

VOLUNTARY ARBITRATION PROCEEDINGS

STATE OF OHIO

The Employer

-and-

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

The Union

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:OPINION AND AWARDAPPEARANCESFor the Employer:Eric Warren, Advocate
Georgia Brokaw, Advocate
John Stull, Supervisor
Tim Ferguson, Bureau Chief
Don Stiltner, EEO Officer
Brian Walton, ObserverFor the Union:John Gersper, Advocate
Carmen Davila, Grievant
James Bolden, Steward
Robert Mercer, WitnessMARVIN J. FELDMAN
Attorney-Arbitrator
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I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on November 23, 1993, at the conference facility of the union, Columbus, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and sequestered and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS

The grievant was employed in the classification of a nursing home and hospital examiner 3 by the employer. Her job description and worker characteristics contained the notation that the grievant by virtue of her duties in that class title necessitated "substantial travel." According to evidence received, the grievant was, upon her being interviewed for the position, was told of the extensive travel requirements and the grievant revealed she would have no problem. The grievant was first hired by the employer on October 23, 1989. Apparently the grievant worked without incident until mid October 1991.

On October 22, 1991, the grievant notified the employer by way of medical statement that the grievant would have surgery on November 22, 1991, and there was a request from the surgeon of the grievant

(presumably), that the grievant should be removed from the travel status required by her job until November 1, 1991. That particular request was granted. The grievant by memo was notified of an assignment in Cincinnati, Ohio, on November 4, 1991. That inter-office communication relevant to that, revealed the following:

"I have received a note from Grant Schmidt, M.D. asking that you be removed from travel status until 11/1/91. We will honor that request. On 11/4/91, you are assigned to join your audit team at:

Southern Ohio Health Services Network
817-A Eastgate South Drive
Cincinnati, OH 45245
Tel: (513) 752-8500

You are to report to the audit site by 9:30 A.M. Please see me if you need directions.

If you feel you are unable to travel to this assigned location, you will need to present documentation in writing to me for consideration by 11/1/91.

Thank you."

Thereafter the employer received another statement from the doctor of the grievant, requesting that the grievant be placed again on a non-travel status from November 4, to November 8, 1991. That was confirmed by the grievant's employer in a memo dated November 1, 1991 and it stated as follows:

"I spoke with Ms. Michelle Ross, who is Dr. Schmidt's nurse. She confirmed that, On Wednesday, October 30, 1991, she mailed a statement to Ms. Davila requesting that Ms. Davila be removed from travel status. I asked Ms. Ross if Ms. Davila should be removed from travel status until after her surgery. Ms. Ross stated no, that

the request states Ms. Davila be removed from travel status from November 4, 1991, to November 8, 1991."

The grievant again received an assignment for travel on November 12, 1991 and that assignment revealed the following:

"I have received a second note from Grant Schmidt, M.D. asking that you be removed from travel status until 11/8/91. We will honor that request. On 11/12/91, you are assigned to join your audit team at:

Southern Ohio Health Services Network
817-A Eastgate South Drive
Cincinnati, OH 45245
Tel: (513) 752-8500

You are to report to the audit site by 9:30 A.M. Please see me if you need directions.

If you feel you are unable to travel to this assigned location, you will need to present documentation in writing to me for consideration by 11/8/91.

Thank you."

The employer received a memo from the grievant concerning various medical appointments. That November 12, 1991, memo from the grievant to the employer revealed the following:

"TO: FILE

FROM: JOHN STULL, AIC, SPECIALIZED AUDIT SECTION

SUBJECT: MEDICAL APPOINTMENTS FOR CARMEN DAVILA

Today Carmen gave me the following schedule of medical appointments for this week:

11/12 - 12:50 - Dr. Schmidt

11/13 - 4:00 - Dr. Stone
11/15 - all day - pre-operative testing at
Riverside Hosp."

