SUSAN GRODY RUBEN, Esq.
Labor Arbitrator
30799 Pinetree Road, No. 226
Cleveland, OH 44124

IN ARBITRATION PROCEEDINGS PURSUANT TO THE

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME

and

OHIO DEPARTMENT OF DEVELOPMENTAL DISABILITIES

Grievance # 24-13-20100930-0036-01-04

Grievant: Linda Schultz

ARBITRATOR'S OPINION AND AWARD

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME ("the Union") and OHIO DEPARTMENT OF DEVELOPMENTAL DISABIITIES ("the State") under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. The Parties agreed there are no impediments to a final and binding decision by the Arbitrator pursuant to the Agreement.

Hearing was held June 29, 2011 in Tiffin, Ohio. Both Parties were represented by advocates who had full opportunity for the examination and cross-examination of

witnesses, the introduction of exhibits, and for argument. Both Parties submitted post-hearing briefs.

APPEARANCES:

On behalf of the Union:

JAMES HAUENSTEIN, OCSEA Staff Representative, 390 Worthington Rd., Westerville, Ohio 43082.

On behalf of the State:

CORNELL L. HALE, Labor Relations Officer, Ohio Department of Developmental Disabilities, 30 East Broad St., Columbus, Ohio 43215.

STIPULATED ISSUE

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

RELEVANT PORTION OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT
April 15, 2009 – February 29, 2012

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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….

…

24.02 – Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action include:

a. One (1) or more oral reprimand(s) (with appropriate notation in employee's file);

b. One (1) or more written reprimand(s);

c. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

…

d. One (1) or more day(s) suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No suspension greater than five (5) days shall be issued by the Employer;

e. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

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STIPULATED FACTS

1. The grievance is properly before the Arbitrator.

2. The Grievant was hired by the State on June 26, 2000.

3. The Grievant was removed from her position as a Therapeutic Program Worker on September 18, 2010.

4. The Grievant was removed for violation of the Ohio Department of Developmental Disabilities Standards of Conduct of Policy, specifically Failure to Report for Duty reference # 4 (Not in approved leave status for one scheduled shift or more).

5. The Grievant had the following active prior discipline on the attendance track at the time of her removal:

1/06/09	**Written reprimand for AWOL**
12/03/09	**2-day working suspension for Failure to Follow Attendance Policy**

1/14/10 5-day working suspension for Failure to Report for Duty reference # 5

ADDITIONAL FACTS

In the Grievant's removal letter dated September 8, 2010, her offense was described as follows:

> **On August 24, 2010 you inquired about getting the day of Saturday August 28, 2010 off work to attend your uncle's funeral – you were told you would have to use personal leave and you did not have any. On the night of Friday August 27, 2010 you were seen at "The Nest" – a bar in Fostoria, OH by Tiffin Developmental Center employees Sharon Keller and Nicole Andrews. Both Sharon and Nicole asked if you were working the week-end, to which you replied "No." Per the posting, you were scheduled to work. Sharon asked who had your kids for the week-end and you said they were with their dad, this was also heard by Nicole. Sharon and Nicole state you were still at the bar when they left between 2"10 – 2:15 AM on the morning of August 28, 2010. You called off sick for your shift on August 28, 2010 at 2:02 AM – this was verified by phone records.**

The Grievant was charged with Job Abandonment – Failure to Report for Duty – Not in Approved Leave Status for One Scheduled Shift or More. On the Attendance Track disciplinary grid, an employee found to have violated this rule is subject to removal as progressive discipline for a 3rd or greater attendance offense.

PARTIES' POSITIONS

State's Position

The Grievant used her son as a pretext to call off sick from work on August 28, 2010. The Grievant called off sick at 2:02 a.m. on August 28, 2010. This is evidenced by phone records and the employee call-off form.

Sharon Keller, Residential Care Supervisor (RCS), and Nicole Andrews, Therapeutic Program Worker (TPW), testified they observed the Grievant at a bar at 2:10 a.m. on said date. During an administrative investigation that was recorded and transcribed, the Grievant stated she called in sick to care for her ill son *after* she arrived

home. Ms. Keller and Ms. Andrews also testified the Grievant said she was not working that weekend and her kids were with their father. The witness testimony is consistent with their accounts given during the administrative investigation. The Grievant did not rebut the testimony of Ms. Keller and Ms. Andrews. The Grievant failed to sufficiently dispel the Employer's doubt regarding the veracity of her statements made concerning her request off from work.

