

#1874

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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

**AND**

**THE STATE OF OHIO DEPARTMENT OF JOB & FAMILY SERVICES**

**Grievant: Steven Stultz**

**Case No. 16-11-(2004-08-20)-0071-01-09**

**Date of Hearing: February 23, 2006**

**Place of Hearing: Columbus, Ohio**

**APPEARANCES:**

**For the Union:**

**Advocate: John Porter, Attorney  
2<sup>ND</sup> Chair: Jen Neague**

**Witnesses:**

**Steve Stultz, Grievant**

**For the Employer:**

**Advocate: Richard C. Corbin  
2<sup>nd</sup> Chair: Andy Shuman**

**Witnesses:**

**Rebecca A. Castorano  
Karen Wright  
Kyle D. Martin, Attorney  
Laura M. Clark  
Janet Jackson**

**ARBITRATOR: Dwight A. Washington, Esq.**

**Date of Award: April 28, 2006**

## **INTRODUCTION**

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003, through February 28, 2006, between the State of Ohio - Ohio Department of Job and Family Services ("ODJFS") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support the removal of the Grievant, Steven Stultz ("Stultz"), for being absent without leave beginning December 24, 2003 and failing to properly call off beginning July 20, 2004. The discipline was issued because the Grievant was absent from work for an extended period of time without approved leave.

The removal of the Grievant occurred on August 20, 2004, and was appealed in accordance with Article 25 of the CBA. This matter was heard on January 23, 2006, and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing written closing briefs were presented by both parties, with the record being closed as of May 17, 2006. This matter is properly before the Arbitrator for resolution.

## **BACKGROUND**

Stultz was employed as a Customer Service Representative ("CSR") for ODJFS at the time of his removal. Stultz assisted clients regarding issues involving employment related services. His immediate supervisor at all times relevant herein was Janet Jackson ("Jackson"). Stultz had sixteen years of service with ODJFS with no discipline on his record at the time of removal.

On December 24, 2003, Stultz claims that he was assaulted by an unknown assailant, who entered into the workplace around 7:30 a.m. causing injuries that required his absence from work until June 24, 2004. Stultz reported the incident to Jackson approximately 5 or 10 minutes after the assault. No eyewitness other than Stultz observed the assault, but several co-workers were in the area

and provided email statements to Karen Jordan ("Jordan"), ODJFS Office Manager, the morning of December 24, 2003. However, neither the City of Columbus Police Department nor the Ohio State Highway Patrol ("OSHP") was contacted by anyone from ODJFS until December 29, 2003.

According to Stultz, the assailant pushed him in the shoulder area which caused him to hit a cabinet and fall to the floor. Previously, on September 4, 2003 the Grievant had rotator cuff surgery due to an injury which occurred at home. On the day of the alleged assault, Stultz experienced discomfort by mid-morning in his shoulder due to the prior surgery and obtained permission from Jackson to seek treatment for his injury. Stultz completed an incident report prior to leaving work. According to Stultz, his doctor's office was closing early due to Christmas observance so he was unable to see the doctor until December 26, 2003. Stultz did not seek urgent care or emergency room treatment on December 24<sup>th</sup> or 25<sup>th</sup>.

On December 26, 2003 the First Report of Injury ("FRI") was completed by John E. Ratlitt, D.O. ("Ratlitt") after examining Stultz, indicating the following injuries: lumbar sacral sprain; shoulder/arm sprain; and post contusion syndrome. (Joint Exhibits ("JX") 6, p.1) According to Dr. Ratlitt, Stultz "... was coming to open the door when a man stepped in pushed patient (Stultz) down, (who) bumped into a file cabinet and fell on his rear." (JX 6, p.1.) The FRI is the initial step in filing for workers compensation benefits when a work related injury is involved. ODJFS contested the claim that Stultz had a work related injury assault leading to the following various administrative findings by the Bureau of Workers Compensation ("BWC") and the Industrial Commission of Ohio ("IC"):

1. January 16, 2004 - Claim denied by BWC Customer Service Specialist.
2. February 25, 2004 - Claim allowed by the IC District Hearing Officer.
3. April 16, 2004 - Claim overruled and denied by IC Staff Hearing Officer.
4. May 13, 2004 - IC rejects Stultz's appeal and claim remains disallowed.