The grievant was excused from that travel and then off work from November 22, 1991, the date of her surgery until January 6, 1992. At the time upon her return the audit team to which she was assigned was in the office working on the backlog of audit reports. On March 24, the grievant received an assignment for April 6, 1992, requiring her to be out of town on an audit assignment. The grievant, in a meeting with the chief of her section on March 24, 1992, was indicated to have revealed the following to him in her meeting with him:

"TO: FILE

FROM: JOHN STULL, CHIEF, SPECIALIZED AUDIT
SECTION

SUBJECT: MEETING WITH CARMEN DAVILA

The above named employee came to me today to ask that I give her something in writing regarding the dates of the upcoming OHF audits in Cincinnati. She asked that I indicate starting dates, length of time the audits will require and location of the audit. Also she asked that I indicate in writing that she is assigned to report to the audit sites.

Robert Vohsing had indicated to me that he had notified his team of the schedule of audits. He told me Carmen indicated she would be unable to travel until June because of a medical disability.

I asked Carmen if she would, in fact be unable to travel until June. She stated, 'I told you all that I am not traveling again at all, period.'

Carmen has made the statement to me in the past that she will never travel with Robert as her AIC. I asked her today if she would ever be traveling. She said, 'I might, if I'm reassigned to the right supervisor.'"

On March 27, 1992, the grievant received by interoffice communication a statement from her auditor in charge that she is expected to be in Cincinnati for an April 6, 1992, audit. That memo revealed the following:

"March 27, 1992

TO: Carmen Davila, N.H. & Hospital
Examiner 3, SAS
Bureau of Financial Audits

FROM: Robert Vohsing, AIC, SAS
Bureau of Financial Audits

SUBJECT: Cincinnati Audit Scheduled for
April 6, 1992

In my office on March 23, 1992, you stated you were not able to work the Cincinnati audit because of medical reasons. In order to reasonably accommodate your physical handicap we must have a letter from your physician indicating what duties of your position you are unable to perform, the reason and the approximate length of time which you are unable to perform your job duties. Your position description is attached so that your physician can use it as a guide to determine the exact duties you are unable to perform. Please respond by April 3, 1992, so that arrangements can be made.

The audits of Walnut Hills/Evanston Medical Center and Lincoln Heights Health Center will begin April 6, 1992, and last for approximately three weeks.

Every effort will be made to reasonably assist you in fulfilling your work requirements."

Instead of reporting to her audit site the grievant reported late to the office on April 6, 1992, when she should have been in Cincinnati and gave the name of a new physician to her section chief. She further indicated that the new physician would be forwarding a letter to the chief. The grievant delivered a letter to Mr. Stull, her section chief,

under date of April 6, 1992, from Warren L. Bertner, a psychologist in Columbus, Ohio. That letter revealed the following:

"April 6, 1992

To Whom It May Concern:

I am writing after my first visit with Ms. Devila on Friday April 3, 1992. She was referred to me thru the State of Ohio EAP due to perceived stress on her part and the need to find appropriate measures to cope with her situation.

I interviewed Ms. Devila and determined that she is suffering from a significant depressive disorder. I am currently working with her to find an appropriate medical resource to place her on medication. Given her situation I have encouraged her to consider at least a month's disability status. She herself is reluctant to be away from her job that long partly due to her being away last year due to surgery. In discussing ways to reduce her job stress I believe that an accommodation be reached to minimize her travel so that the constant aggravations of unfamiliar surroundings do not intensify further her medical circumstances. Should this not be possible, I believe that disability leave may be the only other reasonable option.

I intend to see Ms. Davila on a regular basis to monitor her situation. Should further documentation be necessary, I can be contacted by mail or telephone.

Sincerely,

/s/ Warren L. Bertner, M.Ed."

