RICHARD BALES

Grievance No. 45-BCI-21-03

In the Matter of Arbitration between:

Office of Ohio Attorney General

and

Ohio Civil Service Employee Association

Arbitrator: Richard Bales
Grievant: Teresa Bobst
Grievance No.: 45-BCI-21-03
Grievance: January 11, 2021
Hearing: March 22, 2022
Brief Exchange: May 16, 2022
Decision Date: May 25, 2022

Award

I. Facts

The Ohio Attorney General (OAG) operates the Bureau of Criminal Investigation (BCI). The BCI is the forensic lab for the State of Ohio, maintains the State's primary criminal background information systems, and is responsible for conducting law enforcement activities. The Ohio Civil Service Employee Association (OCSEA) is the exclusive representative of certain BCI personnel, including Automated Fingerprint Identification System (AFIS) Operator 2. Relations between OAG and OCSEA at all times relevant to this Grievance were governed by a collective bargaining agreement dated November 1, 2018 - June 30, 2021 (CBA).

The facts leading to this Grievance are mostly agreed, so I will omit most pinpoint references to the transcript.

Grievant Teresa Bobst has been employed as an AFIS Operator 2 since July 2010. Her performance evaluations have been consistently positive, and she has no disciplinary history apart from a series of issues regarding leaves of absence. The most recent leave-of-absence issue is the subject of this Grievance.

Ms. Bobst's direct supervisor was Virginia Potts. Among other duties, Ms. Potts maintains a vacation calendar to coordinate the vacation days of employees in her department. When an employee wishes to take a vacation, the employee notifies Ms. Potts, who checks the calendar to make sure everyone is not requesting the same vacation days, then tells the employee whether the dates are available for vacation. Ms. Potts does not have authority to approve or disapprove unpaid leaves of absence. Tr. 60-68 (Potts).

In 2018, Ms. Bobst took a mission trip to Zambia. Because she did not have sufficient accrued vacation for the trip, she requested leave without pay (LWOP). OAG granted her

request. However, in a letter that is not part of this record, OAG apparently urged Ms. Bobst to bring up her leave balance and told her that OAG did not intend to allow future leaves of absence if Ms. Bobst did not have sufficient accumulated leave. OAG Ex. 13, at 94.

In early 2019, Ms. Bobst booked and paid for a beach vacation for August of that year. In July 2019, Ms. Bobst went on a mission trip to Africa. She did not have enough accrued vacation for this trip, and used 12.5 hours of sick leave instead. Id.

Not surprisingly, Ms. Bobst was still short on accrued vacation days for her scheduled vacation the following month. On July 24, 2019, she emailed Meredith Rockwell, Chief of Human Resources and Labor Counsel, to ask whether prior approval was required for leave without pay (LWOP). Ms. Rockwell responded that same day, stating:

> It would depend on why the time off was being taken. If the time off is for an approved FMLA condition then the FMLA certification would be sufficient. If you are interested in an unpaid leave of absence, that leave must be approved. If leave without pay is taken without FMLA or prior approval, then the employee may be subject to discipline, up to and including removal.

OAG Ex. 12.

Ms. Bobst requested LWOP for her August vacation. Consistent with the 2019 letter described above, OAG denied the request. Ms. Bobst took her vacation anyway.

When Ms. Bobst returned from vacation, Ms. Rockwell recommended a ten-day unpaid suspension for having used sick leave for her trip to Africa and for taking leave without approval for her vacation. OCSEA grieved. Ms. Bobst acknowledged having knowingly taken LWOP without approval, but argued that her direct supervisor Ms. Potts had told her she would likely receive nothing more than a written reprimand (notwithstanding Ms. Rockwell's written admonition that discipline could include removal). OAG Ex. 13, at 95; Tr. 204 (Bobst). OCSEA, through the grievance process, negotiated for the discipline to be reduced to a one-day working suspension. OAG Ex. 13, at 147.

Beginning Spring 2020, the COVID-19 pandemic significantly complicated all aspects of travel. In late 2020 and early 2021, Center for Disease Control and Prevention (CDC) Guidelines recommended fourteen-day quarantine periods for Americans returning from a COVID-19 Level three risk location. Consistent with this, OAG required a fourteen-day quarantine period following an OAG employee's return from international travel to a COVID-19 Level three risk location. OAG Ex. 16. This policy specifically stated that "Anyone who does travel to a Level 3 locale may not report to any AGO [OAG] facility for 14 days after he/she returns to the States." OAG communicated this quarantine requirement to its employees by email on November 3, 2020. Id.

Ms. Bobst took a scheduled vacation in August 2020. Shortly after, Ms. Bobst's daughter told Ms. Bobst that the daughter would be getting married in Zambia in late 2020. Tr. 205-06 (Bobst). Ms. Bobst gave Ms. Potts the dates she anticipated being gone, and Ms. Potts confirmed those dates were available on the vacation calendar. OAG Ex. 29. Ms. Bobst then asked Ms. Potts whether she would be required to quarantine, Tr. 208 (Bobst), and Ms. Potts referred her to Human Resources. Tr. 64 (Potts).

On November 9, 2020, Ms. Bobst emailed Ms. Rockwell, stating that she was travelling to Africa to attend her daughter's wedding, and that she did not have enough leave time to cover the quarantine. OAG Ex. 21. Ms. Bobst requested either Families First Coronavirus Response Act (FFCRA) leave or LWOP. Ms. Rockwell checked the Ms. Bobst's leave balances and found them insufficient to cover her vacation and the quarantine period. Tr. 94-96 (Rockwell). She then replied by email, denying the request for both FFCRA leave and LWOP. OAG Ex. 21. Ms. Rockwell explained that FFCRA leave does not cover the quarantine period resulting from discretionary travel. This email warned Ms. Bobst that if she took the trip, she would be disciplined, up to and including termination, for being absent without pay and for job abandonment. This was Ms. Bobst's first written warning.

On November 13, 2020, Ms. Bobst emailed Ms. Rockwell to request approval for leave donation to cover the quarantine period. OAG Ex. 22. At some point, Ms. Bobst told at least two co-workers that she was going to Africa notwithstanding her shortage of accrued leave. Tr. 181 (Crystal Botkin); email from Ms. Bobst to Ms. Rockwell (Dec. 4. 2020), OAG Ex. 27 (describing a co-worker's offer to donate leave so Ms. Bobst could travel to Africa). Ms. Rockwell denied the request by email on November 16, 2020. OAG Ex. 23. Ms. Rockwell explained in the email that the OAG Donated Leave Policy permits use of donated leave only when an employee or an employee's immediate family member has a serious illness. Ms. Rockwell warned Ms. Bobst in writing a second time that an unapproved leave of absence would result in discipline, up to and including termination. Id.

On November 25, 2020, Ms. Bobst emailed her supervisor, Ms. Potts, to ask about her quarantine dates. OAG Ex. 26. Ms. Potts forwarded the Ms. Bobst's email to Ms. Rockwell. Ms. Rockwell responded to Ms. Pott and advised that Ms. Bobst was not approved for the trip, and that she would be quarantined for fourteen days upon her return to Ohio. The email noted that Ms. Rockwell believed that the previous suspension for taking unauthorized LWOP was still active, and that if Ms. Bobst again took unapproved leave, she would be subject to progressive discipline. Id. Ms. Potts responded to Ms. Rockwell indicating that she had forwarded Ms. Rockwell's response to Ms. Bobst. Id. This was Ms. Rockwell's third written warning to Ms. Bobst.

On December 2, 2020, concerned that Ms. Bobst was proceeding with her plans to travel to Africa, Ms. Rockwell emailed Ms. Bobst again. OAG Ex. 27. This email explained that staffing levels were "very difficult" due to the pandemic and employee quarantines, and that there was no remote work available for Ms. Bobst to do from home during her quarantine

period. It reiterated that Ms. Bobst's trip would result in an unapproved leave of absence, and that she would be disciplined, up to and including termination. This email was Ms. Rockwell's fourth warning to Ms. Bobst.

On December 4, 2020, Ms. Bobst sent Ms. Rockwell an email. OAG Ex. 27. She acknowledged the office's staffing challenges, OAG's travel/quarantine policy, and that her accumulated leave was insufficient to cover the quarantine. She also acknowledged that she was aware that her requests for LWOP and leave donation had been denied, and that she would not be able to telework. Notwithstanding all this, she told Ms. Rockwell she was going to Africa regardless.

Ms. Bobst traveled to Africa December 7-14, 2020, and returned to Ohio on December 17, 2020. Her fourteen-day quarantine ran from December 18-31, 2020. She needed 144 hours of leave to cover the eighteen days she was off work. She had approximately 80 hours accrued as of the pay period ending December 5, 2020, and accrued an additional six hours in the pay period ending December 19, 2020, giving her approximately 86 total accrued hours. OAG Ex. 15. Consequently, she was absent without leave for approximately 58 work-hours.

On December 22, 2020, OAG notified Ms. Bobst and OCSEA of a pre-disciplinary conference to be held on December 29, 2020. Tr. 215 (Bobst); Joint Ex. 8, at 72-75. The pre-disciplinary notice included the recommended disciplinary action of removal, the actions that gave rise to the potential discipline (abuse of leave and job abandonment), and the time and the place of the conference. The pre-disciplinary conference took place on December 29, 2020, at which OCSEA represented Ms. Bobst and presented arguments in her defense. Tr. 217-18 (Bobst). OAG timely notified Ms. Bobst and OCSEA on December 30, 2020, that Ms. Bobst was being removed from her position as AFIS Operator 2 in the BCI Section of the OAG. Tr. 217-218 (Bobst); Joint Ex. 10. OCSEA timely grieved. Joint Ex. 1. OAG denied the Grievance, Joint Ex. 4, and OCSEA appealed to arbitration.

II. Relevant Provisions of the Collective Bargaining Agreement

ARTICLE 15
DISCIPLINE

Section 15.1 Standard. The Employer will not discipline an employee without just cause.

Section 15.2 Progressive Discipline. The Employer will ordinarily observe the principle of progressive discipline with the following steps:

1) Written reprimand,
2) Suspension,
3) Termination.

However, discipline imposed shall be commensurate with the offense.

ARTICLE 28
LEAVE OF ABSENCE WITHOUT PAY

Section 28.1 Requesting Leave of Absence without Pay. A leave of absence without pay may be granted to an employee subject to the operational needs of the Employer. … An employee who takes leave without pay without prior approval may be subject to discipline up to and including termination.

III. Issue

Did the Employer have just cause to remove Ms. Bobst from employment? If not, what shall the remedy be?

IV. Arguments and Analysis

The CBA explicitly gives OAG the right to deny an employee's request for unpaid leave. Article 28, Section 28.1. OCSEA argues Ms. Bobst's discipline was unduly harsh and should be replaced with an unpaid suspension of 3-10 days. This, however, would effectively erase from the CBA OAG's right to deny unpaid leave. The net effect of OCSEA's argument is that, notwithstanding OAG's right to deny unpaid leave, Ms. Bobst would be able to take her unpaid leave, and the only penalty would be an **extension** of the unpaid leave which Ms. Bobst wanted and which OAG has the contractual right to deny. This is inconsistent with the plain language of the CBA giving OAG the right to deny unpaid leave.

OCSEA raises four counter-arguments. First, OCSEA argues that the CBA language permitting OAG to discharge Ms. Bobst for taking unauthorized leave is permissive: "taking unapproved LWOP '***may*** be subject to discipline ***up to*** and including termination.' (emphasis added)." OCSEA Brief at 3, quoting Article 28, Section 28.1. I agree the language is permissive, but disagree the language supports discipline in this case short of discharge, for two reasons. First, as discussed in the previous paragraph, there is no way to give effect to OAG's contractual right to deny unpaid leave while simultaneously reinstating Ms. Bobst. Discipline involving an unpaid suspension gives Ms. Bobst more of what she already has taken without permission – akin to "penalizing" a thief by giving him more loot.

Second, myriad aggravating factors justify a significant penalty. (a) Ms. Bobst was discharged for having committed precisely the same offense that she committed a year before, under nearly identical circumstances – she obviously did not learn from the prior discipline. (b) Ms. Bobst was told four times in writing by Human Resources that she was not authorized to

take unpaid leave and that discharge was a possible consequence, but she did it anyway. (c) Ms. Bobst knowingly and willingly disobeyed the equivalent of a direct order, for which OAG easily could have charged her with insubordination in addition to taking unauthorized leave. (d) Ms. Bobst told at least two other employees – Ms. Botkin, and the employee from whom Ms. Bobst solicited a leave donation – that she did not have sufficient accumulated leave to travel to Africa. Her leaving anyway was thus a public challenge to OAG's authority to manage the workplace.

OCSEA's second argument is that, notwithstanding OAG telling Ms. Bobst four times in writing that taking unauthorized leave could result in discharge, OAG provided insufficient notice. OCSEA makes two sub-arguments. First, OCSEA argues that because Ms. Bobst's discipline for her first unauthorized leave was only a one-day working suspension, it was reasonable for her to assume that discipline for a second offense would be a three- or five-day suspension rather than discharge. OCSEA Brief at 13. I disagree. OAG's initial discipline for Ms. Bobst's first offense was a ten-day unpaid suspension. That put both Ms. Bobst and OCSEA on notice that OAG takes seriously Article 28, Section 28.1's admonition that unauthorized leave can result in discharge. OCSEA's success in vigorously advocating for a reduction in Ms. Bobst's discipline, and OAG's willingness to negotiate with OCSEA to resolve that grievance, does not in any way undercut the seriousness of Ms. Bobst's infraction or diminish the message OAG sent with its initial level of discipline. Any doubt was erased by four subsequent written warnings that explicitly said a recurrence could result in discharge.

OCSEA's second notice sub-argument is that Ms. Potts – Ms. Bobst's direct supervisor – told Ms. Bobst she would get only a "slap on the hand" for taking unauthorized leave. OCSEA Brief at 2. Even if true – and Ms. Bobst was the only witness who testified to this – Ms. Bobst knew from previous experience that Ms. Potts was wrong. According to Ms. Bobst's testimony, Ms. Potts had told her the same thing before Ms. Bobst took her first unauthorized leave – a leave which initially resulted in a ten-day suspension. Ms. Bobst should have known at that point that Ms. Potts did not speak for Human Resources. And she also should have known that Ms. Rockwell far outranked Ms. Potts on Human Resource matters. Thus, when Ms. Rockwell told Ms. Bobst four times in writing – including once in an email forwarded by Ms. Potts herself – that unauthorized leave could result in discharge, Ms. Bobst had no business relying on anything Ms. Potts might say to the contrary.

OCSEA's second major argument is that the CBA requires progressive discipline, and OAG has a "past practice" of issuing "'multiple reprimands, writtens, sometimes multiple suspensions'" before discharging employees. OCSEA Brief at 4, quoting Tr. at 174 (Gray). OCSEA has not shown, however, any specific instances where an employee committed a second offense with the sort of aggravating factors described above and received discipline short of discharge. Article 15, Section 15.2 requires progressive discipline, but also provides that "discipline imposed shall be commensurate with the offense." In light of the aggravating factors described above, I find discharge is commensurate with Ms. Bobst's offense.

OCSEA's third argument is that OAG should have permitted Ms. Bobst to work from home during her quarantine. OAG demonstrated through Ms. Rockway's testimony that no such work was available; OAG had tried it once for one employee, but that experiment was unsuccessful and OAG did not offer it again to other employees. However, even if OAG routinely permitted employees to work from home during quarantine, it had no obligation to do so for Ms. Bobst under these circumstances. Ms. Bobst deliberately violated a work rule in the face of repeated written warnings by the Human Resources Director. Such conduct need not be accommodated – rewarded even – by allowing her to work from home.

OCSEA's fourth argument is that mitigating factors weigh against discharge. Ms. Bobst's desire to attend her daughter's wedding is understandable. However, it does not erase OAG's explicit contractual right to enforce a reasonable leave policy designed to ensure adequate staffing levels. It is unfortunate that COVID-19 required Ms. Bobst to quarantine after international travel, but the pandemic also caused OAG's short-staffing which made it difficult to accommodate employee leaves. Ms. Bobst has been honest about her leaves, but she has also honestly testified she would take yet another unauthorized leave under similar circumstances. She has solid performance reviews and no disciplinary history other than the leave issues described in this Award – but the leave issues are significant, and nothing in the record indicates that any level of discipline short of discharge is likely to change her behavior.

To sum: when Ms. Bobst left for Africa, she knew she was doing something not permitted by the CBA. OAG told her repeatedly that if she did it she would be disciplined and could be discharged. She did it anyway. This was a willful, premeditated, second-offense, in-your-face violation that other employees knew about and which therefore directly and publicly challenged OAG's ability to manage the workplace by enforcing reasonable work rules.

Ms. Bobst gambled that OAG would once again back down. She lost that bet, but now complains of the consequences. A gamble, however, is not unfair just because the gambler loses.

V. Award

The Grievance is denied.

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Richard A. Bales, Arbitrator