Stultz's appealed the final administrative IC finding of May 13, 2004 to the Franklin County Common Pleas Court, which was voluntarily dismissed by Stultz in November 2004. Stultz

was represented by legal counsel throughout the legal process before the IC. On June 24, 2004 Stultz returned to work.

The employer contends that Stultz was absent from work without leave from December 24, 2003 through June 24, 2004. The workers compensation claim was denied and under ODJFS Standards of Employee Conduct. Stultz's lengthy absence was treated as an absence without leave ("AWOL"). Stultz had exhausted all accrued leaves, and had zero leave balances to apply to this absence. ODJFS further contends that on July 20, 2004 and thereafter Stultz failed to properly call off in violation of procedures for another absence that began that day.

The Union contends that ODJFS conducted a poor investigation regarding the assault highlighted by the employer's failure to contact any law enforcement officials on December 24, 2004. ODJFS did not comply with its notification procedures to contact the police promptly and as a result the perpetrator wasn't apprehended.

The Union points out that Stultz's BWC claim was allowed at the hearing on February 24, 2004 so the Grievant had a reasonable belief that his time off would be compensated. Moreover, the Grievant complied with the proper call off procedure, indicative by past practice, and ODJFS contention that on July 20, 2004 the Grievant misused approved leave is contrary to the doctor's note faxed to Jackson on July 21, 2004.

The Union views this treatment as retaliatory, without just cause and punitive towards the Grievant. ODJFS believes that just cause existed for removal based solely upon the actions of the Grievant.

## ISSUE

Was the removal of the Grievant in violation of ODJFS's standards regarding leave and proper call off procedures for just cause? If not, what shall the remedy be?

### RELEVANT PROVISION OF THE CBA, AND ODJFS STANDARDS OF EMPLOYEE CODE ARTICLE 24 – DISCIPLINE

#### 24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(i).

### ODJFS STANDARDS OF EMPLOYEE CONDUCT POLICY

#### A1: Failure to provide proper call off

		<u>OFFENSE</u>	
1 <sup>st</sup>	2 <sup>nd</sup>	3 <sup>rd</sup>	4 <sup>th</sup>
Verbal Reprimand	Written Reprimand	Fine or Suspension	Removal

#### A2(C): Absent without leave (no call /no show): three days or more

<u>OFFENSE</u>
1 <sup>st</sup> Removal

**A3 (D): Absent without leave: four days or more**

**OFFENSE**

**1<sup>st</sup>  
Removal**

**A4: Misuse or abuse of any approved leave**

**OFFENSE**

**1<sup>st</sup>                                      2<sup>nd</sup>                                      3<sup>rd</sup>                                      4<sup>th</sup>**

**Determination based on the severity of the incident**

**POSITION OF THE PARTIES**

**POSITION OF THE EMPLOYER**

On December 24, 2003 the Grievant claimed that an unknown assailant pushed him down at the back door of the office building causing him to re-injure his surgically repaired shoulder.

ODJFS became aware of the alleged assault a short time thereafter through co-workers and Jackson. The Grievant informed Jackson of the assault who instructed him to complete an incident report. The Grievant submitted an incident report through Jackson with her proxy, at 9:20a.m. the same day. (Union Exhibit ("Un Ex"), A. p.1) The incident report indicated that an unknown person pushed the Grievant to the floor while attempting to come in the back door of the office. Other employees either reporting to work, or on a smoke break were around the back door area between 7:20a.m. and 8:00a.m. Liz Bullock ("Bullock"), Pam McCreary ("McCreary") and Alex (last name unknown) each saw someone in the parking lot at that time. Mei-Shine Sze-To ("TO") whose desk was near the rear door, stated she saw the Grievant as he was attempting to get up from the floor. (Un Ex, A, p.1) The alleged assault occurred around 7:30a.m. according to the Ohio State Highway Patrol ("OSHP") investigation and the various statements provided by the Grievant. (Un Ex C, pp. 13-26)

Co-workers TO, Bullock, Sylvia Earthman ("Earthman") and Jackson on the date of the incident provided written statement to ODJFS as part of its initial investigation. (Un. Ex A, pp.5-8) However, none of the statements indicate that they saw an assailant trying to get into the building running away from the building, or physically touching the Grievant.

Neither Jackson nor Jordan contacted the police on December 24, 2003 as was the standard practice at ODJFS. ODJFS employees did not work on December 25<sup>th</sup>, 26<sup>th</sup>, and 28<sup>th</sup> due to observance of the Christmas Season.

