#1300

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. 34-08-97-03-17-058-01-09
SHERRILL CRAIG, GRIEVANT

STATE OF OHIO	:	
	:	
The Employer	:	
	:	
-and-	:	OPINION AND AWARD
	:	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11 AFL-CIO	:	
	:	
The Union	:	

APPEARANCES

For the Employer:

Nancy V. Kuss, Labor Relations Officer
Roger A. Coe, Labor Relations Officer
Robinette J. Huston, M.D., Witness
Rodney Sampson, Office of Collective Bargaining
Gretchen J. White, Witness
Kathleen Raparelli, Witness
Larry A. Kilmer, Witness

For the Union:

Herman S. Whitter, Attorney, Assistant Director of Dispute Resolution
Michael E. Martin, Staff Representative
Sherrill S. Craig, Grievant
Nitabelle Journell, Witness
Pamela J. Hager, Witness
Deborah Flint, Witness
Lindsay Harshbarger, Witness
Nitabelle Journall, Witness
Brett A. Scott, M.D., Witness

MARVIN J. FELDMAN
Attorney-Arbitrator
1104 The Superior Building
815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216/781-6100

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 hearings in this cause were scheduled and conducted on May 18, 1998, May 19, 1998, June 11, 1998 and June 12, 1998. A portion of the hearing (May 18, 1998, AM) was conducted in London, Ohio and the balance of this matter was thereafter conducted at the conference facility of the employer in Dayton, Ohio, (North) at the Ohio Bureau of Workers' Compensation offices. The parties stipulated and agreed that the witnesses should be sequestered and sworn. The employer stipulated that this matter was properly before the arbitrator. The union indicated and stated that the arbitrator had no jurisdiction over the merits in this cause because procedurally, the activity of the employer did not comport with the necessary conditions precedent so as to invoke the merit jurisdiction of the arbitrator under the instant contract. The parties, after hearing chose to brief the procedural issue, relying upon oral closing for the merit argument. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. JOINT STIPULATION OF FACT

The parties entered into some joint stipulations which may be fairly stated as follows:

"JOINT STIPULATIONS

1. Sherrill Craig began her employment with the Ohio Bureau of Workers' Compensation (BWC) on January 19, 1988, as a Public Inquiries Assistant 1.

2. Sherrill Craig's tenure with BWC is documented in the Ohio Department of Administrative Services (DAS) Employment History (EHOC) on the line system.

3. At the time of her removal Sherrill Craig was a Workers' Compensation Claims Service Specialist in the Agency's Dayton Customer Service Office.

4. Sherrill Craig was familiar with and knew the rules for filing disability leave benefits with the Ohio Department of Administrative Services.

5. Dr. Huston had treated Sherrill Craig from April, 1995 to her removal March 12, 1997.

6. Sherrill Craig was removed from BWC employment as a Workers' Compensation Claims Service Specialist on March 12, 1997.

7. Sherrill Craig has no active discipline.

8. Joint Exhibits 11 and 12 were received from Dr. Huston and given to the Union on or about 4/22/98.

9. Grievant did appeal her disability determination to the Court of Common Pleas.

/s/Nancy V. Kuss	/s/Michael Martin
Nancy V. Kuss	Michael Martin
Advocate for OBWC	Advocate for
	OCSEA/AFSMCE"

III. JOINT ISSUES TO BE DECIDED

At the outset of hearing the parties entered into a stipulation of joint issue and it may be fairly stated as follows:

"JOINT ISSUE

Was the Grievant removed for just cause? If not, what shall the remedy be?

/s/Nancy V. Cuss	/s/Michael Martin
Nancy V. Cuss	Michael Martin
Advocate for the Ohio	Advocate for OCSEA/AFSCME,
Bureau of Workers'	Local 11
Compensation"	

IV. PROCEDURAL ISSUE

On March 7, 1997, the grievant, an employee of more than nine years, was removed from her employment as a claims service specialist in the Dayton customer service office of the Ohio Bureau of Workers' Compensation. The letter of removal revealed the following:

> "March 7, 1997
>
> Sherill Craig
> 1026 South Dugan Road
> Urbana, Ohio 43078
>
> CERTIFIED MAIL
>
> Dear Ms. Craig:
>
> This letter is to inform you that you are hereby removed from employment as a Claims Service Specialist in the Dayton Customer Service Office of the Ohio Bureau of Workers' Compensation, effective close of business March 12, 1997.
>
> After reviewing the recommendation of the meeting officer, it has been determined that just cause exists for this action. The charges you have been found in violation of are under BWC Progressive Disciplinary Guidelines, 'Insubordination (a) Willful disobedience/Failure to carry out a direct order' and 'Willful Falsification of an Official Document'.
>
> You will need to turn in to your supervisor all BWC property including your State Identification card(s), EIN number, computer password, voice mail password, building access card and any other information or property of the BWC. You will no longer be permitted access to employee work areas in any Ohio Bureau of Workers' Compensation facility.
>
> Sincerely,
>
> /s/James Conrad
> Ohio Bureau of Workers' Compensation Administrator"

Thereafter a protest was filed and that grievance was filed on a

timely and proper basis under the contract and it revealed the following pertinent information:

> "Ms. Craig received a letter from Mr. James Conrad dated March 7, 1997, stating that she was hereby removed from employment as claims spec in the Dayton BWC office as of March 12, 1997. Ms. Craig hereby wishes to appeal her removal, and state that she was not insubordinate but was medically unable to carry out a direct order to return to work. Ms. Craig also denies falsification of any official document concerning disability claims. Ms. Craig states that her due process and contractual rights have been violated. That Ms. Craig due process and contractual rights be honored by BWC management, that she be reinstated to her claim service specialist job, receive all back pay and all benefits due and to be made whole.
>
> Signature: /s/Michael E. Martin
>
> Date: 3-10-97"

The employer had complained that the grievant failed to return to work on or before Monday, February 10, 1997. The following direct order was mailed to the grievant on February 4, 1997 and the grievant received it. That order that was not adhered to by the grievant stated the following:

> "Failure to return to work on or before, Monday, February 10, 1997, will be an act of insubordination, and will lead BWC to conclude you have abandoned your position and the BWC will proceed to recommend immediate termination from employment."

By way of defense the grievant stated she could not work. The reader is directed to the medical report of Dr. Scott, the surgeon employed by the grievant. The report is on the next page. Further, the

grievant was charged with an alleged willful falsification of an official document and that document was an employee disability leave form that was forwarded to the employer for processing. On that document was a question requesting an estimated date of release to work. The document on its face revealed that the original date placed on it was February 1, 1997. The month was crossed out and March was placed in its stead. Thereafter as to the numbers of the date, the employer stated that the grievant was responsible for changing the date by adding a figure three before the figure one making the date of release to work as corrected, March 31. The employer contended that the date should have been March 1, and that the grievant changed the date thereby falsifying an official record.

At hearing, the treating physician of the grievant who signed the form testified. She testified that she completed the form and corrected February to March. She also testified that the correct date, however, for returning to work was March 1, not March 31, 1997, as the form that was processed finally stated. The charge therefore as of the time of hearing was that the grievant changed the date to 31, adding a "3" therefore.

In use at the time and under date of October 1, 1996, were posted work rules for the bargaining unit employees of which the grievant was a member. Those work rules revealed that willful disobedience of a direct order at the first step would trigger a discharge or removal and that when that was compounded with the second charge of a willful falsification, that too would trigger a discharge and terminate the seniority of the grievant.

The grievant was notified that she should be present on March 3, 1997, for a predisciplinary hearing. At that time the grievant claimed that she was too ill to attend in person and was allowed to attend by phone conference calling. At hearing the grievant produced a medical report of her treating surgeon and it stated;

> "3 March 1996
>
> Attn: Nancy Seaman, Cathy Raparelli
>
> Re: Sherrill Craig
>
> Please be advised that Sherrill Craig is presently under my care for pars defect, spondylolesthesis with degenerative disc L5/S1 (see attached chart note from last visit). Ms. Craig is totally disabled and unable to ride/drive a car until she has been re-evaluated after her epidural steroid blocks.
>
> If you have any questions, please do not hesitate to contact my office.
>
> Sincerely,
>
> /s/Brett A. Scott, M.D.
> BAS/gm"

At that time a Pam Hager was called in by management to be the union representative (steward) at the predisciplinary hearing. Pam Hager testified that she told both the supervisor of the grievant who was present at the hearing and the labor relations officer who conducted the hearing that she was no longer a steward. The employer stated, according to Hager, two things, namely that she, Pam Hager, should attend as a witness and that she, Pam Hager, was still listed with the employer as a steward and therefore considered a valid union representative of the grievant. The employer further stated that Hager never refused attendance.