During the administrative investigation, the Grievant gave an imprecise account of the events surrounding her call off. She said she did not recall talking to her coworkers about whether or not she was working that weekend but she did recall them asking where her children were. The Grievant was unclear as to her location at the time of the call off. She was vague as to the time of her call off. The Grievant's recollection on September 1, 2010 of events that transpired on the night of August 27, 2010 and the early morning hours of August 28, 2010 were sketchy at best. But Ms. Keller and Ms. Andrews were forthright and unshakeable in their recollections regarding their conversations with the Grievant.

The Grievant took the stand at the arbitration hearing not to refute or rebut the testimony given by Ms. Keller and Ms. Andrews, but to offer a handwritten statement allegedly written by her ex-husband. Anyone could have written this letter. The letter was not notarized nor was it properly authenticated. Furthermore, the note does not say the Grievant had her children on August 28, 2010 and August 29, 2010. It states the Grievant was *scheduled* to have her children on those dates. The Grievant is in this situation because she lied; therefore, relying on her testimony to authenticate the document is hardly feasible.

During cross examination the Union advocate faintly attempted to discredit Ms. Keller and Ms. Andrews by asking them about their consumption of alcohol on the evening in question. However, each testified they consumed a small amount of alcohol during the course of a four hour period (10 p.m. to 2:10 a.m.). They demonstrated good recall of the times, activities and conversations held on the evening of August 27, 2010 and the early morning of August 28, 2010. Furthermore, the Union presented no evidence to demonstrate why these two witnesses would fabricate their accounts of that evening.

Cindy Meeker, Institution Superintendent, was asked on cross examination, "Is it against department policy to report off work from a bar?" Ms. Meeker testified the Grievant was not disciplined for calling off work from a bar. Ms. Meeker explained that

the Grievant's termination was based on the totality of the circumstances. Two coworkers heard the Grievant say she was not working that weekend: They also heard the Grievant say her children were with their father that weekend: During the investigation, the Grievant said she called in sick from home not from the bar: Finally, the Grievant's timeline for calling from home at 2:02 a.m. is not credible because her coworkers reported the Grievant was seen at the bar at 2:10 a.m. The Union's question to Ms. Meeker was irrelevant and immaterial to this instant case because the Grievant never claimed she called in sick from the bar. In summation, as Ms. Meeker testified, the Grievant was removed for Failure to Report for Duty # 4 – not in approved leave status for one scheduled shift or more.

The Grievant called off sick to care for her son. Her request for sick leave/FMLA was denied because the Employer discovered, through a fair and thorough investigation, that the Grievant used her son as a pretext to call off sick.

The Employer took corrective action for the abuse of sick leave/FMLA. The discipline applied to the Grievant was progressive. If the Grievant did not have any prior active discipline, she would have received a 2-Day Working Suspension; however, the Grievant had a full plate of prior, active discipline and was terminated. The Grievant's termination was proper.

<u>Union's Position</u>

The State's approach to this arbitration is the grievance will be denied if the Union's evidence and testimony differs from what the State presents. This flies in the face of the universal understanding that management, not the bargaining unit, carries the burden of proof in a dispute over discipline. It undermines arbitration as an impartial instrument for preserving industrial peace.

Management's premature conclusions about what happened the night of August 28, 2010 caused a domino effect. The first domino to fall was the investigation. The State concluded there was no reason to investigate further once hearing Sharon Keller's statement, because it proved the Grievant was lying about where she was when she

called in. If the Grievant was not at home as proved by Sharon Keller's statement, then the Grievant could not have known her son was sick. If her son wasn't sick, then her use of leave was unjustified concluded the State.

The second domino to fall was the pre-disciplinary hearing. The Grievant's attempt to refute or rebut the evidence was summarily dismissed in the same manner and based on the same rationale. Even the Grievant's attempt to provide proof through a statement from her son about the incident was dismissed out of hand due to the State's conclusion "he has a vested interest in his mother retaining her job."

The Union has questioned the credibility of Sharon Keller and Nicole Andrews' statements since the first time reading them. Yes, employees do stupid things and in our line of work, we get to see a lot of stupidity. But the State is asking us to believe that simultaneously while the Grievant was planning to lie about her son being sick, she was telling a supervisor all about it at a bar the night before.