It might be noted that the grievant until that period of time requested a non-travel status on the basis of her surgical problems. For the first time the grievant requested a waiver of the travel status by way of having her condition diagnosed as a depressive disorder. At any rate, the grievant was granted a requested vacation after she met

with the EEO officers at the facility who received a copy of Psychologist Warren L. Bertner's letter. The grievant met the EEO officers at the facility who were notified because there was an attempt on the part of the employer at that time to "reasonably accommodate" the grievant with her inability to travel and still accomplish her duties.

That meeting with the EEO officers ended rather abruptly, as can be seen by the following correspondence. The following is an April 20, 1992, letter addressed to the grievant by the civil rights' officers at the facility. That letter revealed the following:

"April 20, 1992

Ms. Carmen Davila
3355 Pine Valley Road
Columbus, OH 43219

CERTIFIED MAIL

Dear Ms. Davila:

This letter is to summarize the highlights of the meeting we held with you and your representatives, Ms. Brenda Barker, on Thursday, April 16, 1992.

The focus of the meeting from a civil rights perspective was to attempt to provide reasonable accommodation to you for a possible handicapping condition in accordance with Section 504 of the Rehabilitation Act of 1973; a function which unquestionably falls within the purview of the EEO program. You indicated you did not require any reasonable accommodation for purposes of traveling as you do not intend to travel. Pursuant to your directive to us during this meeting, this office will not pursue this matter any further.

Sincerely,

/s/ Lenora B. Johnson
Civil Rights Officer

/s/ Don Stiltner, Jr.
Civil Rights Officer"

That letter and the visit to the EEO officers also triggered a

letter from the grievant in response. Her letter revealed the following:

"April 22, 1992

Ms. Lenora B. Johnson
Civil Rights Officer
Ohio Dept. of Human Services
30 E. Broad Street
Columbus, OH 43215

CERTIFIED MAIL

Dear Ms. Johnson:

I am in receipt of your letter dated 4/20/92 alluding to the 4/16/92 meeting between you and I, Brenda Barker and Don Stiltner, Jr. After reading your letter, I felt compelled to clarify some misconceptions on both your part and Don's.

First of all, the purpose of the meeting was for you to explain to me how you came into possession of my personal, confidential medical correspondence. Despite my futile attempts, that question was never answered.

Apparently, I have become a victim of unprofessional and unethical tactics that have not only infringed upon my right to privacy and confidentiality, but also my rights as guaranteed me via the Employee Assistance Program.

-I did not file a discrimination complaint based on handicap; hence, you had no right to receive or act upon my confidential medical record.

-I did not file a disability claim; and again, your involvement was neither warranted nor required.

I am well aware of Section 504 of the Rehabilitation Act of 1973 and despite your 'civil right' perspective, your involvement in this matter was unnecessary, unethical and unprofessional.

Be advised that the laxity shown by Tim Ferguson, as well as both you and Don Stiltner, Jr., in the handling of such a sensitive and confidential medical matter has caused me a great amount of undue stress.

You were correct on only two points in your

letter: (1) until my doctor feels it is advisable for me to travel, I will be unable to do so; however, as has been the case within my unit and other similar units, not being able to travel does not prevent me from performing similar work duties 'in the office' and most certainly I would not be insubordinate and simply refuse to perform my job; and (2) I did direct you not to pursue the 'matter' any further because a door has been opened re: my confidential medical correspondence that I intend on closing through a professional, ethical and expedient manner. Again, I reiterate that your involvement was not warranted, under any circumstances and the supervisor who forwarded my confidential medical correspondence was fully aware of standard procedures; hence, I can only conclude that this mishandling was intentional.

It is quite unfortunate for all involved that without any justification or due cause, standard and professional procedures were not followed in addressing my respective situation. I am guaranteed confidentiality not only by my doctor but also by the Employee Assistance Program administered on behalf of the State of Ohio's employees.

Any further correspondence regarding this matter will be directed to the proper authorities.

For the sake of others in the future, I would suggest a refresher course for all management level personnel with an agenda that includes: (1) civil rights; (2) EAP; (3) issues of a confidential nature and (4) professional ethics.