On December 29, 2003 ODJFS notified the OSHP of the incident and obtained a written statement from co-worker Shelia Hinton ("Hinton") on what she had observed that morning of December 24, 2003. (Un Ex A, p. 9) Hinton's statement is comparable to her co-workers in substance. OSHP investigation was delayed due to their inability to contact the Grievant in January 2004 to obtain a statement because of phone problems the Grievant was experiencing. The Grievant did not provide a statement to OSHP until February 5, 2004. (Un Ex A, p. 13)

In May 2005, the Grievant provided a deposition under oath and claims co-worker Laura Clark ("Clark") saw the assailant running from the building and she observed the Grievant when he was angry and emotional. (Deposition of Steven Stultz dated May 13, 2005, (Dep.-Stultz) pp. 151-154) ODJFS, on the other hand, points out that the Grievant did not tell Jackson on December 24, 2003 or the OSHP on February 5, 2004 of Clark's presence. When interviewed by ODJFS, not only does Clark refute the allegations of her seeing an assailant flee but she also states that she saw a black man talking with the Grievant at the back door when she arrived to work on the morning of December 24, 2003. Clark added that the Grievant and the man appeared to know each other and the Grievant was acting normal and did not appear upset.

ODJFS further points out the Grievant's sequence of events at the back door around 7:30a.m. simply could not occur. According to the Grievant, TO was the first person to see him on the floor (Dep. Stultz, p. 146) however, he further testified "... I got up within seconds. There's Laura Clark who was coming into the building who saw him out there leaving from the building." (Dep. Stultz, p. 145) If Clark arrived at work at 7:30a.m. then she would have seen TO and Stultz in the back area. Neither Clark nor TO recalls seeing each other that morning in that area. Also, if Bullock and McCreary were smoking outside around 7:30a.m., why didn't they see the assailant at the back door?

Finally, no evidence exists to contradict that the Grievant was absent without leave from December 29, 2003 through June 24, 2004 or that he called off properly on July 20, 2004. ODJFS contends that the discipline was commensurate with the conduct and the decision to remove the grievant was not arbitrary or capricious. ODJFS seeks that the grievance be denied in its entirety.

The parties stipulated to the BWC's and IC's Administrative proceedings and findings contained in the Worker's Compensation case filed on December 26, 2003. The Grievant claimed to have a concussion and a fractured clavicle as a result of the December 24, 2003 incident. From January 16, 2004 through November 11, 2005, the parties availed themselves of the various administrative and civil process associated with the alleged compensable injury. (Un Ex B, p.11)

Of significance, ODJFS prevailed at the final administrative appeal before the IC on May 13, 2004 in that the Grievant's claim was disallowed upholding the determination that "the Staff Hearing Officer finds the factual scenario improbable and incredible." (Un Ex B, p. 11) The Grievant filed an appeal in the Court of Common Pleas, Franklin County which was voluntarily dismissed by the Grievant on November 11, 2005.

Finally, ODJFS was suspicious of the unverified injury due to Grievant's long term pattern of absence from the workplace. The grievant in 2002 and 2003 had unwitnessed slip and fall

claims which occurred in the restroom at work. The Grievant also beginning in 2001 filed a series of disability claims listing a myriad of conditions contributing to his disability.

## **POSITION OF THE UNION**

The Grievant was assaulted on December 24, 2003 by an assailant who entered the building through an unsecured door. The Grievant was pushed by him in the shoulders causing him to hit his head on a file cabinet and fall on his butt. The incident reinjured his shoulder necessitating the filing of a Worker's Compensation Claim which is directly related to the events preceding his removal.

The Grievant was a sixteen (16) year employee with no active discipline of record. The Grievant was employed as a CSR and assisted clients regarding employment services offered by ODJFS. The Grievant reported the assault to his supervisor, Jackson, shortly after it occurred. The Grievant asked Jackson if the police should be contacted. Neither Jackson nor Jordan, contacted the police or the OSHP to report the assault, even though it's standard procedure's to call 911 when an employee is assaulted. OSHP was not contacted for almost a week later, hampering any real efforts to locate the assailant.

The Union questions the credibility of ODJFS witness statements as well as the witnesses' testimony during the arbitration hearing which was inconsistent and lacked specific details regarding the assault or the description of the intruder. ODJFS's conduct after the assault resulted in a flawed investigation. The Union submits the only consistent thread is that several workers did observe a stranger in the parking lot between 7:30a.m. and 8:00a.m.

As a result of the assault the Grievant filed a Worker's Compensation Claim and sought legal advice regarding a potential tort claim against ODJFS and the intruder. The Grievant contends

that he was advised by ODJFS that any legal action was moot because of his pending Worker's Compensation Claim. In reliance upon this advice, the Grievant elected not to pursue his tort claim.

The Worker's Compensation Claim was allowed at one proceeding before the IC, reaffirming to the Grievant that he would be compensated for his time off. The decision was reversed when Jackson testified that the Grievant failed to report the incident on the date of injury. The Union contends that such testimony was false and contrary to the request for leave forms electronically proxied by Jackson on December 23, 2003. (Un Ex A, p. 4)

The Union also contends that the only reason the Grievant was absent from work was because of the work related assault. The Union admits that the Grievant did not have leave time to apply to this absence, however, in the past ODJFS has granted the Grievant leave without pay when the Grievant had no accrue leave on the books or under the Family Medical Leave Act ("FMLA"). At the least, ODJFS was required to inform the Grievant in writing that leave without pay in lieu of FMLA was no longer an option.

Finally, the Union contends that the Grievant did not misuse or abuse approved leave on July 20, 2004. On July 20, 2004 the Grievant was a witness in a legal proceeding that required his attendance. The Grievant had ODJFS's consent to attend. At approximately 1:30p.m. the legal matter was concluded and the Grievant did not return to work. The Grievant was in severe pain, went to see his doctor and faxed the doctor's excuse to ODJFS for the evening of July 20, 2004. Additionally, on July 21, 2004 the Grievant called Jackson informing her of his medical appointment the previous day. This was the process the Grievant had followed in the past with the employer's consent. (Un Ex H, p. 36)

The Union submits that the Grievant was not removed for valid reasons but retaliatory purposes. The evidence fails to support a violation of reasons within the discharge letter. The Grievant should be reinstated and made whole.

### **BURDEN OF PROOF**

It is well accepted in discharge and discipline related grievances, the employer bear the evidentiary burden of proof. See, Elkouri & Elkouri – “How Arbitration Works” (6<sup>th</sup> ed., 2003).

The Arbitrator’s task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984). The evidence in this matter will be weighed and analyzed in light of the ODJFS’s burden to prove that the Grievant was guilty of wrongdoing in violating the ODJFS leave and/or call-in policy. Due to the seriousness of the matter and Article 24 requirement of ‘just cause’, the evidence must be sufficient to convince this Arbitrator of guilt by the Grievant. See, J.R. Simple Co and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

### **DISCUSSIONS AND CONCLUSIONS**

After a review of the testimony, exhibits, deposition dated May 13, 2005 and post hearing statements of both parties, the grievance is denied. My reasons are as follows:

The incident on December 24, 2003 regarding the assault, occupied the bulk of the hearing as well as the post hearing statements. Both parties presented stark differences in versions of what occurred on the underlying facts that were subject to different conclusions based upon which version was more believable. An analysis of the December 24<sup>th</sup> assault begins with the evidence provided by the Grievant on the following dates: December 24, 2003 incident report; February 5, 2004

Statement to the OSHP (Un Ex C, pp. 13-14); April 16, 2004 IC Hearing (JX 6, p Doc 10); August 16, 2004 predisciplinary hearing (JX 3b); and Grievant's sworn statement (deposition) of May 13, 2005.

### **1. December 24, 2003 - Incident**

The Grievant reported to Jackson that at 7:30 a.m., he was pushed to the floor by someone who was attempting to enter the facility through the back door. (Un Ex A, p. 8) Bullock, McCreary and Alex from the telephone center were on smoke breaks around that same time and saw a man in the parking lot. (Un Ex A, p.1) Neither Bullock nor McCreary's statements indicate that they saw the man at the back door area. The Grievant prepared an incident report at 9:24 a.m. which included the fact that TO saw him as he was getting off the floor. (Un Ex A, p.1) Based upon this statement, TO was the first person in contact with the Grievant immediately after the attack and would have been the first person to observe the Grievant's reaction to the assault. TO provided a statement at 12:40 p.m. and indicated that she saw the Grievant on the floor near the vending machines and she asked him if he fell. The Grievant replied "someone was trying to get in," whereupon he got up and looked out the door into the parking area. (Un Ex A, p.5) According to the Grievant's deposition, Clark was the second person in contact with him after the assault. According to Stultz, when he was opening the door Clark was coming into the building and actually saw the man running towards the left side of the building past the trash dumpster. (Dep. Stultz, p. 146)