It was further contended by the grievant and therefore the union that a staff representative by the name of Mr. Michael E. Martin did not attend the predisciplinary hearing. The employer contended that Mr. Martin had called the hearing officer prior to the hearing for the purpose of obtaining a continuance. The hearing officer, namely a Kathleen Raparelli, stated that she assumed Mr. Martin would attend and admitted receiving the call from Mr. Martin. Mr. Martin denied any calling and stated that the employer was not candid in its testimony. Thus, from all of this, it was contended by the union that the grievant did not have union representation at a meeting concerning discipline and that therefore the grievant's due process under the contract was violated. The minutes of the March 3, 1997, meeting revealed the following:

> "FROM: Kathleen Raparelli,
> Labor Relations Officer
>
> SUBJECT: Pre-Disciplinary Meeting
> Officer's Report-Sherrill Craig
>
> DATE: March 5, 1997
>
> I was scheduled to meeting, with Sherill(sic) Craig, a Claims Service Specialist in the Dayton Customer Service Office South, on March 3, 1997. Present for the meeting were myself, Wayne Curry, Director, Dayton Customer Service Office, Larry Kilmer, Supervisor, Dayton Customer Service office, Jeffery Marva, Payroll Officer, and Pam Hager, OCSEA/AFSCME, Steward. After a discussion on March 1, 1997, it was agreed that Ms. Craig would attend the meeting through a conference call to her home at 10:00 a.m. The union had no objection.
>
> When I arrived at the Dayton Office I was informed that Ms. Craig had left a message for me to inform me that I was to call her brother, Merill Craig. I called Ms. Craig at 10:00 a.m. and informed her that I was not interested in conducting the meeting with Merill, but I would accept any

written statements she would like to submit. I informed Ms. Craig I would be calling her in ten minutes (10) to begin the hearing. When I contacted Ms. Craig at approximately ten (10) minutes after 10:00 a.m. she asked to speak with the union representative Pam Hager. Ms. Craig was concerned that Mike Martin, OCSEA/AFSCME, Staff Representative had not arrived for the meeting. Ms. Craig stated that her understanding was that he intended to be present. I agreed to postpone the meeting until 11:00 a.m.

Mr. Martin did not show up in the Dayton Office. I was able to reach Ms. Craig at 11:07 a.m. to begin the meeting.

Ms. Craig had been charged with violation of the Ohio Bureau of Workers' Compensation disciplinary guidelines, 'Insubordination (a) Willful Disobedience/failure to carry out a direct order' and 'Willful Falsification of an Official Document'.

Ms. Craig claims that she did not return to work when ordered to do so because she is under medical care. Ms. Craig had provided a statement from her doctor which states that she is estimated to return to work on February 20, 1997. Ms. Craig did not return to work nor did she provide subsequent medical documentation regarding her return to work date. The union was given a copy of the falsified disability paperwork and I agreed to send a copy to Ms. Craig's home. The copy was sent March 5, 1997.

Ms. Craig has been charged with falsification of her disability paperwork. The paperwork reflects that the date of return has been changed. Her doctor wrote that Ms. Craig may return to work on February 1, 1997, however the date has been changed to March 31, 1997. Mr. Marva described that chain of custody of Ms. Craig's disability paperwork. The paperwork was mailed directly to him at the William Green Building. He did not change the return to work date. Mr. Marva completed that employer section of the claim, kept his copy and sent the remaining paperwork to the Department of Administrative Services. Mr. Marva stated that if the paperwork had been changed by someone in the Department of Administrative Services it would not reflect on his copy of the claim.

The envelope in which the disability paperwork was sent appears to be in Ms. Craig's handwriting and

the paperwork was changed to reflect a later return to work date than the doctor had given. Ms. Craig stated that she was very uncomfortable going forward with the pre-disciplinary meeting without Mike Martin present. I told Ms. Craig that she has a right to a union representative, who was present, however she does not have the right to the union representative of her choice and that we would continue forward.

Ms. Craig stated that her brother had all the information but he was not allowed to come to the hearing. I told Ms. Craig that we had made arrangements on Saturday for her to participate in the meeting by teleconference. There was no mention of a family member taking her place and I needed to talk with her and not her brother. I told Ms. Craig that I would be willing to accept any statement she would like to send. Ms. Craig denies that she changed the return to work date on the disability paperwork. Ms. Craig assured me that she has information that would prove that she did not falsify the documents. We agreed that she would send the documentation overnight mail so I would have it by 4:45 p.m. on Tuesday, March 4, 1997.

