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IN THE MATTER OF THE ARBITRATION BETWEEN:	* Case No.
OHIO BUREAU OF WORKERS' COMPENSATION	* 34-49-941014-
	* 0261-01-09
-and-	* Case No.
	* 34-49-941014-
OSCEA/AFSCME	* 0261-01-09
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ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For The Employer:

Roger A. Coe, 1st. Chair  
Pat Mogay, 2nd. Chair  
Carl J. Alcorn, Manager, Public Information Department  
R. Sue Jones, Supervisor, Public Information

For the Union:

John Fisher, Representative  
Howard Marsh, Grievant  
Andre Davis, Claims Representative II, Public  
Information  
Joyce Parrell

The Ohio Civil Service Employees Association/American Federation of State, County and Municipal Employees (the Union) and the Ohio Bureau of Workers' Compensation (the State or the OBWC) agreed, at the outset of this proceeding, that two grievances would be heard in tandem. One of these grievances protests the twenty-five day suspension of Howard Marsh (the Grievant) and the other protests his termination on January 27, 1995. The Hearing was held on September 19, 1995, at 9:00 a.m. in the Marble Room, Union headquarters, Columbus, Ohio. Both parties were represented and stipulated that this case is properly before the Arbitrator. They had a full and fair opportunity to present evidence and testimony and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the parties provided oral closing argument.

ISSUES

Was the Grievant's twenty-five day suspension for just cause? If not, what shall the remedy be?

Was the Grievant's termination for just cause? If

not, what shall the remedy be?

### BACKGROUND

Some of the facts of these cases are straight forward. The Grievant began his employment with the OBWC as a part-time employee when he was a student nine years ago. He apparently became a full-time employee in 1989, and was a Clerk 2 when the events discussed herein occurred. His disciplinary record standing at the time of these events, was as follows:

- 1) June, 1989 -written reprimand (unexcused absence)
- 2) August 1989 - verbal reprimand (being away from Work area without authorization)
- 3) January, 1990 - written reprimand (unexcused absence)
- 4) August, 1990 - one day suspension (unexcused absence)
- 5) April, 1991 - three day suspension (unexcused absence)
- 6) September 5, 1991 - seven day suspension (Unexcused absence)
- 7) May, 1993 - fifteen day suspension (unexcused absence)
- 8) August, 1993 - written reprimand (falsification of an official document)
- 9) January, 1994 - verbal reprimand (away from work area without authorization)
- 10) March, 1994 - written reprimand (tardiness) (JX-7)

The first case consolidated in this proceeding involves events which occurred on July 25, 1994, and which resulted in charges that the Grievant engaged in ¶Willful Falsification of an Official Document¶ and incurred an ¶Unexcused Absence - Leaving the Work Area Without Authorization¶. (JX-2) Mr. Alcorn and the Grievant agree that the former was sitting at the desk where the sign out/in log was kept when the latter signed out for lunch.

The testimony of these individuals diverges thereafter.

According to Mr. Alcorn, he had no reason to check the Grievant's sign out time at that juncture. He stated that he next saw the Grievant at 2:57 p.m.<sup>1</sup> On direct examination, Mr. Alcorn testified that he confronted the Grievant, who said he had called the Secretary, Karen Jennings,<sup>2</sup> and informed her that he was going to be late returning from lunch. On cross-examination, Mr. Alcorn stated that his first discussion with the Grievant about this incident occurred the following day. Mr. Alcorn also testified that, at about 1:20 p.m., Ms. Sonja Nallie, Director, Public Information,<sup>3</sup> told him, in essence, that the Grievant had been missing from his work area without authorization. It was then that Mr. Alcorn said he checked the sign out/in log because he "didn't want a situation where I [Mr. Alcorn] gave him [the Grievant] a reprimand when I [Mr. Alcorn] hadn't checked out the full situation".

The Grievant testified that, at about 1:15 p.m. he was still on the floor, "putting mail on the verticle file". Thereafter, he said that he went back to his desk and signed out "about 1:23-1:24". On cross-examination, the Grievant said that he "did some things" (e.g., got his keys) at his desk, and then signed out for lunch. The Grievant stated that he then "got his car" because he

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<sup>1</sup> It was established, as fact, that the Grievant had one hour for lunch.

<sup>2</sup> Ms. Jennings was not presented as a witness in this proceeding.

<sup>3</sup> Ms. Nallie was not presented as a witness in this proceeding.

had to make a run out east<sup>4</sup>. At some juncture during this run, the Grievant testified that he knew that he was going to be late in returning to work.<sup>5</sup> He also stated that this was not an uncommon occurrence for him and that he used his cellular phone to call the Secretary, Karen Jennings, to advise her of his situation.<sup>6</sup> The Grievant testified that Mr. Alcorn first spoke to him about this matter maybe a week later.

The Daily Attendance Record (JX-2) for July 25, 1994, shows the following with respect to the events in question: the Grievant signed out for lunch at 1:25 p.m. and signed in at 2:57 p.m.

According to Mr. Alcorn's testimony, he never spoke to Ms. Jennings about this incident. The record contains a statement that Mr. Alcorn agrees he prepared, and which appears to be notarized, dated August 10, 1994, (JX-2) which states:

At approximately 1:15 p.m., July 25, 1994, I observed Howard N. Marsh signed out on the daily attendance record at 1:25 p.m. for lunch. Between 1:20, and 1:30 p.m., I made a complete search of the floor to see if Howard could be found.<sup>7</sup> I The search, because I made the same observation Howard's [the Grievant's] departure approximately two days prior to this occurrence, at which time,

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<sup>4</sup> No evidence or testimony was presented that this "run" was on official business.

<sup>5</sup> At no time was the Grievant asked, nor did he indicate that there was a mitigating circumstance which caused him to be late in returning from his lunch break.

<sup>6</sup> There is no dispute between the parties that Ms. Jennings is also a bargaining unit employee.

<sup>7</sup> On cross-examination, Mr. Alcorn admitted that portion of his August 10th statement indicating that he had made a complete search of the floor was false.

Howard [the Grievant] informed me he was in the vertical (sic) file area.

The record also contains a statement by Ms. Nallie, dated August 10, 1994, which appears to have been notarized.

According to that statement:

On July 25, 1994, I [Ms. Nallie] observed that Howard Marsh had signed out for lunch at a later time than at the time I was observing. I went to Howard's pod and he was not there. I informed his supervisor, Carl Alcorn. Mr. Alcorn was Aware and in the process of searching the 10th floor for Mr. Marsh.

The observation of Howard Marsh's 'sign-in and Sign-out practices' were being performed because of continued peer accusations that he may be falsifying the daily attendance records by actually taking up to and sometimes exceeding 2 hours for lunch but only recording one (1) hour.)JX-2)

On August 23, 1994, a letter was sent to the Grievant, informing him that #disciplinary action is contemplated against you in the form of suspension#. (JX-2) This letter also advised the Grievant of the reasons for the action as #Willful Falsification of an Official Document# and #Unexcused Absence - Leaving the Work Area Without Authorization#. It scheduled a pre-disciplinary meeting on August 31, 1994, and advised the Grievant of his rights. No evidence or testimony was presented about what transpired at this meeting. In a letter, dated October 14, 1994, Ms. Sandra Devery, Administrator,<sup>8</sup> wrote to the Grievant to inform him that he was thereby suspended for 25 working days pursuant to the aforesaid charges. A grievance was

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<sup>8</sup> Ms. Devery was not called as a witness in this proceeding by either party.

filed, undated, (JX-3), however, no procedural challenges are asserted.