The Grievant also had conversations with co-workers, Hinton, Bullock and McCreary between 7:30a.m. and 8:00a.m. regarding a stranger in the parking lot area who was either trying to get a cigarette or attempting to break into a car. (Un Ex A, pp. 6-9) None of the co-workers statements dated December 24, 2003 indicates that the Grievant appeared injured, upset or angry as a result of the incident.

The Grievant's incident report only contains the following description of the incident...."[I] was pushed down to the floor by unknown person." (Un Ex A, p.1) Absent from the incident report is any indication of Clark's observance of the assailant. The Grievant did not tell Jackson or any co-worker that Clark had actually saw the assailant running from the building.

The grievant indicated that he obtained consent from Jackson around 10:30a.m to go to his doctor due to the pain he was experiencing in the shoulder area. The Grievant arrived at his doctor's office around 11:00a.m but was unable to obtain treatment due to the early closure for Christmas. The Grievant admits that no other medical treatment was sought until he saw Dr. Ratliff on December 26, 2004.

## **2. February 5, 2004 –OSHP Statement(s)**

The OSHP on December 29, 2003 received notice that the Grievant was allegedly assaulted at work. The OSHP conducted an investigation and interviewed TO, Bullock, McCreary and Jackson. (Un Ex C pp. 10-11) OSHP investigation also included an interview with the Grievant in a question and answer ("Q & A") format. (Un Ex C, pp.13-14) The statement was dated February 5, 2004 and provides in part:

- Q. Where there any witnesses to the incident?
- A. I didn't see anyone around there. (emphasis added)
- Q. Describe the person that pushed you?
- A. I think he was black, per his hands. Maybe a inch or inch and a half taller than me. I think he was a mechanic cause his hands were dirty, like oil was on them. I didn't see his face because he had a hooded jacket on.

The statement further indicates the Grievant was pushed in both shoulders and after a couple of hours started to feel discomfort and his waist area was sore from falling on his rear end. The final question on the Q&A was the following:

- Q. Anything you would like to add to your statement?

A. No, Sir. (emphasis added)

TO also provided a statement to OSHP on January 22, 2004 and indicated in her Q & A's that the Grievant never mentioned that he was hurt or assaulted and his actions were normal. (Un Ex C, pp. 16-17) The record is void of any evidence that OSHP was aware of Clark's knowledge of the assailant. Clark was not interviewed or contacted by the OSHP.

### **3. April 16, 2004 – Industrial Commission Hearing**

The Grievant, represented by counsel, attended an IC hearing before Staff Hearing Officer Arthur W. Shantz ("Shantz") to determine if the injuries of the December 24, 2003 would be allowed. ODJFS had appealed the previous decision where the Grievant's claims were allowed for lumbar sacral strain/sprain, left shoulder stain/sprain and post concussion syndrome.<sup>1</sup>

The Grievant and ODJFS had the opportunity to present testimony and evidence regarding the assault and medical documentation relating to the injury. The Grievant proffered no witness(es) in this proceeding, other than himself. As noted below, both parties had a prior opportunity to present evidence regarding the assault to the IC on January 16, 2004. Shantz determined that the claim was disallowed and stated "...the injured worker alleges that he was assaulted on State premises by an unknown intruder, that the intruder struck him with sufficient force to cause a concussion and a fractured clavicle but he did not seek treatment at an emergency room, even though he is of status post a previous rotator cuff repair." (Joint Exhibit ("JX") 6, Doc 10) Shantz concluded that the facts stated by the Grievant were "improbable and incredible." Shantz's decision was appealed, which was denied on May 13, 2004 by the Industrial Commission of Ohio effectively ending the administrative process.

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<sup>1</sup> The parties stipulated to the Bureau of Worker's Compensation and Industrial Commission proceedings regarding the December 24, 2003 claim. The April 16, 2003 hearing resulted from BWC disallowance of claim on January 16, 2004 and IC reversal and allowance of claim on February 25, 2004.