Due to the testimony about the close and long-term friendship of Sharon Keller and Nicole Andrews and the commonality of the content, the Union treats these statements as one. The Union urges that in light of the testimony the Arbitrator not consider either statement as being independently corroborative of the other.

The Union finds one fact compelling in analyzing credibility in this case. The Grievant freely admitted at the start of her investigatory interview she was at a bar past midnight on a work night. But there is no rule the Grievant would be violating if she had called off from that bar. In this age of cellular communications, it was just as likely she found out that her son was sick while she was at the bar. There is nothing exculpatory about the fact the Grievant had no idea what time she actually left the bar or called in.

The same cannot be said of Sharon Keller's or Nicole Andrews testimony and statements. First, Ms. Keller's and Ms. Andrews' testified they started at The Nest bar,

left to go to another bar, and returned to The Nest over a period of about six hours. They further testified to having only drunk 2 and 1-½ beers respectively. Looking back, the Union regrets not asking them which bar they didn't buy a drink in.

The State had no right to deny the Grievant's request for leave under the Family and Medical Leave Act. The FMLA is clear employees WILL receive up to 12 weeks of leave under the Act to care for (in this case) a family member. The State can ask for recertification of the FMLA leave no more often than every 30 days, but they cannot deny the leave. Further, the Act provides in Section 825.220 that "An employer is prohibited from inferring with, restraining, or denying the exercise of (or attempts to exercise any rights provided by the Act." The Act goes on further to state that "An employer may be liable for compensation and benefits lost by reason of the violation, for other actual monetary losses sustained as a direct result of the violation and for appropriate equitable or other relief, including employment reinstatement, promotion, or any other relief tailored to the harm suffered…." Further, the Act requires the Grievant to follow the "usual and customary practices for calling in to request leave under the Act. She properly followed these protocols. The Act is absolutely affirmative that FML cannot be denied. If her leave cannot be denied, then she cannot have violated the work rules management has claimed she violated.

On the morning of August 30, 2010, the State knew it they could not deny the Grievant's Request for Family Medical Leave. Instead, the State carried out a series of activities that muddle the real issue, creating a smokescreen to cover the denial of her leave request. The State manipulated the truth in an attempt to create a bogus charge. With just a slight change in details, the State could create the appearance of dishonesty, deny the leave, and create a violation of a work rule which would result in termination.

Sharon Keller invoked innuendo stating the Grievant did not have her kids that weekend, wasn't planning on going to work anyway, and she was still at the bar when she called in. As a supervisor, Sharon Keller was privy to knowing exactly what time the Grievant called in.

The record shows the State's actions were built entirely on one supposition that was never proved nor could ever really be proved – that the Grievant lied about where she was when she called Tiffin Developmental Center for Family Medical Leave for her son. The rest of the State's case is built from this foundation. Just cause requires an investigation be full and fair. It requires the evaluation of all evidence, not just the evidence that supports the State's perspective. It also requires proof of wrongdoing.

The State has not met its burden of just cause. We request the Arbitrator to grant the grievance in its entirety, return the Grievant to her previous position, and award her the appropriate make-whole remedy.

ARBITRATOR'S OPINION

The State has the burden of proving it had just cause to remove the Grievant from employment. Essentially, the State must prove the Grievant committed the alleged misconduct, and that removal was appropriate under the circumstances.

<u>The Alleged Misconduct</u>

The Grievant was accused of falsifying the reason for calling off from her assigned shift. Specifically, she was accused of stating she needed FMLA leave to care for her ill son. The accusation stemmed from two coworkers' observations of and discussions with the Grievant at a local bar the night before the Grievant's shift for which she called off.

The two coworkers credibly reported at the time of the incident and credibly testified at the arbitration hearing the Grievant was at the bar at the time she called off. The Union plausibly contended another of the Grievant's sons could have called her at the bar to tell her his brother was sick, and having learned that, the Grievant could have then legitimately called off from the bar. The only problem with this scenario is there is no record evidence to support it. Rather, the Grievant has contended she went home from the bar, learned one of her sons was ill, and called off. The Grievant's version of events is inconsistent with the weight of the record evidence.

The Appropriate Discipline

This being the Grievant's fourth active discipline on the Attendance Track grid, she was subject to removal. No mitigating circumstances are present in the record to render the removal inappropriate.

AWARD

For the reasons set out above, the grievance is denied.

DATED: September 11, 2011

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator