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GRIEVANCE COORDINATOR

**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**OCSEA, LOCAL 11, AFSCME-AFL-CIO**

**AND**

**STATE OF OHIO/ODOT**

**Before: Robert G. Stein**

**Grievant(s): La'Mon L. Brown**
**Case # 31-08-06-13-03-21-01-07**
**Termination**

**Advocate(s) for the UNION:**

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**Advocate(s) for the EMPLOYER:**

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## INTRODUCTION

A hearing on the above referenced matter was held on January 12th and February 10, 2004 at ODOT District 8 located in Lebanon, Ohio. The parties agreed that the issue is properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. The parties submitted written briefs in lieu of making oral closings.

## ISSUE

Was the Grievant, La'Mon Brown, discharged for just cause? If not, what shall the remedy be?

## RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference see Agreement for language)

ARTICLES 24, 29, and see Parties' briefs

## BACKGROUND

The Grievant is La'Mon Brown ("Grievant", "Brown"), a Survey Technician II at District 8. His employer is the Ohio Department of Transportation ("ODOT",

"Employer" "Department"). Brown has been employed with ODOT for approximately sixteen (16) years and was terminated on 6/11/03. He was charged with violations of Directive WR 101:

**#18 Falsifying any official documents**

**# 25 Violation of ORC 124.34-failure of good behavior, dishonesty**

The basic facts of the case indicate the Grievant had applied and received approval to take leave under the Federal Medical Leave Act ("FMLA") to provide assistance to his stepfather, William Whaley. Prior to this leave, the Grievant had also applied for and received FMLA leave to assist in his mother's care. On March 31, 2003 and April 3, 2003, the Grievant applied for and received approval to take intermittent FMLA leave in order to provide assistance to his ill stepfather. During a portion of each of these FMLA days, the Grievant engaged in his outside job of scalping tickets to athletic and entertainment events. On March 31 and April 3 he was scalping tickets to the Cincinnati Red's games.

The Employer contends the Grievant used the serious illness of his family members to obtain leave in order to engage in his outside ticket scalping business. In addition, the Employer asserts the Grievant repeatedly lied during the investigation, disciplinary, and grievance phases of this matter. The Grievant violated the fundamental trust that must exist between employee and

employer, argues the Employer. The Grievant strongly disagreed with the Employer's characterization of the events of March 31 and April 3, 2003. He asserts he never deceived the Employer, and that he used FMLA leave for legitimate reasons, and was terminated unjustly. He filed a grievance leading to the instant arbitration.

## SUMMARY OF EMPLOYER'S POSITION

The Employer argues it placed the Grievant on notice regarding the impropriety of scalping baseball tickets while on FMLA leave. Its position in this matter is succinctly stated in its brief. It reads as follows:

**ARGUMENT**

The facts, testimony and evidence presented at hearing support managements position that the action taken was just, fair and reasonable and well within the longstanding work rules and directives of the employer.

The employer has established, through testimony and evidence, that the Grievant was removed for just cause. Specifically, the Employer established that the Grievant was deceitful in claiming that unpaid absences of March 31, 2003 and April 3, 2003, were necessary to care for the serious health condition of his stepfather. The Employer established that the Grievant was engaged in a for profit ticket scalping business during regular work hours. The Grievant later submitted request for leave in lieu of sick leave (FMLA) to cover these absences. Finally, the Employer established that the Grievant repeatedly lied during the investigation of his misconduct and throughout the disciplinary and grievance procedures.

The Employer established that on March 31, 2003, the Grievant reported off to care for his stepfather. On Tuesday, April 1, 2003, the Grievant returned to work and informed his supervisor that he would be off on April 3, 2003 for the same reason. The Grievant's supervisor became suspicious, as he knew the Grievant scalped tickets and that April 3, 2003 was a "Business Man's Special" for the Cincinnati Red's baseball team. The Grievant's supervisor phoned the District Labor Relations Office, Carl Best, to discuss his concerns. Mr. Best later contacted ODOT's Office of Internal Investigations to inform them of their suspicions.

