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In the Matter of Arbitration Between:

OHIO DEPARTMENT OF PUBLIC SAFETY
DIVISION OF STATE HIGHWAY PATROL

and

OHIO STATE TROOPERS ASSOCIATION, INC.

Re: Grievance 15-03-960925-0076-04-01
Reiff termination

Hearing held June 27, 1997, in Van Wert, Ohio

Decision issued July 15, 1997

APPEARANCES

Employer
Staff Lt. Richard Corbin, Advocate
Colleen Ryan, OCB, Second Chair

Union

Herschel M. Sigall, Esq., Attorney
Thomas W. Vargo, Esq., Attorney
Jim Roberts, Exec. Dir., OSTA
Susan Reiff, Grievant

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant was employed by the Ohio State Highway Patrol as a Trooper at the Van Wert post and had been so employed for approximately two years when, on September 25, 1996, she was discharged. She was a member of a bargaining unit represented by the Ohio State Troopers Association, Inc. The unit includes, among other classifications, both troopers and dispatchers of the Ohio State Highway Patrol.

Grievant's discharge occurred after an investigation was conducted following inquiries to the Employer from the Ohio Department of Administrative Services concerning an application for disability benefits filed by Grievant June 20, 1996. Grievant had been hospitalized for an appendectomy in late May, 1996 and was discovered to have Crohn's disease as well. The Department of Administrative Services noted that the return to work date on Grievant's application form had apparently been altered to change it from July 1 to July 10. The alteration was made in black ink while the form was completed in blue ink and was on a portion of the form that was to be filled out by the attending physician.

A criminal investigation was begun and staff members at the office of Dr. Hamdi, the surgeon whose office filled in the July 1 date on the form, told the investigator that they had not changed the date to July 10. Grievant was interviewed in early August, waiving her Miranda rights. Grievant stated that it was she who had changed the form but

that it was at a doctor's direction. During the interview, she called her mother, who had taken her to the doctors' offices, and asked her mother whether it was Dr. Hamdi, the surgeon, or Dr. Metry, the internist to whom she was referred after the appendix surgery, who had told her not to come back to work on July 1. After consulting her mother, Grievant signed a short statement for the criminal investigator in which she indicated that she had changed the form with the concurrence of Dr. Hamdi's staff. Less than a week later she sent a memo to the post commander indicating that it was Dr. Metry who had authorized her later return to work..

Criminal charges for first degree misdemeanor falsification and attempted theft were filed. These resulted in a finding of "not guilty" after trial.

After an administrative investigation, Grievant was charged with violating Highway Patrol Rules and Regulations, specifically 4501:2-6-02 (E) False Statement, Truthfulness. On September 19, 1996, the Employer gave Grievant notice of an intent to terminate. The notice charged her with falsifying the Attemding Physician's Statement when submitting her application for disability leave benefits. A pre-disciplinary hearing was held. Grievant was removed from her position as a Highway Patrol Trooper effective September 25, 1996 and a grievance was filed that date. The matter was processed to arbitration by the parties and a hearing held June 27, 1997, in Van Wert, Ohio, before the

undersigned arbitrator. At hearing, the parties stipulated that the matter was properly before the arbitrator. In addition, it was stipulated that transcripts of sworn testimony from certain witnesses at Grievant's criminal trial could be admitted as evidence.

II. ISSUE

The parties stipulated the issue to be:

Was Grievant terminated for just cause under the collective bargaining agreement?

III. COLLECTIVE BARGAINING AGREEMENT

Among the provisions of the Agreement referred to by the parties and consulted by the arbitrator are:

Section 19.01, "Standard," which provides:

> No bargaining unit member shall be reduced in pay or position, suspended, or removed except for just cause.

Section 19.04 "Pre-suspension or Pre-termination Meeting"

Section 19.05, "Progressive Discipline," which provides in part:

> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:
> 1. Verbal Reprimand (with appropriate notation in employee's file);
> 2. Written Reprimand;
> 3. A fine not to exceed two (2) days pay;
> 4. Suspension;
> 5. Demotion or Removal.
>
> However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action.....

IV. POSITIONS OF THE PARTIES

The parties made a number of detailed arguments during the course of the hearing. Their positions are only briefly summarized below.

A. The Employer

The Employer argues that the termination was for just cause and asks that the grievance be denied. The Employer argues that troopers have to be held to a high standard with regard to honesty and that Grievant did not live up to this standard. The Employer points out that Grievant admittedly altered the return to work date without authorization to do so. She submitted the altered application without any notice to the Employer. When asked about it, she told the Employer's investigator in a statement that she had changed the form at the surgeon's office under his direction and that only later did she change her story to claim that the change was made at the direction of Dr. Metry. The Employer argues that Grievant's reliance on the testimony of Dr.Metry is misplaced. First the Employer asks the arbitrator to note that Dr. Metry's records indicate that on June 13 he discussed with Grievant the end of June as a return date and not until her June 27 appointment did he set the July 10 date for her return, a full week after Grievant turned in the altered form. He sent the investigator a letter indicating that on June 27 he had set the July 10 return to work date. In any event, the Employer argues that Dr. Metry

was not the physician of record and, if Grievant wanted to use his date, she should have taken him a new form.

The Employer argues that Grievant is a short term employee who has demonstrated a willingness to lie, both on the form and on her statement to the investigator. The Employer asks that the discipline stand.

B. The Union

The Union argues that the discharge was not for just cause. The Union argues that the Employer has overreacted in discharging Grievant. It argues that there is no doubt that Grievant, who was very sick, was entitled to leave up to July 10. It points to testimony from Dr. Hamdi's office staff that it was Grievant who requested the July 1 date and that they advised her should could have been given 8 weeks which would have taken her well beyond July 10.

The Union argues as well that Grievant did not understand the leave forms in that she had never even used sick leave before and that the leave forms were not commonly used at the post either. The Union argues that Grievant was still ill but had to file the papers and changed it because she had to turn it in at that time. It points out that if Grievant had truly wanted to be duplicitous, she would not have made the change in such an obvious fashion and would not have used a black pen on a form filled out in blue ink. In the view of the Union, Grievant was not trying to fool anybody because she knew that she was entitled to stay on leave that long. The Union argues that she was authorized

to write the 10th based on the advice of Dr. Metry. The Union argues that there is no reason to disbelieve the testimony of Dr. Metry on this matter. The Union argues that Grievant is a good employee and that it was wrong to put her through a criminal trial and this discharge proceeding. The Union asks that the grievance be sustained and that Grievant be reinstated and made whole.

V. DECISION AND ANALYSIS

In reaching a decision in this matter, the arbitrator has considered the testimony and exhibits presented at hearing, the collective bargaining agreement and the arguments of the parties.

The arbitrator does not disagree with the Employer as to the importance of honesty in members of the Ohio State Highway Patrol. The public expects that the people wearing that uniform are honest and reliable. They expect them not to steal. Further, because this is an arbitration proceeding conducted under contractual standards and possibly different rules of proof and evidence, the arbitrator is not bound by the result in the criminal proceeding.

If Grievant fraudulently forged a document to obtain additional benefits for herself, the issue of discharge would be properly on the table. After reviewing all the evidence, however, the arbitrator does not believe it was such a case and does not believe that the Employer has established just cause for discharge. The reasons for this resolution follow.

1. This was not a case of a person trying to acquire benefits to which she was not entitled. On June 20, when she turned in the form, Grievant was still sick and weak and had to have her mother drive her to the post. Her medical condition warranted a later return to work date and always had. Dr. Hamdi's office put the July 1 date on the form at Grievant's insistence (she wanted to return to duty in time to help with the busy July 4 weekend) but staff members testified that, given the operation and her condition, Grievant could have had six weeks or up to eight weeks and that eight weeks could have been granted June 6 when the July 1 date was put on the form. Eight weeks would have run substantially past the July 10 date she filled in. As will be discussed below, there is also testimony that Dr. Metry, who treated Grievant after the surgery, told her July 10. Thus, Grievant's medical condition seemed to have warranted a later return to work date than July 1. Although she did alter the form, the information she added was not a lie about her medical condition or ability to return to work. This was not a case of a well person seeking to "steal" benefits.

2. Although the form's instructions state that the attending physician section is to be filled out by the physician, Grievant had seen this form filled out by office staff on June 6. Thus, it had been treated as more of an informal matter and the office staff in Dr. Hamdi's office had authority to write in the return to work date in

accordance with the guidelines set by the doctor (which, according to the office staff would have allowed Grievant to get a later return to work date.) It was also clear that Grievant did not fully understand the form or its instructions. There was testimony that applications for disability leaves had not come up at the post. When Grievant filled out the form, she left too many blanks and it had to be completed by the post commander. One section was amended at the direction of the post commander after he checked with Grievant because she had erroneously failed to request that benefits be supplemented with available leave.

3. Grievant did write and sign a short statement as a consequence of her August 7 criminal investigation interview. In that statement she indicated that she modified the form, apparently after Dr. Hamdi allegedly told her she would not be ready to return to work July 1 and alleged that Dr. Hamdi's staff indicated it was OK to modify the form. In reality, Dr. Hamdi did not see Grievant again, did not change her return to work date and his staff was not consulted about the change. At arbitration, Grievant testified that she modified the form while on the post June 20 to hand in the form. As the Employer argues, this disparity is troubling.

A number of unique circumstances, however, make it possible that the disparity is the result of confusion rather than intentional falsification. First, the record includes a transcript of a telephone call Grievant made to

her mother in the course of the August 7 interview. The call was on a recorded line and Grievant put the call on a speakerphone for the investigator to hear. In the course of the call, she asked her mother whether it was Dr. Hamdi or Dr. Metry who had authorized her later return to work. Grievant wrote her statement that it was Dr. Hamdi only after her mother indicated that it was Dr. Hamdi who had authorized the later return. Thus, Grievant was seemingly unclear on the circumstances at the time of the interview. It was a criminal interview and no right to union representation was given. Further, no transcript of the interview was presented (other than the telephone call) making it difficult to confirm what was said and by whom. Grievant did provide a written statement to her post commander August 12, a few days after the criminal investigation interview, in which statement she indicated that it was not Dr. Hamdi who authorized the later return to work but Dr. Metry. She indicated that Dr. Metry had authorized it during her June 13 appointment with him.

4. The Employer has argued as well that the false statement to the investigator is grounds for denying reinstatement. Grievant was charged with and discharged for falsifying her disability benefits application. She was not formally charged with making false statements to investigators nor was this reason given at the time of her discharge. In any event, the lack of clarity surrounding

the criminal investigation interview makes it too difficult to determine if any erroneous statement was willful.

5. With regard to Dr. Metry, he testified both at arbitration and at the criminal trial that he did tell Grievant during her June 13 visit that she was not to go back to work until July 10. This was one week before she turned in her disability benefits application.

As the Employer argues, his testimony seems inconsistent with his records which, for the June 13 appointment, indicate that Grievant would be returning to work at the end of June and with his letter to the investigator. His records for Grievant's June 27 appointment indicate that her return to work date should be July 10.

At hearing and at the criminal trial, Dr. Metry testified that he did discuss with Grievant at her June 13 appointment that she should not return to work until July 10 and that his records and his letter based on those records were not correct. At the trial, his and grievant's testimony on this point was buttressed by testimony from a post dispatcher who testified that Grievant had called the post June 13 to report that her return to work date had been changed to July 10 and that the dispatcher had written down the message and left it for the sergeant. This testimony was supported by that of another trooper who testified that she saw such a note at the sergeant's work station.

Grievant's version that Dr. Metry told her on June 13 that she should return to work is possible in that Grievant had to get the July 10 date from somewhere when she modified the form. To disbelieve Grievant on this point, the arbitrator would have to believe that two members of an elite law enforcement agency and a physician would risk their futures by giving perjured testimony at a criminal trial.

6. Given the above uncertainties, the arbitrator cannot tell exactly what happened. The Employer has the burden of proof and the arbitrator does not believe that it has been proven that Grievant willfully or intentionally falsified the form or that she had the intent in any way to obtain benefits for which she did not qualify.

7. Grievant did not follow the instructions on the form which indicated that it was for the attending physician to fill in the return to work date. Neither did she get Dr. Metry as her new attending physician to complete a form. The form states above the signature space that:

I have read and understand the instructions on the back of this application. I certify that the above statements are true to the best of my knowledge and understand any misrepresentation on my part may result in a denial of my benefits.

Grievant has already paid the exact price set forth in the form's warnings for failing to follow the instructions. Her claim for disability benefits was denied costing her, according to testimony at hearing, over $900.

8. One final matter is worth noting. The Employer's Report of Investigation dated August 26, 1996, includes a misleading statement that has carried throughout the case and affected its disposition by the Employer. The Report accuses Grievant of changing the date and submitting form for processing on June 6, 1996. The Report then discounts her evidence involving Dr. Metry on the basis that it came after that date. For example, with regard to Grievant's claim that Dr. Metry changed her return to work date during her June 13 visit, the Report concludes "(t)his is seven days after she had changed the date to July 10, 1996 on the ADM 4310 and submitted it for processing." Similarly, the Report indicates that Dr. Metry's chart shows he had a telephone conference with her on June 8 but concludes "this is two days after (Grievant) signed and submitted her ADM 4310 with the July 10 return to work date." The problem is that Grievant submitted the form on June 20, not on June 6. Although her signature is dated June 6, June 6 is the date she went to Dr. Hamdi's office and convinced them to put the July 1 return date on it when they would have authorized a later date. She modified the form at some later date.

That this error carried through the whole process is made clear by the documents submitted as part of the disciplinary chain. The September 18, 1996 charge against Grievant charges that

> on June 6, 1996, (Grievant) falsified the Attending Physician's Statement when submitting her Application for Diability Leave Benefits.

The September 19, 1996, notice of intent to terminate sent to Grievant states:

> it is charged that on June 6, 1996, you falsified the Attending Physician's Statement when submitting your application for disability leave benefits.

Finally, the September 25, 1996, letter advising Grievant of her removal states that:

> It is charged that on June 06, 1996, you falsified the Attending Physician's Statement when submitting your application for disability leave benefits.

Thus, the entire set of disciplinary decisions may have been based on an erroneous report of the facts. Grievant did not submit her application on June 6. Although she modified the form, it was almost certainly at some time after June 6. She submitted the form June 20. The indication in the Report that Grievant submitted her application June 6 could easily have led senior officers to believe that Grievant was not sick enough to warrant a later return date and discount entirely Grievant's arguments that her new doctor had told her not to return to work until July 10.

VI. AWARD

The grievance is sustained. Grievant shall be reinstated without loss of seniority and made whole.

Respectfully submitted,

July 15, 1997
City of Van Wert, Ohio
County of Van Wert

Douglas E. Ray
Arbitrator