I have not received anything from Ms. Craig.

Based on the above I find that just cause exists for discipline."

The notification by the union of designated steward that was placed into evidence revealed the following:

"NOTIFICATION OF DESIGNATED STEWARD

TO: Agency Head for (agency)
Kathy Raparelli - Labor Relation
Bureau of Workers' Compensation

FROM: Chapter President (name)
Tommy Jones
Montgomery County Chapter #5700

RE: Designated Steward Assignments

DATE: 2-26-96

The following assignments have been made by OCSEA/AFSCME, Local 11 for

Montgomery County Chapter #5700/BWC Dayton
(institution of facility location)

JURISDICTION	SHIFT	STEWARD'S NAME
BWE (Poe Ave.)	8:00 - 4:45	Deborah Flint (Lead Steward)
BWC (Poe Ave.)	8:00 - 4:45	Connie Miles

cc: Jerry Pesch

In cases where the assigned steward is unavailable due to absence or illness, all correspondence should be directed to the following individuals respectively:

Chapter President (name) Tommy Jones

Chapter Vice President (names) Cheryl Evans

Chapter Chief Steward (name) Tommy Jones"

The union contended that article 24.04 of the labor contract by and between the parties, stated that steward representation is a contractual entitlement of each bargaining unit member in predisciplinary meetings. The union further stated that the failure to provide a valid steward at such meetings is a condition precedent that is necessary to properly trigger a discharge of an employee protected under the contract of collective bargaining.

See article 24.04 which stated the following:

"24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her."

In this particular case the union contended that the employer denied the grievant a valid union steward, for the predisciplinary hearing especially in light of the fact that the union had formally notified the employer of the actual steward at the facility.

The employer on the other hand indicated and stated that Pam Hager had been on the employer's list of stewards and that there was no notification that she had been released by the union as a steward. The contract does not demand of the union any written notice of release of stewards once they are no longer acting as a steward for the union. Nor does management have any protocol involved in this regard either. Both parties agreed that the appointment of a union steward is the function of the union and not of the employer.

It might be noted that the lead steward (Flint) in this particular situation had requested the assistant steward (Miles) to attend the predisciplinary meeting. The lead steward knew that she herself would be on vacation and trusted the assistant steward to attend this particular March 3, meeting. The assistant became ill and was off due to illness and therefore neither of the properly valid stewards were available. Management decided to move forward in this particular matter, without either of the listed stewards present and with Mr. Martin, a union staff representative, absent also. The grievant was also absent. See above explanation.

The union further indicated and stated that at the time of the predisciplinary meeting a full investigation had not been made by management. The person who chaired the step 3 predisciplinary hearing

stated in the record herein that she had not talked to any doctor concerning the alleged improper answers on the forms that were filled out and which were the predicate of the change of "willful making of false or untrue statements" regarding the grievant's disability. Kathleen Raparelli, the chair of the step 3 predisciplinary meeting stated that she accepted the alleged changes on the disability form and credited the grievant with all of the changes. Raparelli had not participated into any investigation herself whatsoever.

Based upon the alleged improper investigation of management prior to the predisciplinary hearing and based upon the fact that the grievant did not have the benefit of a bonafide and contractually protected union representative, the union sought to overturn the termination event of the grievant on the basis that the grievant was entitled to certain due process protection under the terms of the contract and such activity was not offered and provided to the grievant in this particular matter---all as bargained for. The union offered further evidence at hearing that Pat Hager who did attend the predisciplinary hearing told the lead steward, Ms. Flint, of the event after Ms. Flint returned a day or two later from vacation and Ms. Flint reported, as did Ms. Hager, that Hager was not a union steward at the time when she was taken into the predisciplinary meeting concerning this employee, the date being March 3, 1997.

The employer stated that since Ms. Hager's name appeared on the list of stewards as compiled by the employer, Hager was a valid steward. The employer was not motivated to vitiate the discharge of the grievant based upon the procedural arguments of the union. The employer further

stated by and through the 3rd step predisciplinary officer, that she, was not bound to do any investigation. It was upon the arguments of the union and the defenses of the employer thereto that this matter rose to arbitration for opinion and award on those procedural issues as well as on the merit issues.

