed by the Grievant and accurately evidence the lateness of her

arrivals. The Union questioned the accuracy of the time clocks used to document departure and arrival times. Yet, Swigley's testimony seemed to refute this contention. During direct examination, she noted that the digital clocks were checked and synchronized each morning by a management representative.

Attempts to provide mitigating justifications also proved to be unsupported by any credible evidence and testimony. The Grievant could have readily supported her claims by providing a verifiable physician's statement documenting her physical condition and justifying her uncontrollable restroom requirements. Her assertion, moreover, seemed inconsistent which further raised suspicions concerning her credibility. At various times during her testimony she provided two varying versions concerning mitigating circumstances. One version dealt with a bladder difficulty engendered by her pregnancy, while another dealt with ongoing and long-term physical problems. The timing of these restroom requirements also poses some puzzling questions. On two separate occasions, following late arrivals, the Grievant had to use the restroom facilities. Such a coincidence seems quite implausible and further taints the Grievant's mitigation defense.

The discrimination and harassment allegations are viewed as totally unsupported by this Arbitrator. A critical review of the record failed to provide any direct or indirect evidence in support of these arguments. The Union did not introduce any evidence suggesting that the Employer engaged in unequal treatment strategies. Also, supervisory harassment allegations were

not even raised during the course of the hearing; personal animus did not play a role in the removal decision. The Employer merely adhered to its absenteeism policy and the particulars contained in the Denihan letter (Joint Exhibit 9). The Grievant placed herself in this perilous position by engaging in attendance related misconduct over a lengthy period of time. These two incidents, standing alone, might not have justified removal. Within the context discussed above, however, the Employer cannot be reasonably expected any longer to tolerate the Grievant's non-response to its corrective attempts. As such, discharge is not an overly stringent penalty.

## AWARD

For the reasons more fully noted above, the grievance is denied.

May 14, 1990

Dr. David M. Pincus
Arbitrator