Respectfully,

Carmen M. Davila"

The grievant was again notified on August 10, 1992, of an impending audit in Toledo beginning September 14, 1992. On September 10, she was again reminded of the impending Toledo audit but she stated that she would not attend. At that time she was told that if it was a medical reason for non-attendance then she would have to bring in a medical slip or note from her doctor. On September 16, 1992, the grievant was told

to either report to her audit site in Toledo or provide a statement from her doctor. At that time the grievant indicated that she no longer intended to submit a statement from her doctor because the statement she submitted in April from Doctor Bertner was sufficient.

On September 24, 1992, a predisciplinary investigatory interview was had with the grievant and the grievant received a written reprimand dated September 25, 1992 and it revealed the following:

"September 25, 1992

TO: Carmen Davila, SAS
Bureau of Financial Audits

FROM: John Stull, Chief, SAS
Bureau of Financial Audits

SUBJECT: Written Reprimand for Willful
Refusal to Follow Direction of
a Supervisor

This is a written reprimand to you for the above named violation of ODHS rules which represents insubordination. The action which constituted the offense was your stated refusal to travel and your failure to report to your assigned work location, combined with you failure to, and refusal to produce a statement from your physician justifying your inability to travel.

The offense was committed on September 24, 1992, upon your arrival at work at 8:00 a.m. If no further offense occurs, this memo will be removed from your personnel file on September 24, 1993.

To prevent further discipline and correct this offense, I must have resolution of the question of your ability to perform your job duties as described in your position description (copy attached). In order to substantiate your claim that you are unable to travel, I must receive a letter from your physician stating what, if any of your job duties you are unable to perform, the reason you are unable to perform those duties, and

the expected length of time you will be unable to perform those duties.

If I receive such a letter, I will present a copy of the letter to Don Stiltner and/or Lenora Johnson of ODHS Office of Human Resources Management with a request that they advise me whether your condition, as described in the letter, requires reasonable accommodation by the department.

I must receive this information by 8:00 a.m., on October 1, 1992. Failure to provide such information by that time will be considered a second offense of insubordination and will result in a recommendation of further disciplinary action.

/s/ John Stull, Chief
Specialized Audit Section"

The matter was not processed to arbitration because of a contractual clause at paragraph 25.01 (G) which revealed the following:

"G. Oral reprimands shall be grievable through Step Two. Written reprimands shall be grievable through Step Three. If a oral or written reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the oral or written reprimand."

It might be noted that the last paragraph of the grievant's written reprimand of September 25, indicated that if a medical statement was not provided by the grievant that a failure to provide such statement would be considered a second offense of insubordination. That is in fact what occurred and under date of December 16, 1992, the grievant in fact received a suspension of six days for willful refusal to follow directions of a supervisor. The actual writing of that disciplinary activity revealed the following:

"December 16, 1992

Carmen Davila
MIS Budget and Planning
30 East Board Street,, 38th Floor
Columbus, Ohio 43215

Dear Ms. Davila:

As a result of the findings of the pre-disciplinary hearing held on October 29, 1992, I have approved the following disciplinary action:

You will be suspended for six (6) work days for willfull refusal to follow the direction of your supervisor. The dates of your suspension are Thursday, December 17, 1992 through Thursday, December 24, 1992. You are due to return to work at your regular time on Monday, December 28, 1992.

Please be advised that further infractions may lead to further disciplinary actions, which could include termination.

Sincerely,

/s/ James Conrad
Director"

A protest was filed and that protest revealed the following:

"Carmen Davila has received a notice of suspension dated November 25, 1992 (see attached) which calls for a six (6) day suspension. The Union contends that there was no just cause to discipline the frievant (sic) in the instant case is that a valid medical statement had been previously submitted by her which should have been sufficient."

In that protest contract article 2 and 24 of the collective bargaining agreement were indicated as being the predicate of the grievance.

Paragraph 2.01 of the contract revealed the following:

"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."

Paragraph 24.01 revealed the following:

"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."