#### **4. August 16, 2004 Predisciplinary Hearing**

On August 16<sup>th</sup> the Grievant with his Union Representative had another chance to state with clarity what happened. At no time before the ODJFS hearing officer did the Grievant offer Clark as a witness to support his claim that an unknown assailant assaulted him. By August 16<sup>th</sup> the Grievant, by participating in the administrative proceedings, was aware that his assault claim was found to be “improbable and incredible” by the staff hearing officer. The pre-disciplinary meeting was specifically design to address the charges against the Grievant and allow him to explain or present witness statements if mitigating circumstances exist. Once again the record is silent except for the Grievant’s version.

Due to the above statements and the Grievant’s deposition, the assault based upon the the Grievant’s version of the incident does not support his claim. On December 24, 2003 the Grievant, had previous involvement alleging worked related injuries (Management Exhibits (“M Ex”), pp. 3-9) including two slip and fall claims where he was the only witness, was well aware of the need to provide accurate information in support of his worker’s compensation claim. The Grievant’s CSR job required involvement with the public over employment services indicates a knowledge and sophistication of the employment area not normally shared by lay people. Therefore, unless the Grievant was in a state of severe shock, and no medical evidence suggests such a conclusion, the Grievant should have been able to recall the critical facts of the incident in each of the administrative proceedings detailed above. Why was Clark not subpoenaed to any of the Administrative Hearings if she had critical information regarding the believability of the incident? Why was Clark not mentioned in the Q&A conducted by the OSHP?

According to the Grievant’s deposition TO and Clark saw the Grievant within seconds after the assault. TO arrived when the Grievant was getting up off the floor and Clark arrived when the

Grievant opened the back door to look for the assailant in the parking lot. It's unrealistic to conclude that TO and Clark would not have seen each other at this time. The record is void of any evidence that TO and Clark saw each other seconds after the alleged assault.

It is also undisputed within five to ten minutes, Jackson was made aware of the incident by the Grievant, who told Jackson that a man was attempting to get in the back door and the Grievant to "stop him and the man shove him".(Un Ex A, p. 7) Why was Jackson not informed of Clark's involvement and/or knowledge of the assailant? Other employees (Hinton, Bullock, McCreary & Earthman) were identified by the Grievant to Jackson, regarding information they possessed. ODJFS's initial investigation included the employees providing written accounts of what they knew. However, the Union argues a major defect in ODJFS investigation occurred ODJFS failed to contact the police on December 24th so that a prompt police investigation could begin. I concur.

ODJFS is required to contact the police if an employee alleges a workplace assault. Regardless of the previous background of the various claims previously involving the Grievant, the failure of Jackson and/or Jordan to contact the police prior to December 29, 2004 was inexcusable and untimely. What if the after the fact it was determined an assault occurred? Only due to my prior determination is this defect not fatal to this fact pattern. Moreover, if the facts had remotely indicated that an actual assault occurred, this failure by ODJFS would have weighed heavily in mitigation and fashioning an appropriate remedy. (JX 4 c)

All of the Grievant's written statements, except his deposition, and his testimonies before the BWC fails to identify Clark as a witness. At the Arbitration hearing the Grievant testified that he provided Clark's name to the OSHP investigator. No evidence supports this allegation and Clark's involvement to ODJFS was stealth until May 13, 2005 approximately seventeen months post the

assault. The Grievant's deposition version of Clark's role is in direct opposition to her statement given to ODJFS on June 8, 2005 and her testimony at the Arbitration Hearing. (M Ex 10)

The Grievant deposition indicates that Clark was coming into the building when she observed the assailant running towards the side of the building. The Grievant further indicated that he was emotional and angry after the assault. Clark testified that she did not observe anyone running away from the building but she saw the Grievant at the back door talking to another man in a calm manner that morning. Clark added that she asked the Grievant if the man was his brother because they looked alike. Finally, Clark testified that the man exited the building at a normal walking pace.

Clark impressed the arbitrator as a witness who was reluctant to testify, but her recollection was honest and truthful. Further Clark had nothing to gain or lose by her account of events. The significance being, Clark was identified by the Grievant as a vital link to support the underlying facts for his injury on December 24, 2003. I find that Clark did not observe anyone running but did see the Grievant talking with another man who didn't work at ODJFS. Furthermore, I find that the Grievant did not appear upset or emotional in front his co-workers or Clark after the alleged assault. Based upon the record as a whole as specific statements provided by the Grievant, I find that the record does not indicate that the Grievant was injured by an assailant at work the morning of December 24, 2003.

