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**IN THE MATTER OF THE ARBITRATION BETWEEN**

**Ohio Civil Rights Commission**

**-and-**

**Ohio Civil Service Employees Association,  
AFSCME Local 11, AFL-CIO**

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\*  
\*Grievance Nos.  
\*06-04-921214-0022-  
\*01-14  
\*06-04-930304-0002-  
\*01-14  
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**ARBITRATOR:** Mollie H. Bowers

**APPEARANCES:**

**For the State:**

Sharon Hilliard, Advocate  
Rodney Sampson, Second Chair  
Terry Crawford, Labor Relations Officer, OCRC  
Eva Bess, Supervisor, OCRC  
Nancy Stir, Manager, Human Resources, OCRC

**For the Union:**

Steve Lieber, Staff Representative  
Lon Brown, Grievant

The Hearing was held on November 4, 1993, at 9:00 a.m. in Conference Room 703 at the Office of Collective Bargaining in Columbus, Ohio. Both parties were represented at this proceeding. They had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the other party.

At the outset of the Hearing, the Ohio Civil Rights Commission (hereinafter, "the State" or "the OCRC"), the Ohio Civil Service Employees Association, AFSCME Local 11, AFL-CIO (hereinafter, "the Union") and Mr. Lon Brown (hereinafter, "the Grievant") agreed to consolidate the grievances over his five and ten day suspensions into one proceeding.

**ISSUE**

The parties stipulated to the following issues:

**Were the five and ten day suspensions imposed upon the Grievant for just cause? If not, what should the remedy be?**

**RELEVANT CONTRACT CLAUSES AND RULES**

**CONTRACT CLAUSES**

**ARTICLE 2 - NON DISCRIMINATION**

**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 prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

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

**2.02 - Agreement Rights**

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

**ARTICLE 5 - MANAGEMENT RIGHTS**

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08(C), Numbers 1-9.

**ARTICLE 9 - EMPLOYEE ASSISTANCE PROGRAM****9.01 - Joint Promotion**

The Employer and the Union recognize the value of counseling and assistance programs to those employees who have personal problems which interface with their job duties and responsibilities. The Union and the Employer, therefore, agree to continue the existing EAP and to work jointly to promote the program.

**9.02 - EAP Advisory Committee**

The parties agree that there will be a committee composed of nine (9) union representatives that will meet with and advise the Director of the EAP. This committee will review the program and discuss specific strategies for improving access for employees. Additional meetings will be held to follow up and evaluate the strategies. The EAP shall also be an appropriate topic for Labor-Management Committees.

**9.03 - EAP Steward Training**

The Employer agrees to provide orientation and training about the EAP to union stewards. All new stewards shall receive EAP training within a reasonable time of their designation. Such training shall deal with the central office operation and community referral procedures. Such training will be held during regular working hours. Whenever possible, training will be held for stewards working second and third shifts during their working time. If the Employer initiates programmatic changes which would impact upon the EAP programs, all stewards shall receive training on the new program within a reasonable time.

**9.04 - Employee Participation in EAP**

A. Records regarding treatment and participation in the EAP shall be confidential. No records shall be maintained in the employee's personnel file except those that relate to the job or are provided for in Article 23. In cases where the employee and the Employer have entered into a voluntary EAP participation agreement in which the Employer agrees to defer discipline as a result of employee participation in the EAP treatment program, the employee shall be required to waive confidentiality to the extent required to provide the Employer with reports regarding compliance or non-compliance with the EAP treatment program.

B. If an employee has exhausted all available leave and requests time off to have an initial appointment with a community agency, the Agency shall provide such time off without pay.

C. The Employer or its representative shall not direct an employee to participate in the EAP. Such participation shall be strictly voluntary.

D. Seeking and/or accepting assistance to alleviate an alcohol, other drug, behavioral or emotional problem will not in and of itself jeopardize an employee's job security or consideration for advancement.

## **ARTICLE 24 - DISCIPLINE**

### **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. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

### **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.

### **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-discipline meeting. At the discretion of the Employer, the forty-five (45) day 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. The OCSEA Chapter President shall notify the agency head in writing of the name and address of the Union representative to receive such notice. 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 that 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.

