

Thomas J. Nowel, NAA
Arbitrator and Mediator
Lakewood, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In Arbitration Proceedings Between:)	Case No. COM-
)	2018-03967-09
State of Ohio, Department of Commerce)	
)	ARBITRATION
and)	OPINION AND
)	AWARD
Ohio Civil Service Employees Association,)	
Local 11 AFSCME)	DATE:
)	July 9, 2019
Re: Olivia Malcolm Removal		

APPEARANCES:

John M. Dean, Human Resources Manager, Department of Commerce, for the State of Ohio, and Mykai L. Riffle, Staff Representative, Ohio Civil Service Employees Association, Local 11 AFSCME.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, Local 11 AFSCME. The Union grieved the termination of employment of Olivia Malcolm who had been employed as an Administrative Professional 2 in the Department of Commerce. The grievance was denied by the Employer and advanced to arbitration following grievance mediation.

The arbitrator was selected to hear this matter pursuant to Section 25.05 of the collective bargaining agreement. Hearing was held on June 4, 2019 at the conference center of OCSEA in Westerville, Ohio. At the conclusion of the arbitration hearing, the parties agreed to submit post hearing briefs not later than June 21, 2019. The record of hearing was closed on that date.

JOINT STIPULATIONS OF THE PARTIES

1. The grievance is properly before the arbitrator. There are no procedural objections.
2. Olivia Malcolm began employment with the Department of Commerce as an intermittent Customer Service Assistant 2 on August 12, 2013.
3. On November 4, 2013, she became a full time, permanent Customer Service Assistant 2.
4. On September 7, 2014, she moved laterally to an Administrative Professional 2 position.
5. Olivia Malcolm was removed on November 16, 2018.
6. At the time of her removal, she had one active reprimand.

Stipulated Issue: Did the Ohio Department of Commerce remove the grievant from her position as an Administrative Professional 2 for just cause? If not, what shall the remedy be?

WITNESSES

TESTIFYING FOR THE EMPLOYER:

Amy Grover, Human Resources Manager

TESTIFYING FOR THE UNION:

Olivia Malcolm, Grievant

RELEVANT PROVISIONS OF THE AGREEMENT

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 Article 25.05. Employees of the Lottery Commission shall be governed by ORC Section 3770.021.

24.02 – Progressive Discipline

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

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

If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.

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

The remainder of this section is not relevant to the matter at hand.

24.10 – Ohio Employee Assistance Program (EAP)

In cases where disciplinary action is contemplated and the affected employee elects to participate in the Ohio EAP, the disciplinary action may be delayed until completion of the program. Upon notification by the Ohio EAP case monitor of successful completion of the program under the provisions of the Ohio EAP Participation Agreement, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action. Participation in the Ohio EAP program by an employee may be considered in mitigating disciplinary action only if such participation commenced within five (5) days of a pre-disciplinary meeting or prior to the imposition of discipline, whichever is later. Separate disciplinary action may be instituted for offenses committed after the commencement of the Ohio EAP program.

BACKGROUND

The Grievant, Olivia Malcolm, was first employed by the State of Ohio in the Department of Commerce as an intermittent Customer Service Assistant 2 on August 12, 2013. She became a full time employee on November 4, 2013 and assumed the position of Customer Service Assistant 2 in the Real Estate Division. Uncontroverted testimony during the arbitration hearing indicated that the Grievant was the victim of violent domestic abuse, and in January 2017 she was forced to move into a protective shelter with her three young children. She informed the Employer of her domestic concerns and took a short leave of absence. The Grievant then discovered she was pregnant with her fourth child. Three of her children were school age, and the Grievant took leave from December 2017 to February 2018 for child birth and to care for the infant. The Grievant stated during the arbitration hearing that she experienced depression and her financial condition was critical. The Grievant stated that she received no financial support from the fathers of her children although it had been ordered by the court. When the Grievant returned to work on February 12, 2018, she was faced with the

cost of childcare. In March 2018, she took secondary employment at a pretzel stand in an area mall in order to provide for funds to cover the cost of childcare. The Grievant had previously taken on secondary employment at a catering company and had completed and submitted the required documentation required by the State. She failed to complete and provide the form for her secondary employment at the pretzel store.