Reaching the above conclusion casts a long shadow of credibility over the Grievant and his actions on that day. Did the Grievant intentionally plant himself on the floor? The overall evidence could allow for such interference, but the Arbitrator will not draw that conclusion because such a finding is ancillary to the central question of whether removal was proper due to the Grievant's absence without leave and failure to call-off properly.

## **ABSENT WITHOUT LEAVE (AWOL)**

The Grievant was off from work from December 24, 2003 until June 24, 2004 due to the alleged assault. The treatment of these dates by ODJFS is the main reason for Grievant's removal. The ODJFS position is straight forward in that "...[t]hus the real issue of this hearing is whether Grievant was in fact absent without leave." (ODJFS closing statement, p.1) ODJFS argues that Grievant had zero leave balances; was ineligible for leave under the Family Medical Leave Act ("FMLA"); and his worker's compensation claim was denied. Without any leave available the Grievant was absent without leave for six months, in violation of ODJFS Standards A 2 (c)- three days or more (no call no show); A 3 (d) – four days or more; and A 4 – misuse or abuse of any approved leave. First offense for violation of A 2 (c) or A 3 (d) is removal.

On December 26, 2003 the initial FRI validating the absence of the Grievant from work was filed by Dr. Ratliff. (JX 6, p.1). All of the events regarding medical treatment and proceedings before the IC were predicated upon the assault allegations of the Grievant. On April 16, 2004, BWC Hearing Officer Shantz disallowed the claim, which was previously allowed on February 25<sup>th</sup>, and Shantz concluded that the evidence failed to support a compensable injury. The denial by Shantz was appealed by the Grievant to the IC and ultimately to the Common Pleas Court. Once the Grievant's worker's compensation claim was denied and his administrative appeals before the IC were exhausted as of May 13, 2004 the Courts were the last resort. However, the Appeal of IC's final administrative denial to the Common Pleas Court did not abrogate ODJFS's right to ensure Grievant's time off from work was covered by some type of approved leave. The Grievant was initially put on notice on January 29, 2004 when he was notified by letter the status of his FMLA leave. The letter contained the following statement:

“ It has been determined that you are not eligible to exert FMLA protection for the time period of December 24, 2003 through February 26, 2004...” (JX, J5 C)

Also the pay stub of the Grievant for the week ending December 27, 2003 contains his leave balances or lack thereof. (JX, J5 C)

Finally, on May 19, 2004 ODJFS was concerned regarding the disallowance of his worker's compensation claim, and sent the grievant a letter that stated either medical or physical verification must be submitted to account for his absence. The letter indicated that “Any unapproved leave without pay may result in disciplinary action for being absent without leave (“AWOL”) up to and including termination....” (Un Ex F) ODJFS did not receive medical verification to specify the leave to support the Grievant's absence, which made the Grievant AWOL.

The record reveals the Grievant was fully aware of his lack of accrue leave beginning in December 2003 and reaffirmed in January 2004, the medical choices selected by the Grievant based upon the alleged assault was his own doing. The records contains no correspondence from the Grievant or his Attorney contesting ODJFS treatment of his accrue leave or that ODJFS past practice of allowing him to take unpaid leave was applicable to this leave. When the Grievant received ODJFS's letter of January 29, 2004, he was required to take some type of affirmative action to ensure this leave was authorized by ODJFS.

Under different facts, this Arbitrator would be reluctant to uphold the imposition of discipline on the allowance or disallowance of proceedings before the IC and/or BWC pursuant to the ORC § 4123. This fact pattern is unique based in part upon the history of the previous filings of disability and Worker's Compensation claims by the Grievant since 2001 and the December 24, 2003 incident. In determining whether that six months is the proper measurement, the December 24, 2003 incident is not separate from this analysis. Simply, “[T]he assault was the proximate cause of every

other incident that occurred and the reason why this cause came before the Arbitrator.” (Union Closing Statement, p.2) emphasis added. I concur. The administrative proceedings and the discipline are related inextricably to the assault.