#### **24.09 - Employee Assistance Program**

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action. Participation in an EAP program by an employee may be considered in mitigating disciplinary action only if such participation commenced within five (5) days of a predisciplinary meeting or prior to the imposition of discipline, whichever is later. Separate disciplinary action may be instituted for offenses committed after the commencement of an EAP program.

#### **DISCIPLINARY GRID**

<u>Violation</u>	<u>1st</u>	<u>2nd</u>	<u>3rd</u>	<u>4th</u>
10. Extending Break or lunch period without authorization.	Oral	Written	Suspension	Removal
12. Unexcused tardiness or leaving work early.	Oral	Written	Suspension	Removal

**BACKGROUND**

The Grievant began work for the OCRC on April 25, 1989, and was a Civil Rights Representative (or Investigator II) at the time the events occurred which gave rise to the instant case. He investigated charts of alleged discrimination by collecting appropriate data and by preparing analytical reports of findings for submission to the OCRC.

Most of the facts of this case are undisputed. In February of 1992, the Grievant served a three day suspension for violation of work rules 10. and 12. cited above. He was suspended for five days, beginning on December 7, 1992, for violation of these same work rules. The instances of extending the lunch period and or tardiness cited as basis for this discipline were as follows:

**Extending Lunch**

August 20 and 27, 1992  
September 4, 8, 10, 17, and 21, 1992  
October 7 and 14, 1992

**Tardiness**

August 26, 1992  
September 11, 1992  
October 15, 1992

On December 8, a grievance was filed protesting this discipline. Various sections of Articles 2, 5, 9 and 24 of the collective bargaining agreement (Agreement) were cited specifically as having been violated as well as "all pertinent articles of the contract." The grievance alleged that the Grievant had been denied access to the Employee Assistance Program (EAP) "which would have

mitigated disciplinary action." As remedy, the Union asked that the Grievant be reimbursed for the five day suspension and otherwise be made whole and that management adhere to the Agreement. The parties agree that this grievance was properly processed through the negotiated procedure and is now before this Arbitrator for decision.

The Grievant was suspended for ten days, beginning on February 18, 1993, for violation of work rules 10 and 12. The instances of extending the lunch period and of tardiness cited as basis for this discipline were as follows:

**EXTENDING LUNCH**

November 18, 1992  
November 24, 1992  
November 25, 1992  
December 30, 1992  
January 15, 1993

On March 1, 1993, a grievance was filed protesting this discipline. Articles of the Agreement alleged to have been violated were the same as in the grievance against the five day suspension. In the statement of facts, the "Grievant alleged that mitigating circumstances were ignored by management which would have been addressed through EAP." The remedy requested was the same as for the five day suspension. The parties agree that this grievance was properly processed through the negotiated procedure and is now before this Arbitrator for decision.

The parties agree that the Grievant also received other discipline as follows:

Written falsification of official document	September 15, 1992
3 day suspension, failure to meet deadlines	April 29, 1991
3 day suspension, Work Rules 10 and 12	March 6, 1991
1 day suspension, Inattentive to Duties, Failure of Good Behavior, Acts of Discrimination	January 31, 1991
Written reprimand, Failure to meet deadlines	September 10, 1990
Written reprimand, Use of Insulting Language	September 6, 1990
Written reprimand, Failure to meet deadlines	August 28, 1990
Written reprimand, Inefficient Use of time; Dishonesty	August 21, 1990
Written reprimand, Failure to meet deadlines	August 16, 1990
Oral warning, Failure to meet deadlines, Inattentive to duties, Leaving work area without permission of Supervisor;	April 23, 1990
Written reprimand, Unexcused Tardiness, AWOL-1Day, Excessive Absenteeism	April 4, 1990
Written reprimand, Work Rule 12	August 9, 1989
Oral warning, Work Rule 12	July 13, 1989

There is no dispute that the Grievant was aware of the tardiness policy set forth in Joint Exhibit 6 and of the policy on hours of work set forth in State Exhibit 2 (see also, State Exhibit 13). Joint Exhibit 7 shows that the Grievant received the disciplinary Grid in effect as of September 30, 1991. Joint Exhibit 8 confirms that the Grievant received the revised work rules on April 17, 1989. With respect to lunch periods, Ms. Eva Bess, the Grievant's immediate Supervisor, testified that employees have one hour to be taken between 11:00 a.m. and 2:00 p.m. for lunch. If more than an hour is needed, she stated that a leave form must be filled out and Supervisory approval gotten in advance.



Ms. Bess further stated that, if an employee was out and found he/she could not get back in time, the employee could call his/her supervisor and request additional time. The Grievant admitted that he had been late for work and late returning from lunch. He said that, "For a long period of time there was a grace period." The Grievant agreed that he had received the memos from Greg Vincent on "Attendance in the Office - Break Schedules," dated August 5, 1991, on "Enforcement of Work Rules," dated October 18, 1991, and on "Attendance in the Office - Lunch and Break schedules (Re-issuance - see Attached," dated August 4, 1992.

On September 29, 1990, the Grievant and the OCRC entered into an EAP participation agreement in accordance with Article 24.09 of the Agreement. The participation agreement held in abeyance discipline that had been proposed for tardiness. Ms. Nancy Stir gave un rebutted testimony that, while this agreement was in effect, the Grievant was tardy on other occasions. She also stated that the Grievant was scheduled for a pre-disciplinary hearing in November of 1990, for failure to meet deadlines and that this discipline, too, was held in abeyance. Ms. Stir testified that the Grievant violated the participation agreement and, thus, he received the discipline indicated above for the dates of March 6 and April 29, 1991.

According to Ms. Stir, the Grievant talked to her a number of times thereafter about the EAP. She testified that she advised the Grievant that he could get into the EAP at any time, and, offered

to make the contact for him, but he never got back to her. She also stated that "his [the Grievant's] main interest was in holding discipline in abeyance a second and third time." This witness acknowledged that there were employees whose discipline had been held in abeyance more than once and that, in September of 1993, Jerry Washington was offered a participation agreement when no request had been made.

Joint Exhibit 10a shows that as of June 25, 1991, the Grievant was hospitalized in Huron Hospital and the duration of his stay had not been determined. Joint Exhibit 10b advises that the Grievant was in Huron Hospital from June 20 through July 5, 1991, and that "He is able to return to work at full capacity on July 22, 1991." Joint Exhibit 10c indicates that the Grievant was unable to work since August 23, 1991, was admitted to Stella Mars, Inc. thirty day treatment program on September 9, 1991, and "He will be able to return to work on Wednesday, Oct 9th, 1991."

The Grievant admitted that he had been having personal and family problems. He stated that he saw Dr. Edward J. Lessin, a clinical psychologist, (see Joint Exhibit 11b) on one occasion but was unable to continue because he could not afford the co-payment for the treatment. The Grievant testified that he was currently going to "more" AA meetings and was getting "help" from his church. On December 2, 1992, the Grievant completed a Request for Reasonable Accommodation form whereon it was stated that the reason for the request was "alcohol dependence." The accommodation

requested was as follows:

Allow staff to use leave time for doctor's appointments during work hours. Allow staff to enter into voluntary (sic) EAP participation agreement pursuant to Article 9 of the collective bargaining agreement for the purposes (sic) of deferring pending discipline.

The accommodation was requested for the period December 2, 1992 through March 2, 1993. At the Hearing, the Grievant testified that he "needed help," he had a "serious financial burden for all the suspensions" it was near Christmas and he "just wanted a break so I [he] could get back on track."

Ms. Bess wrote a memorandum, dated December 7, 1992, responding to the request for accommodation. This document states:

Lon, be advised that any leave time that you need to attend your wellness counselling sessions for your condition/disability will be granted. However, you are asked to make sure that you have the time to cover the absence and you must provide documentation to substantiate the visit.

These are the circumstances that led to this proceeding.