V. OPINION RE PROCEDURAL DEFENSE

The parties bargained at arm's length for all the terms of the contract of collective bargaining. One of those terms is restated above and it is important enough to be restated again. Paragraph 24.04 of the contract revealed the following:

> "24.04 - Pre-Discipline
>
> An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her."

It is apparent from the evidence that that clause was not fulfilled by the employer. Unless and until that contract clause is fulfilled, the discharge must fail because the condition precedent was not completed. It is a well settled arbitral rule that arbitral jurisdiction does attach for the purpose of examining the issue of whether or not the conditions precedent to merit jurisdiction have been fulfilled once that issue is raised. That is the clear and dominant public policy in these United States and has been the subject of many arbitral decisions. That issue also has been decided by the Supreme Court of the United States.

In examining this matter of merit jurisdiction through the evidence

placed into the record in this case it is noted that the grievant is a member of a certified bargaining unit, that that bargaining unit has a contractual relationship with the employer herein. It is found in the contract that that bargaining unit member is entitled to valid union representation at a predisciplinary hearing and that the grievant is entitled to an investigatory interview.

In this matter, the evidence clearly revealed that the employer drafted a former steward to attend the predisciplinary hearing of the grievant. The valid stewards, and there were two, were not at the facility on the date in question. One was on vacation and one was ill. The evidence never explained why the employer felt it so compelling to have the hearing on the date it did. The grievant provided no safety hazard. She was home.

The employer stated that the union never notified the employer that Hager was no longer a steward. There is no protocol that was violated by the union in that regard. As a matter of fact on February 26, 1996, or a short time prior, Flint and Miles were appointed. It would appear that a new appointment notice would automatically vitiate all prior appointments. Simply put and from all of this, the grievant simply was not afforded the due process guaranteed under the contract and the law. The conditions precedent as a basis for further valid action by the employer were not fulfilled.

Further, the hearing officer at the predisciplinary hearing testified that it was not her duty to investigate. The contract clearly stated that there be an "investigatory interview." (See 24.04 restated

above). The hearing officer clearly accepted the employer's evidence and failed to interview the grievant for the purpose of examining all of the matters of investigation as raised by the grievant by phone since she, the grievant, could not attend the hearing, due to her poor health. The grievant was really put at a disadvantage by the hearing officer who failed to provide a valid steward at the hearing and by failing to examine the grievant's remarks raised in her defense by her---all contrary to contract.

This activity is sufficient to reverse the termination of the grievant in this matter because clearly, the grievant's due process rights had been violated.

VI. MERIT DISCUSSION

The arbitrator has ruled that the employer deprived the grievant of her due process rights guaranteed under the contract of collective bargaining. However, some discussion of the merits is in order to discuss the multitude of evidence placed into the record in that regard. In a discharge case the employer is obligated to prove from all of the facts that the grievant is guilty of the substandard acts complained of. There are several standards of guilt that could be used, such as a preponderance of the evidence, beyond a reasonable doubt, by clear and convincing evidence or by the entire facts from the entire record. I prefer the latter because that standard allows a totality of the record to be reviewed and revisited.

The employer charge in this case which was the predicate of the dismissal and termination is that the grievant allegedly changed the

date of the medical slip so as to trigger certain health benefits. The evidence in that regard is not clear and convincing. The doctor who completed the medical form stated that the correct date was March 1. The doctor stated that the March 31, date was not her writing of the date. The grievant stated that she did not alter the form. A copy of the form itself does not appear in the medical office charts, as would usually be the case. It appears therefore that the underlying fact has not been proven by the employer. Simply stated, the evidence is in equipoise. The employer on one hand affirms and on the other hand, the grievant denies. I find that there is no evidence of a buttressing nature in the record to substantiate the employer's beliefs.

Simply put, there is a failure of proof to show from all of the evidence that the grievant forged a medical document by changing a date.

The charge of failing to follow a direct order must fail. The grievant could not work. She could not report to work because of her health. There is ample evidence in the record in that regard.

VII. AWARD

The grievant shall be returned to work without loss of seniority and without loss of any back pay or benefits. The parties shall calculate the benefits and back pay due the grievant. If the parties are unable to agree, this arbitrator shall be recalled, for which arbitral jurisdiction is specially reserved for a period of ninety days from the date stated below.

MARVIN J. FELDMAN, Arbitrator

Made and entered
this 26th day
of June, 1998.