

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO VETERANS HOME

- AND -

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 11

GRIEVANT: ROBIN CRISELL

GRIEVANCE NO: 33-00-20080519-0030-01-05

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GENERAL COUNSEL

ARBITRATOR'S OPINION AND AWARD

ARBITRATOR: DAVID M. PINCUS

DATE: NOVEMBER 19, 2008

# 1017

Appearances

For The Employer

Bob Day	Payroll Administrator
Joe Trejo	Office of Collective Bargaining
Donna Green	Management Representative
Buffy Andrews	Advocate

For The Union

Robin Criswell	Grievant
Carolyn Smith	President
Vanessa Brown	Chief Steward
Robert Robinson	Advocate

### INTRODUCTION

This is a proceeding under Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/Mediation Panel between the State of Ohio, Ohio Veterans Home, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the Union, for the period March 1, 2008 to February 28, 2009 (Joint Exhibit 1).

At the arbitration hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing written closings. The parties refused this option and closed the hearing with verbal closings.

### JOINT ISSUE

Was the grievant, Robin Criswell, removed from her position of Food Service Worker for just cause? If not, what shall the remedy be?

### JOINT STIPULATIONS

1. The grievance is properly before the Arbitrator.
2. There are no procedural objections.
3. Grievant was hired on 12/19/97 at the State of Ohio Veterans Home.
4. Grievant's prior discipline: 433 day suspension.

### CASE HISTORY

Robin Criswell, the Grievant, was employed by the Ohio Veterans Home, the Employer, as a full-time Food Service Worker since December 29, 1997. The Employer is a certified nursing home and domiciliary entrusted to care for veterans who have served during armed conflicts.

On December 15, 2006, the Grievant was terminated for violating Corrective Action Standard AN-03-Misappropriation/Exploitation and other forms of misconduct. The primary charge dealt with receiving money from residents. On February 5, 2008, Arbitrator Anna DuVal-Smith reinstated the Grievant to her former position, but back pay and benefits were denied. As such, the Grievant realized a time-served suspension totaling 433 days. Upon her return, the Grievant could have bought her leave balances but she did not.

Shortly after her return to work, the Grievant experienced a work-related injury in the Dietary Department. Her arm was injured by a defective plate warmer while catching dishes in the tank room. Records indicate the Grievant used 5.5 hours of sick time in conjunction with her workers compensation injury.

On April 18, 2008, the Grievant submitted a request for leave form for an absence on April 16, 2008 and April 17, 2008. Her physician documented her illness as acute gastritis. The Grievant's application requested sick leave and any leave time she had available.

The Grievant's leave was approved only for sick leave without any other leave balances applied. On the date in question, she only had 3.78 hours of sick leave available which was applied. This circumstance, however, placed the Grievant in AWOL status for 12.22 hours.

On May 15, 2008, the Grievant was terminated for violating Ohio Veterans Home Correction Action Standard(s): A-05-AWOL - Exceeds Sick Leave Balance. On May 19, 2008, the Union grieved the administrative action by filing a grievance which states in pertinent part:

XXX

The grievant has been terminated for the alleged violation of OVH Corrective action Standard A-05, the Union feels that the termination is unfair and without just cause.

XXX

The parties were unable to settle the grievance during subsequent states of the grievance procedure. Neither party raised substantive nor procedural arbitrability concerns. As such, the grievance is properly before the Arbitrator.

### THE MERITS OF THE CASE

#### The Employer's Position

The Employer opined it had just cause to remove the Grievant. She clearly violated Rule A-05 because she made contact but not in an approved status. Her leave balance at the time in question indicated she had insufficient sick leave to cover the 16 hours requested.

FMLA arguments were inappropriate in this instance. The Grievant had not worked 1200 hours in the preceding 12 months as a consequence of her suspension. Also, her "sickness" episode lasted two days, which fell short of the three consecutive day criterion contained in the FMLA guidelines.

The Grievant's sick leave balance lacked sufficient accumulated hours to cover the episode. This finding would not have varied even if the Grievant had not used 5.5 hours of sick time in conjunction with her Workers Compensation injury.

#### The Union's Position

The Union argued the Employer did not have just cause to remove the Grievant. The Employer's disciplinary action was used solely to punish the Grievant because of her extended prior suspension. She never exhibited any prior attendance related misconduct, which indicated she was salvageable as a valued employee.

The Employer should have allowed the Grievant to supplement her sick leave balance with emergency personal leave and/or leave without pay. Unwillingness to supplement in this instance was totally unreasonable and arbitrary.

The Union relied on a prior grievance settlement negotiated by the parties in 1999. The Employer purportedly agreed to review, on a case-by-case basis, the use of "other" leaves for employees dealing with work-related injuries or disabilities.

The Employer's decision to terminate seems unconvincing in light of other administrative actions. In the past, the Employer has been much more lenient when disciplining interim and intermittent employees. The same standards should have been applied in this instance.

#### THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing and a complete and impartial review of the record, it is this Arbitrator's opinion that the Employer had just cause to remove the Grievant. She clearly violated Rule A-05 by not having sufficient sick leave time to cover her leave request. The removal was not in violation of any contractual requirements nor any of the other alleged defects raised by the Union.

The time-worked suspension, in my view, placed an obligation on the Grievant which veiled this entire episode. When an employee serves such an extensive suspension, it can be viewed as a quasi last chance. Virtually any substantiated subsequent offense can lead to serious consequences.

Unfortunately, the Grievant failed to "purchase" any leave banks upon her return to work. But, that was her decision; which eventually proved to be catastrophic.

The Union's attempt to supplement the Grievant's sick leave balance deficiencies is also defective. Nothing in the collective bargaining agreement

requires "in lieu of" supplementation of sick leave. Neither Article 27.04 nor Article 28.03 contain such an exception. They do, however, reference emergency situations, but the circumstance in dispute does not qualify as an emergency.

Intermittent and interim employees do not hold the same status as full-time employees under the collective bargaining agreement. As such, the Employer can treat these employees differently without any violation of the Agreement (Joint Exhibit 1). Although the Arbitrator does not necessarily concur with this brand of management administrative conduct, nothing in the contract serves as a contractual bar. Also, the Union only provided anecdotes without any probative evidence.

It is axiomatic that prior grievance settlements cannot be considered by arbitrators. To do so would tend to have a chilling effect in future grievance settlement attempts.

#### AWARD

The grievance is denied. The Employer had just cause to remove the Grievant.

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November 21, 2008

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Dr. David M. Pincus  
Arbitrator