### **POSITIONS OF THE PARTIES**

#### **State Position:**

The OCRC maintains that the Grievant's five and ten day suspensions were for just cause. It emphasizes that the instances of tardiness and of lateness in returning from lunch which gave rise to this discipline are undisputed. So too, the OCRC points out, are the ten reprimands, oral and written, and four prior suspensions the Grievant has on his record since he began work

there in April of 1988. The OCRC relies upon the record to further assert that a significant amount of this prior discipline resulted from violations of work rules 10 and 12; the same rules that are at stake in the grievance at bar.

According to the OCRC, the constructive and progressive discipline the Grievant received failed to correct his attendance problems. The OCRC contends that this discipline, coupled with the fact that the Grievant acknowledges receiving the Disciplinary Grid and the policies on tardiness and on hours of work, means that he was well aware of both the rules and the penalties for violating them. It also stresses that no claim has been made that the rules are unreasonable.

The OCRC further asserts that it has made a good faith effort to help the Grievant overcome his problems. It points out that he was afforded an EAP participation agreement in 1990 and, although two disciplinary actions were held in abeyance as a result, the Grievant continued to be tardy, failed to meet deadlines, and failed to otherwise adhere to the terms of the agreement. Nevertheless, the OCRC maintains that it responded appropriately to the Grievant's request for reasonable accommodation by affording him leave without pay to attend wellness counseling, provided he has leave available and documentation of the visit is provided.

These facts substantiate two things the OCRC claims. First, the OCRC argues that the Union's contentions that the discipline was meted out for the purpose of punishing the Grievant and that he

was subjected to disparate treatment are completely unfounded. Second, the OCRC maintains that the discipline is appropriate for the offenses committed. It asks, therefore, that the five and ten day suspensions be sustained as the outcome of this proceeding.

**Union Position:**

With respect to both disciplinary actions, the Union contends that the OCRC did not conduct fair and objective investigations and, thus, failed to meet one of the essential elements of proving just cause. It also asserts that most of the infractions that gave rise to the ten day suspension occurred while the five day suspension was processed. This means, the Union claims, that the Grievant was wrongfully denied an opportunity to correct his behavior between disciplinary actions.

According to the Union, the OCRC has sought to punish the Grievant, and has violated the Americans With Disabilities Act and Article 24, Section 24.09 of the Agreement by failing to afford reasonable accommodation and by denying his repeated requests for an EAP participation agreement. That these actions were punitive, the Union contends, is further confirmed by Ms. Stir's testimony that there have been employees who were afforded more than one EAP participation agreement and one employee, Jerry Washington, who was afforded such an agreement without even requesting one.

As a result of the foregoing considerations, the Union argues that the OCRC has failed to meet its burden of proving just cause for the Grievant's five and ten day suspensions. As remedy, the

Union asks that the grievances be sustained, that the discipline be rescinded and that the Grievant be made whole for all lost wages and benefits.

### DECISION

The evidence and testimony of record was considered carefully in reaching a decision in this case. The Arbitrator concluded that the OCRC presented sufficient evidence to prove just cause for the Grievant's five and ten day suspensions. There is no dispute that the Grievant incurred the incidents of tardiness and of returning late from lunch which were the cause of disciplinary action. The Union failed to provide any support for its allegation that a full and fair investigation was lacking with respect to either suspension.

There is no indication in the record that the policies pertaining to tardiness and to hours of work were unreasonable. The evidence does show, however, that the Grievant had received copies of these policies. It is also a fact that the Grievant had served a three day suspension for violation of work rules 10 and 12 in February of 1992. Based upon this discipline, the Grievant's prior discipline for similar offenses in 1989, and the information contained in the Disciplinary Grid, the Arbitrator concluded that the Grievant was on notice that he had to correct his attendance-related behavior.

Nevertheless, the Union contends that the five and ten day suspensions were meted out in such close proximity that the

Grievant did not have an opportunity to correct his behavior after the five day suspension. The Arbitrator disagrees. The Grievant had due notice of the policies on tardiness and on hours of work. He also had been progressively disciplined to the level of a five day suspension and knew or should have known by or before that time that his attendance problems had to be corrected or more severe discipline would result. Indeed, by the time the Grievant received the five day suspension, he had incurred enough violations of work rules 10 and 12 to have been terminated.