Upon returning to full time employment, the Grievant was faced with the cost of childcare which she believed was beyond her financial means. Additionally, the Grievant believed that she would not qualify for income based public assistance for the cost of childcare. In June 2018, the Grievant, utilizing a web site, created a number of false state pay stubs with reduced wages and submitted them in her name to the Franklin County Department of Job and Family Services in an attempt to procure a subsidy for her family's child care needs. Although the Grievant did not create the falsified documents on a state computer, she emailed them to the County, using her personal email account, on her Commerce Department computer. It did not take long for a representative of Franklin County to determine that the pay stubs were falsified documents. On June 29, 2018, a childcare case manager of the County contacted the Ohio Department of Administrative Services by email and indicated that the Grievant had submitted false state employee pay stubs. The pay stubs were attached to the email. The Department of Commerce immediately opened an investigation, and the Grievant was questioned by Human Resources Manager, Amy Grover, on July 2, 2018. The Grievant immediately admitted that she had created the false pay stubs, and that she had emailed them to the County on her office computer. During the initial interview, the Grievant stated that she had created the pay stubs in the hopes of qualifying for childcare subsidies and that she had

already forwarded legitimate documents to the Job and Family Services office. Following the investigative interview, the Grievant was placed on administrative leave by the Department Director.

The Office of the Ohio Inspector General conducted an investigation of the Grievant's actions and issued a report on October 3, 2018. The report concluded that the Grievant emailed fictitious Ohio pay stubs as proof of income to the County agency. She had created the pay stubs from an online source using a personal computer but emailed them from her state computer to Job and Family Services. The false pay stubs displayed a significantly reduced wage rate. During the Inspector General's investigation, it was also determined that the Grievant had obtained secondary employment but had not completed and submitted the required documentation.

The Childcare Manager at the County agency notified the Grievant, on June 26, 2018, that additional information was required following the submission of the falsified pay stubs. The following day, the Grievant emailed her authentic pay stubs to the County. Based on the false income level submitted by the Grievant, her childcare co-pay would have been \$0. At her actual income level the co-pay was \$71.32 per month.

The Office of the Inspector General concluded that the Grievant had committed a "wrongful act or omission." The Employer conducted a pre-disciplinary hearing on October 22, 2018. Charges were as follows.

#7 – Dishonesty – to include, but not limited to, falsifying, altering or removing an official document or electronic record; providing false information in an investigation; or filing a knowingly false complaint/accusations.

2 – Insubordination – Failure to follow written or known policies, procedures, practices and/or supervisory direction.

Section 24.10 of the collective bargaining agreement provides an opportunity for an Employee, who may be facing discipline, to enroll in the Ohio Employee Assistance Program. The Grievant enrolled in the program following her placement on administrative leave. She was directed to seek diagnosis and counselling at Serenity Behavioral Health Services. The Grievant was evaluated by a Clinical Social Worker who possessed LISW, MSSA and other certifications. On October 29, 2018, the Social Worker provided documentation regarding the Grievant's condition stating that she was diagnosed with Major Depressive Disorder. The document stated that the Grievant had admitted to submitting false pay stubs to the County and that she was remorseful. The document indicated that the Grievant felt suicidal at times. It concluded by stating that the Grievant "was in a life dilemma that lead to a poor decision of which she regrets." Section 24.10 of the Agreement provides the Employer the option of delaying potential discipline pending completion of the EAP program. The provision also allows for mitigation of potential discipline upon completion of the program. The language is permissive, and the Employer denied the request of the Union to delay and consider modification of the potential disciplinary penalty. Following the pre-disciplinary hearing on October 22, 2018, the employment of the Grievant was terminated at the close of business on November 16, 2018. The Union grieved the termination, and the matter was advanced to arbitration. At a later time, the Grievant was indicted by the Franklin County Common Pleas Court. Evidence indicates that the Grievant was placed in a diversion program, and she may have completed the required community service.

POSITION OF THE EMPLOYER

The Employer states that the Grievant was aware that her actions were in violation of various Department policies, and her continued employment would be jeopardized. The Employer states further that the falsification of the state pay stubs was an attempt to defraud the Franklin County Department of Job and Family Services. Further, the use of a Department computer to email the false statements violated the Department's Computer and IT Use Policies. And the Grievant admitted to the creation of the false pay stubs and use of her Department computer to transmit them to the County agency. Additionally, the Office of the Inspector General, following its investigation, confirmed that the Grievant had attempted to defraud the County using State property to submit the false documents. The Inspector General, during the investigation, determined that the Grievant had failed to complete and submit a "Registration of Outside Employment Form" for outside employment at a pretzel stand in an area mall. The completion of the form is mandatory based on department policy. The Employer states that failure to complete the form may not have led to a termination of employment, but the falsification of state pay stubs and use of the Department computer to transmit the false documents are serious offenses. Termination of employment is the proper penalty for both offenses. The behavior of the Grievant reflects poorly her the ability to make good decisions required as an employee of the Department of Commerce. The Employer argues that the Union cannot prove that the discipline imposed is excessive and a violation of the just cause standard.

The Employer states that, in response to the Union's request to delay discipline based on the Grievant's participation in the Ohio EAP Program and Section 24.10 of the Agreement,

the language is clear that the Employer may delay discipline but is not required to do so. The language is permissive and not mandatory, and the Department Director determined that it was important to proceed without delay. The Employer argues that, based on the clear and plain language, there was no violation of Section 24.10.

The Employer states that the Union's request for leniency be denied. The Grievant had less than five years of service with the Department which does not support mitigation. Additionally, the Grievant had active discipline in her employment record. This was the second offense. The Employer states that the disciplinary grid clearly supports termination of employment. The severity of dishonesty precludes reinstatement and mitigation. The Employer states that the Grievant was charged with a fifth degree felony. The Employer argues that termination was for just cause, and the grievance should be denied in its entirety.

POSITION OF THE UNION

The Union emphasizes that the Grievant was forthright and remorseful immediately following her attempt to falsify the pay stubs. She was truthful immediately during the investigation conducted by the Department and later when questioned by the Office of the Inspector General. The Union states that the Grievant has been diagnosed with major depressive disorder. She suffered from a violent domestic relationship and was forced to seek protection in a shelter with her three children and then learned she was pregnant with a fourth child. The Union goes on to state that the Grievant experienced postpartum depression following the birth of her son. Her condition was compounded by lack of finances as she was supporting four children as a single parent and struggling to find the means to provide childcare

when she returned to her position at the Department of Commerce. The Grievant has not received child support.

The Union states that the Grievant did not intentionally violate the Department Ethics policy when she failed to submit the required form for outside employment. She had submitted the form for earlier part time employment and simply forgot to re-submit the form for the part time job at the pretzel stand. The Union states that the Grievant, at this time, was under severe stress. The Union argues that there should be no discipline for her forgetfulness given her stress, depression and financial struggles.

The Union states that, due to the Grievant's lack of financial resources, she submitted the false pay stubs in an attempt to procure a subsidy for childcare. She completed the falsified documents on a personal computer away from the job site and only utilized her Department computer to email the statements to Franklin County. Time spent on the state computer was minimal, and, the Union argues, the Employer should have taken this into consideration.

The Union argues that the Employer failed to consider the Grievant's diagnosis of Major Depressive Disorder. The Union states that this is a medical condition which is beyond the control of the afflicted. The Grievant entered into the Ohio EAP Program prior to the pre-disciplinary hearing decision in compliance with Section 24.10 of the Agreement. The Union argues that Employer should have held the discipline in abeyance until the Grievant completed her initial treatment. The Union requested that the Employer convert the potential termination to a last chance agreement based on the comprehensive diagnosis issued by Serenity Behavioral Health Services on October 29, 2018. The Union argues that the Employer failed to follow the spirit of Section 24.10 of the Agreement when it failed to consider an ADA

accommodation and followed through with the pre-disciplinary hearing and subsequent notice of termination of employment.

The Union states that the Grievant was indicted for the falsification of her pay information, but she entered into the Franklin County Prosecuting Attorney's Diversion Program and successfully completed community service hours. The Union requests that the Grievant be reinstated with full back pay; restoration of seniority credits and leave balances; and reimbursement for medical expenses.

ANALYSIS AND OPINION

Few if any of the facts in this case are in dispute. Rather, the issues to be determined by the arbitrator focus on severity of penalty and circumstances surrounding the personal issues involving the Grievant. The Employer charged the Grievant with two violations of policy, # 2 – Insubordination – Failure to follow written or known policies, procedures, practices and/or supervisory direction; #7 – Dishonesty – to include, but not limited to, falsifying, altering, or removing an official document or electronic record; providing false information in an investigation; or filing a knowingly false complaint/accusations.

The Grievant specifically violated the Ethics policy when she obtained outside employment at the pretzel stand in an area mall without completing and submitting the Registration of Outside Employment form. Evidence indicates that the Grievant had completed the form for outside employment at an earlier time. She had been employed by a catering operation outside of her full time employment and completed the form at that time. The Grievant testified that she had forgotten to complete the form and also believed that the prior

form may have covered her outside employment at the pretzel store. Evidence indicates that the Grievant was struggling with her finances being a single mother of four children. Her diagnosed depression may also have been a factor in her forgetfulness. She certainly had nothing to hide working at a pretzel stand. The Employer states that this violation would not have resulted in termination of employment. When notified of the potential violation, the Grievant submitted the completed form on July 18, 2018. A counseling or written warning would have been a sufficient response by management for this specific policy violation.

The charge of dishonesty is of serious concern. The Grievant created false pay stubs in an attempt to defraud the Franklin County Department of Job and Family Services. Due to financial concerns, the Grievant attempted to receive a greater subsidy for childcare. While she created the falsified forms on her own time and away from the Department, the documents were created to mirror official state pay stubs. To compound the policy violation, the Grievant emailed the falsified forms on her state computer. While the Grievant quickly admitted her actions and expressed remorse, her actions were an egregious violation of policy. Issues of dishonesty and theft in the employment setting often end in termination. It becomes an issue of lost trust. As stated earlier, most of the facts in this case are undisputed. The Employer had just cause to discipline the Grievant. There is, nevertheless, more to this case as illustrated by the Union and with little disagreement from the Employer. The Grievant was the victim of a violent domestic relationship which forced her to move to a shelter with her three children and then to another residence. Shortly thereafter, the Grievant learned she was pregnant with her fourth child. Following leave for childbirth and care for the infant, the Grievant returned to full time employment with a need for childcare. Lacking sufficient financial resources, she

submitted the false payroll stubs. Evidence indicates that the Grievant was suffering from severe stress and depression. The Grievant was placed on administrative leave, and she entered into an agreement with the Ohio EAP program. She was evaluated by a certified clinical social worker at Serenity Behavioral Health Services in August 2018 while on administrative leave. Following the diagnosis, the Grievant was referred for counselling with a therapist at the agency.

The Union argues that, while the Grievant violated policy, she was not completely responsible for her actions due to stress and depression. The Union's argument is compelling. On October 29, 2018, the Clinical Social Worker at Serenity Behavioral Health Services issued a notice regarding the diagnosis of the Grievant. It states the following in part.

I evaluated Olivia Malcolm in August, 2018. At that time she described many symptoms of depression and was diagnosed with Major Depressive Disorder. Ms. Malcolm was feeling hopeless in regards to her ability to maintain her family, as she cannot afford daycare costs, and is ineligible for any public assistance. She did explain to me that she had lied on an application for assistance by indicating that her income is less than she currently makes. She was remorseful that she had to go to those lengths to attempt to get support. Ms. Malcolm was feeling very depressed prior to lying on the application ...

...In my opinion Ms. Malcolm was in a life dilemma that lead to a poor decision of which she regrets. Her depressed mood further affected her ability to make good decisions, and she felt at that time that she had no choice.

The Union argued, at the time, that potential discipline be delayed in order that the Grievant have an opportunity to complete the EAP program and then to be given consideration for the mitigation of the disciplinary penalty as provided for in Section 24.10 of the collective bargaining agreement. The Employer rejected the request and defended its actions at arbitration arguing that the provision is permissive, that the language indicates that

management **may** delay and consider mitigation. The Employer is correct in that the delay and consideration for mitigation are not mandated. There is, therefore no specific violation of Section 24.10. Nevertheless, based on the circumstances involving the Grievant and diagnosis of Major Depressive Disorder, it is determined that, although there clearly was just cause for discipline, the penalty was excessive. The Employer was in possession of the diagnosis from the Clinical Social Worker prior to the issuance of the notice of termination. In *Mason & Hanger Corporation* Arbitrator Daniel F. Jennings found that there was just cause to discipline the Grievant but that termination was excessive based on the circumstances involving the employee. He reinstated with no back pay.

In disciplinary matters, a penalty that is markedly too harsh for the offense is unreasonable and an abuse of managerial discretion. A penalty that flows from an incomplete analysis of both the conduct and the individual employee is arbitrary. *Mason & Hanger Corporation and Pantex Guards Union Local 38, The International Guards Union of America. Daniel F. Jennings. 109 LA 957 965*

In the instant matter, the Employer failed to analyze and give proper consideration to the Grievant's state of mind and severe stress she was experiencing at the time she falsified pay stubs and submitted them to the County on her state computer. As the Clinical Social Worker stated, "Ms. Malcolm was in a life dilemma that lead to a poor decision. . ." In *Buffalo & Pittsburgh Railroad*, Arbitrator Suntrup reinstated a Grievant without back pay, who had engaged in serious policy violations, giving consideration to extenuating circumstances.

The arbitrator has no authority to grant leniency in discipline cases since that is the prerogative reserved for the managers of the company. The arbitrator does have authority, however, to amend the discipline imposed in view of extenuating circumstances, should any be found to exist in sufficient degree. This includes scrutiny

of the grievant's personal record. ...the grievant in this case was very close to retirement age when she was discharged. According to the record, she was 64 years old. Certainly this in and of itself is a mitigating circumstance that reasonable minds ought to find pertinent in rulings of the quantum of discipline.

Buffalo & Pittsburgh Railroad and United Transportation Union. Edward Suntrup.
123 LA 70 73 75

Evidence in the instant matter is clear that the Grievant was suffering from Major Depressive Disorder when she engaged in the falsification of her payroll documents. She almost immediately admitted to her errant behavior and was truthful and remorseful during investigations conducted by the Department and Office of the Ohio Inspector General.

Arbitrator Jerry A. Fullmer stated that "when the parties stipulate to 'what shall the remedy be,' it gives the arbitrator the discretion to determine the penalty." (*A. J. Rose Manufacturing and United Steelworkers Local 73507. 132 LA 1308.*)

The Department's Discipline Policy, Number 201.0, states that management "reserves the right to impose lesser or greater discipline depending on the circumstances of the offense. Factors considered in applying the appropriate penalty include . . . mitigating circumstances if any." The Employer possessed the flexibility, in finding that there was just cause to discipline the Grievant, to impose a mitigated penalty based on the personal circumstances surrounding the Grievant and the findings of the Clinical Social Worker.

The falsification of the pay stubs and their submission to Franklin County are egregious acts and in violation of the Department's Policy #7, Dishonesty, and there is just cause for the discipline of the Grievant. Nevertheless, there is no just cause for the penalty of termination which is therefore a violation of Section 24.01 of the collective bargaining agreement. In determining the appropriate disciplinary penalty, the Employer failed to consider the


circumstances involving the Grievant's personal and family life. In addition, the Employer failed to consider mitigation when notified by Serenity Behavioral Health Services, prior to the decision to terminate the Grievant, that she had been diagnosed with Major Depressive Disorder and suffered from the condition when she created and emailed the false payroll documents. The Grievant is therefore reinstated with no back pay. In the event not all requirements have been met, the Grievant must complete the Prosecuting Attorney's Diversion Program. In addition, the Grievant must enroll in the Ohio EAP program for a period of twelve months and must produce evidence of attendance to the Employer, monthly, commencing with the date of reinstatement. The Grievant is to be returned to the Department in the same classification, shift and schedule in existence at the time of her removal.

AWARD

The grievance is sustained in part and denied in part. The Grievant is reinstated with no back pay effective ten working days following the date of this Award. In the event not all requirements have been met, the Grievant must complete the Prosecuting Attorney's Diversion Program. In addition, the Grievant must enroll in the Ohio EAP program for a period of twelve months as a condition of reinstatement and must produce evidence of attendance to the Employer, monthly, commencing with the date of reinstatement. The Grievant is to be

returned to the Department in the same classification, shift and schedule in existence at the time of her removal. The arbitrator retains jurisdiction for thirty days for purposes of remedy only.

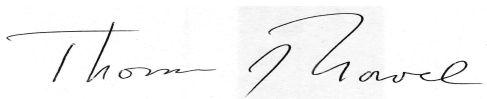
Signed and dated this 9th Day of July 2019 at Lakewood, Ohio.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

Thomas J. Nowel, NAA
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th Day of July 2019, a copy of the foregoing Award was served, by electronic mail, upon Mykai L. Riffle, Staff Representative, for the Ohio Civil Service Employees Association, Local 11 AFSCME; John M. Dean, Human Resources Manager, Department of Commerce, for the State of Ohio; and Chris Haselberger, Policy Analyst for the Ohio Office of Collective Bargaining.

A handwritten signature in black ink that reads "Thomas J. Nowel". The signature is written in a cursive style with a large, stylized 'T' and 'N'.

Thomas J. Nowel, NAA
Arbitrator