The other case at bar in this proceeding pertains to an incident that occurred on December 28, 1994. There is no dispute that the Grievant was working the shift that encompassed the hours from 8:00 a.m. to 6:45 p.m. Ms. R. Sue Jones was the Grievant's Supervisor from 4:45 to 6:45 p.m. She stated that at, ¶about 5:30 [p.m.]¶, she decided to take a ¶quick smoke¶; meaning that she had to take the elevator down and back from the tenth floor where the worksite is located. She testified that, once outside, she took about three puffs on a cigarette, determined it was too cold, and came back to the tenth floor via the elevator. She estimated that, when she returned, it was about 5:35 p.m. Upon her return, Ms. Jones said that the Grievant was not there, but that she ¶didn't think a lot about it¶. She also testified that she subsequently discovered that the Grievant was not there, and asked Sandy Porter, Public Inquiry Assistant,<sup>9</sup> if she had seen him. The alleged answer was 'No'. According to Ms. Jones, at about 5:40 p.m., she walked ¶every inch of the [10th] floor¶ and the Grievant was nowhere to be found. She also enlisted the assistance of Andre Davis, Claims Representative II, in checking the men's restroom on the tenth floor. Ms. Jones said she checked the sign out/in sheet, at about 5:40 p.m., left work at 5:45 p.m., and did not see the Grievant at any time in the

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<sup>9</sup> Ms. Porter was not supplied as a witness in this proceeding.

interim. The sign out/in sheet for December 28, 1995, shows that the Grievant signed out at 5:45 p.m.(JX-12)

In his testimony, Mr. Davis agreed that Ms. Jones asked him to check the tenth floor restroom for the Grievant, but placed the time as between 5:00 and 5:15 p.m. According to this witness, he saw the Grievant later because they both leave at the same time; 5:40 p.m. He said, "They [management] let us leave a few minutes early if we don't take our [or all of our] afternoon break" and that "Everybody signs out at 5:40 p.m." He did not know whether the Grievant had given up all or any part of his afternoon break on the date in question. Mr. Davis stated that he was asked by the Grievant to give a statement at the time of the pre-disciplinary meeting, but that the first time he had given a statement was in the instant proceeding. His testimony was un rebutted that he had never been disciplined for leaving the work area. Mr. Davis stated that, if he was late returning from lunch, the first person he would call is his supervisor and then Karen Jennings, if the supervisor could not be reached. He also admitted that he "might put down [on the sign out/in sheet] that he left five minutes later than he did for lunch" on any given date.

The Grievant testified that he thought he signed out at 5:40 p.m. on December 28. He said that he did not see Ms. Jones between 5:30 and 5:40 p.m. on that date, but that he spoke to a Security Guard, Lee Carter, and "saw Andre [Mr. Davis]" at about 5:50 or 5:55 p.m. when he left the building. Regarding his

whereabouts during the time period in question, the Grievant stated that, at about 5:40 p.m., he went to the restroom on the twelfth floor and remained there for about ten minutes. It was also the Grievant's testimony, on cross-examination, that he was aware of the OBWC's rule on unexcused absences. He asserted, however, that his Supervisor, Ms. Jones, was not there at 5:40 p.m. so he could not advise her that he was leaving the work area to go to the restroom on the twelfth floor. The Grievant also claimed that he was at his desk between 5:00 and 5:15 p.m. on the date in question.

On January 17, 1995, a letter was sent to the Grievant by Ms. Nancy Seman, Hearing Officer,<sup>10</sup> indicating that his termination had been proposed for the reasons that, "You are being charged under BWC Progressive Disciplinary Guidelines 'Unexcused Absence (a) Leaving the work area without authorization' and 'Willful Falsification of Official Document'".(JX-4) This letter also notified the Grievant that a pre-disciplinary meeting would be held on January 17, 1995, and of his rights.

The parties agree that this meeting was rescheduled to January 19, 1995, at the Union's request,(JX-4) and that the Grievant appeared at the meeting. They also stipulated that Lee Carter was at the meeting, but made no written statement until four days later.(JX-8) Ms. Seman served as "Meeting Officer",

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<sup>10</sup> Ms. Seman was not presented as a witness at this proceeding.



prepared a report contained in JX-4, and concluded that the termination was for just cause. On January 25, 1995, Ms. Devery wrote to the Grievant to inform him that his termination from OBWC would be effective at the close of business on January 27, 1995. (JX-4)

There is no dispute that a grievance was timely filed.<sup>11</sup>

These are the matters that the parties have submitted for final and binding decision as the outcome of this proceeding.