Given my prior ruling on the assault, and based upon these facts, the record is supported by credible and reliable evidence that the Grievant was absent from work three days without leave in violation of Standard A 2(c); four days or more without approved leave in violation of Standard A 3(d); and a violation of Standard A 4 that the Grievant misuse/abuse approved leave. The Union contends that ODJFS would allow the Grievant to have leave without pay regardless of the hours whenever the Grievant had used all his accrued leave. However, the record is void of any evidence to support that proposition.

#### **PROPER CALL OFF**

On July 20, 2004 and continuing until August 20, 2004 ODJFS contends the Grievant did not follow the directives of ODJFS protocol or that of Larry Hampton (“Hampton”) ODJFS District Director issued on May 19, 2004. (Un Ex 5, p.31)

Regarding July 20, 2004 the Grievant was subpoenaed to appear as a witness in a Court proceeding and obtain 4 ½ hours of leave to attend. (JX 3d) After the Court proceeding the Grievant went to see his doctor due to shoulder pain. However, from July 22, 2004 through his termination ODJFS contends that he didn’t call off. (JX 3b) On July 21, 2004 the Grievant called off sick and provided medical documentation for surgery that was scheduled on August 12, 2004. Also, the Grievant’s doctor on July 22, 2004 faxed to Jordan medical documentation indicating he was under his care from July 21, 2004 until August 23, 2004.

Whether the Grievant went to his doctor on July 20<sup>th</sup> after his court appearance is questionable due to no evidence from the doctor in the record. At the Arbitration hearing, the Grievant

indicated that he would provide the fax doctor's note that Jackson received the evening of July 20<sup>th</sup> however, no note was proffered post hearing. However from July 21st to his removal ODJFS was aware of the Grievant's medical status through two (2) separate faxes from his doctors. (Un Ex J, pp. 36-37) Both faxes are very specific as to the dates the Grievant was under their medical care. (Un Ex, J, pp. 36-37)

Despite the above ODJFS sent the Grievant a letter on August 5, 2004 from Hampton indicating the Grievant had failed to notify him properly and additional violations may result in discipline. (M Ex, 1) The evidence does not support a violation of ODJFS Standard A1 for failure to properly call off beginning July 20, 2004.

At the Hearing Jordan testified the Grievant was required to call in on Monday mornings to inform ODJFS of his medical status. The Grievant testified that he complied with Hampton's request by calling on Mondays and providing medical documentation regarding his assault injury. ODJFS's evidence fails to demonstrate that the Grievant failed to comply with Hampton's request after May 19, 2004 by providing supervisors notes on the Employee Call-Off Sheets. (JX, 4c).

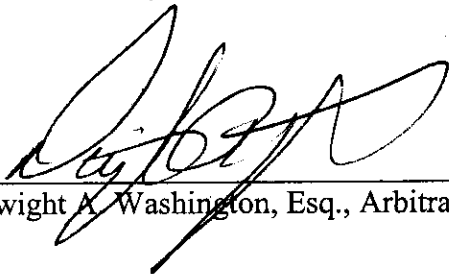
ODJFS contends that by receipt of the proper call off procedures by the Grievant on April 14, 2003 he cannot claim lack of knowledge regarding what was required of him. Unfortunately, the May 19, 2004 letter from Hampton contains different protocols from the internal policy. (M Ex, 2; JX 4c) As an example, while under doctor's care from July 21, 2004 through August 23, 2004 – what was the process for the grievant to follow? Was a weekly call on Monday morning only required or was the Grievant to inform ODJFS if any medical information changed on other days of the week as well? Jordan testified that in early August, she and the Grievant agreed to a revised call-in schedule and the Grievant complied up until his removal. The process as applied to the Grievant lacked clarity and deficiencies to find a violation of ODJFS Standard A 1.

However, there is just cause for discipline in that reliable and credible evidence exists that the Grievant violated ODJFS Standards A 2(c), A 3(d) and A 4 warranting removal. The facts do not support that a work related injury occurred on December 24, 2003 and the Grievant was not on approved leave from December 24, 2003 through June 24, 2004. Pivotal to this conclusion was Stultz's credibility, and no explanation was provided to conclude an unknown assailant assaulted him. Stultz's overall testimony was not credible or believable; and Stultz's continued refusal to acknowledge any wrongdoing warrants no mitigation.

#### **AWARD**

Grievance is denied.

Respectfully submitted this 28<sup>th</sup> day of April, 2006.

  
Dwight A. Washington, Esq., Arbitrator