The Union introduced three memos from Mr. Vincent to the Cleveland Regional Office Staff, two from 1991 and one from 1992, which deal with efforts to achieve adherence to lunch and break schedules, among other things. It used this information to argue that there were on-going problems with adherence with such schedules and that the Grievant was being singled out for discipline. The Arbitrator found for the OCRC and ruled that the Grievant's discipline was consistent with its on-going and consistent efforts to enforce lunch and break schedules in the office. This ruling is also based on the fact that the Union presented no evidence that the Grievant had been subjected to disparate discipline vis-a-vis anyone similarly situated.

Given the record of attendance problems the Grievant accumulated, the Arbitrator found that the five and ten day suspensions were certainly not penalties too harsh for the offenses committed. To reiterate a point made earlier, the OCRC would have

had just cause for the Grievant's termination given the attendance problems he had at the time of the five day suspension.

As a mitigating circumstance, the Union maintained that the OCRC violated Article 24, Section 24.09 of the Agreement by refusing to enter into a second EAP participation agreement with the Grievant. It is a fact that the OCRC and the Grievant entered into such an agreement in September of 1990, to address discipline contemplated for the Grievant's tardiness. Ms. Stir's testimony is uncontroverted that, actually, two disciplinary actions were held in abeyance as a result of that participation agreement and that the Grievant did not fulfill the agreement. The Arbitrator also considered Ms. Stir's testimony that there were employees with whom the OCRC had entered into more than one participation agreement. This testimony, in and of itself, is not fatal to the OCRC's case. To weigh against the OCRC, the Union would have had to have shown that such agreements were made with employees who were similarly situated to the Grievant. The Union made no such showing.

Furthermore, the testimony of Ms. Stir and the Grievant is similar that the main reason he sought such an agreement was to obtain a "break" so he could get back on his feet from the financial consequences of other suspensions. As noted in the Agreement and in the participation agreement the Grievant signed in 1990, the purpose of such agreements is to provide an opportunity for an employee to obtain assistance to deal with a problem. This purpose seems to have been overlooked by the



Grievant in his effort purely and simply to avoid appropriate discipline for offenses committed. The OCRC, therefore, acted properly in refusing the Grievant a second participation agreement under such circumstances.

Finally, the Union claims that the OCRC refused the Grievant reasonable accommodation for his problem with alcohol, in violation of the Americans With Disabilities Act, 42 U.S.C. Section 12101, et. seq. The Arbitrator disagrees with the Union's claim. The evidence shows that the OCRC has reasonably accommodated the Grievant's disability by allowing him leave without pay to pursue wellness activities. The stipulations that he have leave available to cover this time and that he provide documentation to substantiate wellness activities are not unreasonable. The term 'reasonable accommodation' does not mean that management loses the right to control the workforce; including requiring employees to account for their time during scheduled hours. In the instant case, documentation is essential to ensure that the accommodation made is used for the purpose intended. It could also be argued that the Grievant has failed to demonstrate that he is able to perform some essential functions of the job of Civil Rights Representative, namely to come to work on time and to return from lunch at the end of one hour. Moreover, no where has it been written, thus far, that enabling an employee to utilize an EAP participation agreement in lieu of legitimate discipline when that employee has failed to live up to a previous agreement and under

the other circumstances of this case is required to meet the test of 'reasonable accommodation.' Lastly, the record contains two certifications that the Grievant has experienced treatment and is ready to return to full duty. His testimony was that he is currently going to AA and receiving counseling from his church (although no proof was provided), so the Arbitrator concluded that the accommodation afforded the Grievant was reasonable for his disability.

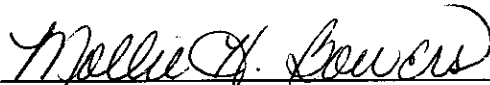
Based upon the foregoing analysis, the Arbitrator determined that the grievances on both the five and ten day suspensions should be denied.

AWARD

The grievance is denied.

November 16, 1993

DATE

  
MOLLIE H. BOWERS, Ph.D.  
Arbitrator