It might be noted that the employer has published a certain disciplinary guideline, the preamble of which revealed the following:

"DISCIPLINARY GUIDELINES

Violations of the Ohio Civil Service Laws and Rules or of the agency policies and procedures may

result in disciplinary action. Grounds for disciplinary action include but are not limited to: violation of work rules, tardiness, excessive absenteeism, gross inefficiency, neglect of duty, insubordination, falsification of official documents, disclosure of confidential information, fighting, abusive language and other disruptive behavior. The specific action to be taken will usually be recommended by your immediate supervisor.

TYPES OF DISCIPLINARY ACTION

The four types of disciplinary action that may be employed are:

1. verbal warning or oral reprimand;
2. written reprimand;
3. suspension from work without pay; and
4. removal from state service."

Within the confines of those guidelines is a disciplinary grid.

The preamble to that grid revealed the following:

"DISCIPLINARY GRID

The following is a list of specific infractions which constitute unacceptable behavior or inefficient service for employees of ODHS. These infractions are violations of departmental policy, the Ohio Revised Code, the Ohio Administrative Code, or other laws governing civil service employees and/or citizens of the State of Ohio. An employee who commits such infraction(s) shall be subject to the appropriate disciplinary actions(s). This list is not all-inclusive nor are the recommended actions absolute. They will serve as a guideline only. The agency, as well as the collective bargaining agreement, states that discipline must be progressive. Each time an employee commits an infraction, discipline is to be imposed at the next highest level. The supervisor should consider, before any suspension, offering the Employee Assistance Program (EAP). Before any removal, EAP could be offered to the employee and discipline held in abeyance pending

successful completion of the EAP program unless the infraction is so serious that removal is necessary. When the employee agrees, a written agreement shall be signed by the employee and the supervisor. Such use of EAP shall generally occur only once unless special circumstances warrant a second use of EAP to reduce discipline. The administration reserves the right to determine the recommended discipline at any step depending on the severity of the infraction."

Since the employer is committed to progressive discipline pursuant to the terms of the contract, the grievant in alleged violation of rule 24, first received a written reprimand and then the instant six day suspension. It might be noted that rule 24 (B) of the unilaterally promulgated rules revealed that the grievant was violative of willful or deliberate refusal to follow the direction of a supervisor.

During the course of the personal activity of the grievant in this particular matter, namely from October, 1991, to November, 1992, the grievant made five personal travel trips during the same period she sought a waiver for business travel. Those five trips for personal reasons are revealed as follows:

1. On April 20, 1992, the grievant requested a vacation and traveled to New Orleans by car with her fiancé.
2. On June 15, 1992, the grievant requested a vacation and it was granted and she went to a wedding in San Diego, California.
3. On August 20, 1992, the grievant attended a union convention in Toledo, Ohio.
4. On September 3, 1992, the grievant requested and received leave to visit her sick mother in Atlanta and did.

5. On September 14, 1992, the grievant received permission and again traveled again to Atlanta to visit her mother.

It might be noted that the grievant was requested information as to why she was able to travel for personal reasons but sought a waiver of travel for business duties. The grievant at hearing, indicated that her business travel produced stress while her personal travel relieved stress.

Further evidence revealed that a male co-worker with the same classification sought and received a waiver of his travel status during a period of caring for his wife during cancer problems. The grievant believed she was denied such similar travel waivers because she was female and hispanic.

Also during the course of this thirteen month period, the grievant filed two charges of discrimination with the Ohio Civil Rights Commission. Both charges were denied and are now concluded.

The parties stipulated to an issue. That stipulation signed off by the parties revealed the following:

"ISSUE (STIPULATION)

Grievance No. 16-00-921201-0053-01-14

Grievant - Carmen Davila

Was the discipline imposed upon the grievant for just cause?

If not, what shall the remedy be?

/s/ Eric L. Warren

Ohio Department of Human Services

/s/ John P. Gersper
OCSEA/AFSCME"

It was upon that information and those contractual clauses and the arguments raised by the parties that this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

The parties are committed to progressive discipline. Paragraph 24.02 of the contract revealed the following:

"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. One or more oral reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more written suspension(s);
- D. Termination."

Rules were placed into evidence in this particular case. Those rules were used as a predicate for determining the level of discipline the grievant should have received for her substandard activity. Those rules were unilaterally promulgated by the employer. Rules in order to be proper must be published, reasonable and evenhandedly applied. The union did not contest any of those particular items and the rules therefore must be considered to be proper. The discipline in September, 1992, was a written reprimand and the current discipline under

consideration in the instant matter is a suspension. Under the rules, the grievant was properly disciplined and in a progressive manner.

There was evidence in the record that a white male had been given a waiver of travel for a period of time during the course of that employee's spouse needing aid and assistance during her bout with cancer. The grievant believed that she, the grievant, was treated in a manner that would exhibit lack of evenhandedness because of a denial of such waiver for her. Upon review of the evidence it was revealed that the grievant also received permission for her travel waivers for a period of thirteen months or a time greater than received by her white male co-worker employed in the same classification. The lack of evenhandedness complained of therefore, must be held for naught.

The evidence further revealed in this particular case that the grievant accepted employment knowing that there was "substantial travel" involved in this classification and the grievant sought to thereafter have that travel requirement waived permanently. For some reason, the grievant indicated and stated that she was not in need of any "reasonable accommodation" when offered for the purpose of determining whether such could be the case. As a matter of fact the grievant was annoyed that the Civil Rights officers at the facility had knowledge of the grievant's problems. Thus, a reasonable accommodation being refused outright, there was no choice by management but to demand that she continue to travel.

Further, the grievant first sought to escape the travel requirement

by virtue of her medical disability and then by way of her mental disability. She refused to obtain sufficient medical report and she refused to cooperate with the appropriate employer Civil Rights officers. The grievant simply did not follow the protocol set forth by the employer. Simply put, the grievant did not comply with the instruction of her supervisor in providing that material in order to have her travel requirements waived.

Further, all during this period of time that the grievant indicated that she could not travel first because of her physical and medical conditions and then because of her mental conditions she traveled on five different personal trips, namely San Diego, California; New Orleans, Louisiana; Toledo, Ohio and two times to Atlanta, Georgia. In other words, the grievant's personal travel activity was inconsistent with her alleged inability to travel for business, first by way of her surgical disability excuse and then by way of her alleged mental disorder excuse.

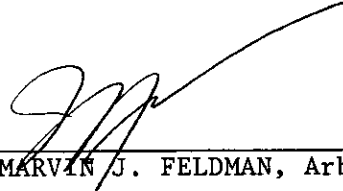
An employee has a duty to be present at the time and place of scheduling. Absent that, the employee must provide good and sufficient reason for not being present. In that regard, the employee was not cooperative and sought to usurp management's authority in that regard. Management sought an excuse and the grievant neither provided the excuse nor worked as assigned and scheduled.

The evidence does not reveal any disparate treatment; the evidence does not reveal sufficient current medical or mental information in

order to allow a waiver of the travel requirements; the evidence does not reveal that the grievant needed a "reasonable accommodation"---all pursuant to her commentary in that regard and the evidence revealed that the grievant sought to "work the system" in order to prevent the department from enforcing the travel necessary for the grievant to do her job. The grievant, further, received progressive discipline. There is no doubt that the grievant consciously and deliberately without any current provable medical reason or current provable mental reason sought to enforce her will as to the travel requirements in her nursing home and hospital examiner 3 position. The evidence in this case is quite clear in that regard. For all of those reasons the grievance must be denied.

IV. AWARD

Grievance denied for reasons stated. The discipline imposed upon the grievant was for just cause.


MARVIN J. FELDMAN, Arbitrator

Made and entered
this 30th day
of November, 1993.