On April 3, 2003, Matthew Long went to the Grievant's mother's house where Grievant arrived at 7:55am and left following his mother and step-father at 8:07am. There is a difference between the parties on whether the Grievant followed his parents, however, this issue is meaningless. The Employer stipulated that they cannot account for the Grievant from 8:15am through 9:45am. However, the Grievant by his own testimony, admitted that he left the doctor's office between 9:00 am and 9:30am.

The Grievant should have returned to duty at this time, not scalp tickets. The Grievant agues that it was necessary for him to be accessible for the care of his step-father. The Employer, as well as the Grievant's key witnesses, his mother and the doctor's nurse, prove that was not truthful. In Union *Exhibit 7*, the nurse stated that the Grievant left as the procedure would take

4 to 6 hours. The Grievant's mother testified that the Grievant knew in advance that the procedure would take all day. She stated the procedure always takes all day and the Grievant always leaves and picks them up between 4:00pm and 5:00pm. Therefore, if the Grievant knew this in advance, as his own mother testified, he would have come dressed for work and been back to work by 10:00am at the latest. The Grievant could have worked until 3:30pm and still be back to the doctor's office by 4:00pm.

The Union argued that had the Grievant returned to duty, he would not have had time for meaningful work. Well, the Grievant's mother's testimony does not support their argument. Also, the Grievant's supervisor testified that there was sufficient work the Grievant could have done at the district office. In fact, his supervisor testified that on a number of occasions the Grievant worked half days.

The Grievant's mother's testimony certainly clears up any questions regarding the Grievant's intent. This, along with the Arbitrator's questioning of "the bike" certainly establish that the Grievant intended to drop his parents off and scalp tickets under the guise of FMLA. Why would the Grievant drive separately if he intended to be with his parents all day? The Grievant's calm response to the Arbitrator establishes what a slick person he is while being untruthful. He stated he didn't want to leave his bike unattended in their neighborhood and he didn't want to listen to their music. The drive to the doctor's office is only 10 to 15 minutes. How much music can you listen to in that period? Why would the Grievant bring his bike at all if he was concerned about its safety? He would not.

The Grievant's defense also challenged Mr. Long's ability to identify the Grievant. Was he the person in red or blue? Was the person bald? Did he sell Mr. Long the ticket and parking pass?... All of this does not matter. When viewing the video tape, the Grievant's Counsel "testified" that the person leaning into a car to either sell or purchase tickets was the Grievant and the person in blue and holding the sign was his partner. So what then, is the Grievant's argument, "Yes, I was selling tickets under the guise of FMLA, just not to Mr. Long." The Union also attempted to discredit the investigatory interview conducted by Les Reel. They attempted to characterize Mr. Reel's tactics as entrapping.

However, as the Arbitrator discovered himself, it is difficult getting the truth from the Grievant. Mr. Reel attempted to give the Grievant every opportunity to be truthful. Margaret Smith was the Grievant's representative and present during the entire interview. Mr. Reel took several breaks to allow him to speak with his Union representative in private as well. If there was any misconduct on the part of Mr. Reel they would have called Margaret Smith to testify. Ms. Smith was the Grievant's representative at that meeting and the Union did not use her as a witness because she would have damaged their defense.

The Union attempted under direct examination to soften the effect of the Grievant's lies. They asked him to clarify his testimony on page 17 of Mr. Reel's interview regarding the time he left his step-father's house on March 31, 2003. The Grievant responded that he was not exactly straight forward with his answer. The Grievant stated the reason was that he thought he may have been under surveillance on March 31, 2003, rather than on April 3, 2003. This is the reason he changed his response on page 19 of the interview. However, under cross examination the Grievant reversed his answer again and responded that he did not lie during the interviews. Mr. Reel did not entrap the Grievant. The Grievant was being evasive throughout his interview. The Union also attempted to distinguish between FMLA and sick leave. The Employer argues that any leave used for FMLA purposes is sick leave. Section 29.02 of the Labor Agreement describes the parties intent of sick leave usage. Specifically, the last sentence of Section 29.02 states "After employees have used all of their accrued vacation, compensatory time or personal days or **may** *(emphasis mine)* be granted leave without pay. As the Arbitrator is aware, the Employer's position has been, since this language was included, that in most instances, leave without pay is only granted for FMLA purposes. The Grievant was well aware of this. You need to look no further than page 22 of Mr. Reel's investigatory interview.

The first response of the Grievant "I didn't have any leave to take". Yet he wanted to scalp tickets. His only option was to use FMLA as that would be the only way to get leave without pay approved .The Employer's position is also continued through their FMLA policy. This policy requires the use of all available leave prior to being granted leave without pay.

However, lets not confuse this case with an attendance case. The Grievant was not removed for use of leave. The Grievant was removed for falsification and for failure of good behavior and dishonesty. The Grievant falsified his leave request when he used leave in lieu of sick leave for that which it was not intended. Arbitrator Pincus describes this argument well on page 11 of the Charles Woodson decision provided to the Arbitrator at the hearing (Employer *Exhibit* # 7,). The Union also attempted to argue disparate treatment. First, they attempted to introduce six actions, five removals and one suspension through Patty Rich. However, Ms. Rich had no knowledge of any of those cases. The only relevance of those eases were that the five removals were for the same charges but different type of misconduct. However, it is clear that the charges against the Grievant are consistent with his misconduct.

The Union then attempted to include twenty-one additional actions. This was done after both parties rested their case in chief. There is absolutely no foundation for these actions to be considered by the Arbitrator. When the parties were discussing the original six cases for stipulation, the Grievant's Advocate specifically asked if that was her entire foundation for his disparate treatment argument. Her response was "Yes".

No testimony was provided for any action introduced by the Grievant's Advocate (all 27 cases), by someone with direct knowledge of those cases. To give them any consideration would be extremely inappropriate. The Employer would be placed in a position of not being able to refute any argument that would be raised in relation to those cases.

Finally, the Union argued the Employer failed to place the Grievant on notice that his actions could have resulted in removal. This argument is also incorrect. Management exhibit 2 describes a conversation between the Grievant, his supervisor, his Union Representative (Doug Jansen) and Carl Best. That conversation was initiated by the Grievant. During this conversation the Grievant's leave pattern was discussed with him. The Grievant's scalping business was discussed in detail. The Grievant was directly told not to scalp tickets while on leave. The Grievant also stated at that meeting that he felt that while he was on FMLA he could do whatever he wanted, that it was his time. Doug Jansen confirmed this conversations content under cross examination. In fact, the day before the Red's game in question, the Grievant's supervisor again told the Grievant not to scalp tickets while on FMLA. This testimony was not challenged. In addition, the Grievant himself testified that his friend and Union Steward, Ed Moore, had previously warned him not to be caught selling tickets while on leave from ODOT. The Grievant chose to disregard all those repeated warnings.

Mr. Arbitrator, the Employer established that the Grievant did commit the infractions cited. ) Even the witnesses who the Grievant called to testify on his behalf could not support his deceitful actions. His own mother contradicts his claims.

The fact is that the Grievant had a side business of scalping tickets. When the Grievant was out of leave, he would use FMLA as a shield to obtain approved leave without pay. To use the serious illness of a loved one in this mariner is inexcusable behavior.

The Grievant repeatedly lied during the investigation and throughout the disciplinary and grievance procedures. This action does not lend toward mitigation. The Grievant falsified his request for leave. This is very serious and it goes to the heart of the employment relationship and the trust that must exist between an employer and employee.

All of the above establishes that this employment relationship was properly ended. The Employer now asks the Arbitrator to support their decision and deny this grievance in its entirety.

## SUMMARY OF UNION'S POSITION

The Union's position is that FMLA leave is distinct from all other leaves contained in the Collective Bargaining Agreement, and that the Grievant was denied his rights under FMLA to return to work. The Union strongly contends the Employer did not have just cause to terminate the Grievant's employment for using FMLA leave to care for his stepfather and mother. