

Rec'd 5/11/2020

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**IN THE MATTER OF ARBITRATION**  
**BETWEEN**  
**STATE OF OHIO**  
**DEPARTMENT OF DEVELOPMENTAL DISABILITIES**  
**AND**  
**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION**  
**LOCAL 11**  
**AFSCME. AFL-CIO**

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Arbitration Dates: February 25, 2020

Grievant: Angela Taylor #DMR-2019-02148-04

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Andy Bower  
Labor Relations Officer  
Ohio Department of Developmental Disabilities  
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Advocate for the Union:

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## **I. HEARING**

The hearing was held at the Southwest Ohio Developmental Center February 25, 2020.

The The joint issue before the Arbitrator is “Was the Grievant, Angela Taylor, removed for Just Cause? If the Grievant was not removed for Just Cause, what shall the remedy be?”

Testifying for the Ohio Department of Developmental Disabilities were Lori Finch, the HR Manager, and Jeanette Gillespie, Superintendent.

The Ohio Civil Service Employee’s Association, Local 11 offered no evidence.

## **II. STATEMENT OF THE CASE**

The Grievant was removed from her position as a Therapeutic Program Worker (TPW) on June 24, 2019. The Grievant is charged with violations of the following rules: Job Abandonment, A-1, No call/No show without proper authorization (unauthorized leave/AWOL) for three (3) consecutive shifts or more.

## **III. THE EMPLOYER’S CASE**

The Employer’s first witness was Lori Finch. Ms. Finch is the HR Manager. She was hired in 1989 as an Account Clerk I. Ms. Finch became an Account Clerk II in March 2004. Ms. Finch then went to HR personnel and worked with FMLA and benefits. She became the HR Manager in 2013.

Ms. Finch reviewed Exhibit M-1 and testified that the Grievant’s last day worked was March 21, 2019. Ms. Finch said the Grievant asked about temporary disability. Ms. Finch testified that Grievant’s benefits were exhausted. Her 2080 hours lifetime allowance was exhausted the previous year.

Ms. Finch read Exhibit M-2 and said it was a letter to the Grievant that her disability

benefits were exhausted. Ms. Finch testified that the Grievant applied anyway and it was denied. Ms. Finch testified that the Grievant got a direct order to return to work. She identified Joint Exhibit Tab 3 Page 9 as the letter ordering Grievant to return to work and advising her she could be discharged. Ms. Finch also testified that Joint Exhibit Tab 3 Page 12 shows confirmation of delivery. The Grievant did not show up.

Ms. Finch next testified that Joint Exhibit Tab 3 Pages 5 - 8 are the Pre-Disciplinary Hearing Notice she sent to Grievant and confirmation of Delivery. Ms. Finch was the Hearing Officer.

Ms. Finch read Joint Exhibit Tab 3 Pages 3 and 4 and said it was her Pre-Disciplinary Hearing Report. She testified that Grievant had no leave nor FMLA available.

On Cross-Examination Ms. Finch read Joint Exhibit Tab 3 Page 9 and testified that it was the letter ordering the Grievant to return to work. Ms. Finch was asked: "Could the Grievant have returned to work?" Ms. Finch answered, "The Doctor said the Grievant was not able to return to work."

Ms. Finch read Tab 5 Page 28 which is the Facility Policy and testified that employees must have approved status. She testified that an employee may have a Leave of Absence without pay but Grievant was never on Leave of Absence Without Pay Status. Non pay status must be approved by the Superintendent.

Ms. Finch read Joint Exhibit 5 Page 57 which is a print of Grievant's record. Ms. Finch testified that the Grievant had some Leave approved when she still had benefits.

On Re-Direct Ms. Finch said the Grievant's record showed on Page 72 that she was Absent Without Leave.

The Employer's next witness was Jeanette Gillespie, Superintendent. Ms. Gillespie has been with the Department thirty-three (33) years and ten (10) months. She started as a TPW. Ms. Gillespie served as Administrative Assistant to the Chief of Police and also as a Program Director. Ms. Gillespie became the Superintendent a year ago January.

Ms. Gillespie reviewed Joint Exhibit Tab 3 and testified it was the Grievant's disciplinary packet. She said she reviews the packet and makes a decision. Ms. Gillespie then testified that the Grievant was in unauthorized leave status.

Ms. Gillespie read Joint Exhibit Tab 3 Page 1 the Order of Removal. She then read Joint Exhibit Tab 4, The Standards of Conduct. She said this guides employees about discipline. Ms. Gillespie testified that Pages 5 - 15 are the agency discipline grid and the grid calls for removal for a first offense.

Ms. Gillespie next read Joint Exhibit Tab 5 Pages 28 - 32 which is the Leave Without Pay Policy. Ms. Gillespie testified that the employee has to ask for Leave Without Pay and the Grievant never asked for it.

On Cross-Examination Ms. Gillespie testified that Leave Without Pay had to be approved by the Superintendent or Deputy. She read Joint Exhibit Tab 5 Page 72 which is Grievant's Pay Record. On April 20, 2019 the Grievant was in Non Pay Status with No Approved Leave. It is coded for No Pay No Approval. Ms. Gillespie was asked: "Are there other employees on Leave Without Pay?" She replied, "I would have to check."

Ms. Gillespie read Joint Exhibit Tab 3 Page 9 and said it was the letter ordering Grievant back to work on April 26. She was asked, "Was the Grievant able to return to work?" Ms. Gillespie replied, "The Grievant never submitted anything." The Grievant worked 2 - 2 ½ weeks

before removal. Ms. Gillespie testified the Grievant was AWOL three (3) shifts after April 26.

Ms. Gillespie testified that the Grievant was ordered back to work because she had no benefits left and there is no leave without benefits.

Ms. Gillespie read Joint Exhibit Tab 5 Page 29 Sec. 5.1.4 which refers to Failure to return after a valid cancellation - AWOL.

On Re-Direct Ms. Gillespie read Joint Exhibit Tab 4 Page 14 and testified the Grievant was absent for three (3) consecutive shifts.

The Union offered no evidence. The Union Advocate spent considerable time and effort in his Cross-Examination of the Employer's witnesses.

The parties agreed to submit written Closing Arguments to the Arbitrator by the close of business March 27, 2020.

#### **IV. OPINION OF THE ARBITRATOR**

The Employer says the Grievant last reported to work on March 1, 2019 and then called off sick for each scheduled shift thereafter. On March 21, 2019 the Grievant contacted Lori Finch, HR Manager, requesting assistance in filling out a Request for Leave (REL) form and to provide her with disability forms. The Grievant said her Doctor advised her to remain off work until May 21, 2019. The Employer says the evidence is Ms. Finch told the Grievant she had already exhausted her disability leave but could apply again if she wanted.

The Employer argues the Grievant had previously been notified of her exhaustion of the 2,080 hour lifetime disability benefit entitlement by letter August 16, 2018.

The Employer contends that by March 22, 2019 the Grievant had exhausted all available leave accruals and had not worked enough hours to qualify for leave under the Family Medical

Leave Act (FMLA). The Grievant was therefore Absent Without Authorized Leave (AWOL).

On April 15, 2019 the Grievant and the Employer received a second notice that Grievant was denied disability, as all leave was exhausted.

Amy Sherrets, Payroll and Benefits Manager for the Employer, advised Ms. Finch to put Grievant on notice that she is AWOL and to give the Grievant a return to work order stating that failure to return is job abandonment.

The Employer says the evidence is Grievant received the letter on April 19, 2019 ordering her back to work on April 26, 2019 and that failure to return would subject her to disciplinary action up to and including removal. Grievant failed to return to work.

On May 13, 2019 the Employer received a fax stating that the Grievant was cleared to return to work with no restrictions on May 14, 2019.

The Employer points out that Ms. Finch was the Pre-Disciplinary Hearing Officer. Ms. Finch testified that she found Just Cause for discipline as Grievant had no eligible benefits, no FMLA coverage, no accrued leave and failed to report for work. Ms. Finch also said the Grievant admitted she had no approved leave benefits or FMLA.

The Employer argues that Jeanette Gillespie, SODC Superintendent reviewed the evidence and it showed Grievant was AWOL for three (3) consecutive shifts or more and guilty of Job Abandonment.

The Employer points out that Ms. Gillespie said the penalty in the disciplinary grid for violation of Job Abandonment A-1, No Call/No Show without proper authorization for three (3) consecutive shifts or more is automatic removal.

The Employer says the evidence is clear that the Grievant was AWOL.

Ms. Gillespie referenced the documentation for another TPW who was removed from employment for the same rule violation as the Grievant. The Employer asserts that the Employer has applied the work rules fairly and even handedly.

Ms. Gillespie also testified that the Grievant neither requested nor received approval for leave without pay.

The Employer cites Arbitrator, Jonathon Dworkin's opinion in Ohio Civil Service Employees Association v Ohio Bureau of Employment Services, Joel Paul, Grievance No. 11-09-970603-0047-01-14: "tenure is not a pass to commit misconduct.....it does not insulate people from removal for conduct totally inimicable to an Employer's fundamental interests."

The Employer argues that attendance ranks very high on the Employer's fundamental interests . Attendance is essential to providing for the services that the clients need for their health and safety.

The Employer also argues that a salvageable employee would care enough about her job to appear at her grievance arbitration.

The Employer further argues that the evidence is clear and the Removal should be upheld in its entirety.

The Union argues that there was no Just Cause for Removal. The Union contends the Employer turned a blind eye to extenuating and mitigating circumstances. The Union also argues the Employer gave no consideration to Grievant's eighteen (18) years of service.

The Union contends the Grievance should be granted. The Union argues there was deliberate indifference in regards to progressive discipline, disregard of Just Cause standards and ignoring the Agency's, Code of Conduct and the Collective Bargaining Agreement.

The Union also argues it does not negotiate the Standards of Conduct or the Disciplinary Grid. The Union says there was not a "fair and sufficient investigation".

The Union also argues that the Employer's claim that Grievant no longer had an interest in or wanted her job is completely unfounded. The Employer was aware the Grievant was under a Doctor's care and medically restricted from returning to full duty.

The Union argues that as of March 22, 2019 the Grievant had exhausted all leave accruals and was not eligible for FMLA benefits, but did not pursue discipline at that time.

The Union says the Employer placed Grievant in non-pay leave status until April 6, 2019 when her leave status was cancelled without notice.

The Union says SODC Policy E-2 says "an employee who fails to return to duty within three (3) working days of the completion of a valid cancellation of leave of absence without pay, without explanation, to the appointing authority or his representative may be removed". The Grievant received no notice her leave of absence status was cancelled and the Employer was well aware the Grievant was under a Doctor's care.

The Union contends the Grievant was interested in her job. The Union asks that the grievance be granted.

The Arbitrator has reviewed the evidence and the arguments of the Advocates.

The Arbitrator notes that the uncontradicted testimony of Ms. Finch is that the Grievant was never in Leave of Absence with non-pay status. Further Ms. Gillespie testified that the Grievant never asked for unpaid Leave of Absence.

Ms. Gillespie also testified on Cross-Examination that the Grievant never submitted anything showing she was able to return to work. This testimony was uncontradicted.

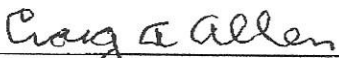


The evidence is clear that the Employer had Just Cause to terminate the Grievant. The Grievant had exhausted all accrued leave benefits and was not eligible for FMLA. Further, the nature of the Grievant's job made attendance a high priority. The Union argues that it did not negotiate the Standards of Conduct or the Discipline Grid but it is still the "law" of the workplace.

The Arbitrator also agrees with the Employer's argument that "a salvageable employee would care enough about her job to appear at her grievance arbitration."

The grievance is denied.

Issued at Ironton, Ohio this 3<sup>rd</sup> day of April, 2020.

  
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Craig A. Allen  
Arbitrator