#### POSITIONS OF THE PARTIES

##### Employer Position:

The Employer contends that the facts are clear and convincing in proving that just cause existed for both of the disciplinary actions at bar in this case. It further asserts that the testimony of the OBWC's witnesses pass the tests of both credibility and interest in the outcome, whereas the Grievant's does not. As an example of proof of this assertion, the Employer points out that the Union's own witness, Mr. Davis, impeached the Grievant's testimony that it was accepted practice to call Secretary Karen Jennings, without ever attempting to reach the supervisor, when he was going to be late returning from lunch; as he was on July 25, 1995. With respect to that event, the Employer also argues that the Grievant is guilty of being absent

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<sup>11</sup> In reviewing the record, after the Hearing was closed, the Arbitrator discovered that the grievance for the July 25, 1994, incident was erroneously included in the JX-5 pertaining to the December 28, 1994, incident. There is no copy of the grievance pertaining to the latter incident in the record of this case.

from his work area without authorization for the period between 1:15 and 1:25 p.m. and from 2:25 to 2:57 p.m., and that the Grievant is guilty of falsifying the sign out/in sheet regarding the time he left for lunch on that date as evidenced by the testimony of Mr. Alcorn.

According to the Employer, the December 28, 1994, event is also subject to the same considerations. It argues that, at the time in question, working hours for other employees in the building were over so that Ms. Jones' return, via elevator, to the tenth floor worksite was not subject to "milk run" delays and, thus, that her representation of the time frame should be deemed credible. Even if this testimony is challenged, the Employer asserts that the Grievant, according to Mr. Davis, also could not be found between 5:00 and 5:15 p.m.; a period for which he was not authorized to be absent from the worksite.

In summing up, the Employer argues that it is also important for the Arbitrator to consider the following:

- O That the Grievant had a five year "live" disciplinary record that included multiple actions for unexcused absences and for other behavior complained of in these cases;
- O That, given this record, a reasonable person would not believe that, on December 28, the Grievant went to the twelfth floor restroom without first advising his supervisor, or anyone else, of his whereabouts;
- O That, also given this record, and the progressive discipline resulting therefrom, that a reasonable person would risk not only being absent from his work area without authorization, but also making fraudulent entries into the sign out/in sheet; and

O That it does not matter who might have seen the Grievant at 5:55 p.m. since he was already off the clock by that time.

Thus, the Employer contends that the Grievant is a repeat offender who has been afforded all the requisite opportunities of both corrective and punitive discipline to salvage his career but to no avail. It asks, therefore, that the discipline in both the subject cases be upheld as the outcome of this proceeding.

Union Position:

The Union argues that none of this discipline is for just cause. With respect to the event of July 25, 1994, it points out that Mr. Alcorn admitted, at the Hearing, that his statement notarized on August 3, was not accurate that he made a complete search of the floor to see if Howard [the Grievant] could be found between 1:20 and 1:30 p.m. on the date in question. It further asserts that the OBWC's investigation of this event was flawed because Mr. Alcorn acknowledged that he never talked to Ms. Jennings. The Union also attacked the Employer because Ms. Nallie was not called to testify to affirm that she saw the Grievant leave for lunch at 1:15 p.m. and simultaneously place on the sign out/in sheet that he left at 1:25 p.m. The Union therefore argues that the OBWC does not have 'clean hands' where the credibility of its witnesses or the substance of its case are concerned. It is also the Union's position that there is a past practice whereby employees, including the Grievant, have regularly contacted Ms. Jennings, rather than a supervisor, to

report that they were going to be late returning from lunch. Finally, although no procedural challenge is raised in this case, the Union asks the Arbitrator to consider why the discipline in this case took so long to be administered if management really had proof of the charges lodged against the Grievant?

With respect to the December 28, event, the Union challenges the credibility of Ms. Jones testimony that the Grievant was not in his work area at 5:30 p.m. How could Ms. Jones know this, the Union questions, since she has admitted that she was on her way down ten floors in an elevator at the time in question? The Union further contends that, even if it is true that Ms. Jones was back on the tenth floor by 5:40 p.m., then she would have seen the Grievant leave early as alleged. She did not. The Union maintains that the truth of the matter is that Ms. Jones could not have returned to the worksite from smoking, as she testified, by 5:40 p.m., and, thus, that she was unavailable for the Grievant to advise that he was going to use the restroom on the twelfth floor. Since this reality was never investigated by management, the Union again contends that management's case is flawed and fails to prove just cause for the Grievant's discipline.

As remedy for both cases, the Union asks that the discipline be rescinded and that the Grievant be reinstated to his former position and be made whole in all respects.

#### ANALYSIS

The record has been carefully considered with respect to both events that are the subject matter of this case. Regarding the incident on July 25, 1994, the Arbitrator found that the Employer failed to prove the charge that the Grievant falsified an official document and one element of its claim that the Grievant incurred an unexcused absence. These charges are based upon the events which occurred at the time the Grievant left the worksite on the date in question. The best evidence the Employer provided, with respect to the first of these charges, was introduced through the testimony of Mr. Alcorn. This witness testified, with corroboration from the Grievant, that he was sitting at the desk when the Grievant signed out. At no time was Mr. Alcorn asked, nor did he volunteer, that he checked his watch when the Grievant signed out. Additionally, it was established that the clock in the area is located behind where Mr. Alcorn was sitting. Since there was no testimony that anyone else told Mr. Alcorn what time it was when the Grievant signed out, it is obvious that he had no independent knowledge of such time.

Nevertheless, in his direct testimony and in his written statement, dated August 10, 1994, (JX-2) Mr. Alcorn stated that the Grievant signed out at or about 1:15 p.m. How, then, did he acquire this knowledge? Based upon Mr. Alcorn's testimony and Ms. Nallie's written statement, dated August 10, 1994, (JX-2) the record indicates Ms. Nallie, subsequent to the Grievant's departure, told Mr. Alcorn that she ~~observed~~ that the Grievant ~~signed out for lunch at a later time than at the time I was~~

observing. (JX-2) Ms. Nallie was not presented as a witness and, thus, the Arbitrator is left at a loss to understand why, if she observed the Grievant signing out as claimed, she did not intercede. But, as testified to by Mr. Alcorn, he did not check the sign out sheet because he knew of no reason why the Grievant's notation of departure time should be challenged.

Based upon these considerations, the Arbitrator determined that Employer failed to prove the charge of falsification of official records where the July 25, 1994, event is concerned. It follows logically, that the Employer also failed to prove that part of its unexcused absence charge which pertains to the time period between approximately 1:15 and 1:25 p.m.

The other part of the Employer's unexcused absence charge for July 25, pertains to the Grievant's undisputed return to work at 2:57 p.m. According to the Grievant, at some time during his lunch hour, he determined that he was going to be late in returning. In his direct testimony, the Grievant said that this was not an unusual occurrence for him and he was docked for such time. The record contains no testimony or evidence to support this assertion.

The Grievant also claims that he called Ms. Jennings on his cellular phone to report that he was going to be late returning from lunch. Although Ms. Jennings is a fellow bargaining unit employee, and the alleged recipient of the call, she was not called as a witness by the Union. It submitted an undated document alleged to have been written and signed by Ms. Jennings.

No weight was given to this document because its authenticity could not be established nor could its alleged author be cross-examined. Additionally, the Arbitrator considered the testimony of Mr. Davis, a Union witness, that if he was going to be late, he would first attempt to contact his supervisor and, if that person was not available, then he would try to contact the secretary. Finally, the Arbitrator noted the Union's argument that there was a mitigating circumstance for the Grievant's late return and that no evidence or testimony regarding the alleged circumstance was presented for this record. For the reasons set forth above, the Arbitrator concluded that the charge of unexcused absence for 32 minutes on July 25, 1994, is sustained.

The Grievant received a twenty-five day suspension as progressive discipline based upon his past record and on the July 25, charges. The 32 minute unexcused absence is the only part of those charges that remains viable. Since the Grievant's last discipline for a similar offense was fifteen days, the Arbitrator determined that the appropriate, progressive discipline for the unexcused absence in question is twenty days.

On December 28, 1994, the Grievant was again charged with unexcused absence and willful falsification of official documents. Resolution of the dispute over these charges hinges upon the credibility of the witnesses. Ms. Jones' testimony contradicted her written statement, dated December 29, (JX-4) and the Daily Attendance Record (JX-12) about what occurred at 5:30 p.m. on the date in question. She testified that the Grievant

was reading a newspaper at the information desk when she left the worksite to go for a smoke. Her written statement asserts that the Grievant was not at his work station, which is accurate, but no search of the premises ensued at that time. She also stated that the search occurred at 5:40 p.m., whereas Mr. Davis indicated that the time was between 5:00 and 5:15 p.m. Given the facts of record, Mr. Davis was either mistaken about the time of the search or the Grievant was also missing from the worksite earlier in the day, or both. In any event, it was established as fact that the Grievant could not be located when the search occurred. Thereafter, Ms. Jones noted on the Record that the Grievant left at 5:30 p.m.; an assertion which she knew was not accurate.

The Grievant denied seeing Ms. Jones at 5:30, but maintained that he went to the restroom on the twelfth floor at 5:40 and remained there for ten minutes. The Union argued that the Grievant had a habit of using that restroom because it was cleaner than the one on the tenth floor. The only corroboration the Union has for this assertion is an undated document allegedly prepared by Terri Reynolds, a co-worker. This person was not presented as a witness and, thus, the authenticity of the document could not be established nor could she be cross-examined about its contents. The document therefore was given no weight.

Even if the Grievant's explanation is accepted, it is a fact that the twelfth floor restroom is not part of his worksite. If his Supervisor was absent when he went to the restroom, it was



incumbent upon him to notify someone of his whereabouts, but there is no credible evidence that he did. Despite his claim to the contrary, the Grievant knew or should have known to provide notification because of his past record of discipline for unexcused absences. Lacking notification, it is understandable that Ms. Jones could not find him when she searched the worksite, regardless of how many minutes her smoke break took, before she left at 5:45 p.m. Lee Carter's statement was given no weight because, even if accurate, it does nothing to establish whether the Grievant exited his tenth floor worksite without permission before the 5:45 p.m. sign out time.

Although there were inaccuracies, as noted above, in Ms. Jones' testimony, they are not fatal to the Employer's position, given the facts of this case. The best evidence is that the search for the Grievant began between 5:35 and 5:40 p.m. By his own admission, the Grievant was not at the worksite at 5:40 and there is no credible evidence that he notified anyone of his whereabouts. The Arbitrator therefore affirms the charge of unexcused absence on December 28, for the period between 5:40 and 5:45 p.m. Additionally, whether the Grievant was in the twelfth floor restroom or had otherwise exited the worksite at 5:45, it is an uncontroverted fact that he did not sign out at that time. Therefore, the charge of falsification of an official document is sustained.

What is the appropriate discipline for this conduct? The events of December 28, standing alone, would not be sufficient to

sustain the Grievant's discharge. Given his past record generally and with respect to unexcused absences, in particular, it is evident that progressive discipline has not been successful in correcting the Grievant's conduct. Through the record of this case, the Employer has presented sufficient evidence to support its claim that the Grievant's discharge was for just cause.

AWARD

The grievance concerning the discipline meted out for the event which occurred on July 25, 1995, is partially sustained. The twenty-five day suspension shall be reduced to twenty days and the Grievant made whole for the lost time.

The grievance concerning the Grievant's discharge is denied.

DATE: September 22, 1995

Mollie H. Bowers  
Mollie H. Bowers, Arbitrator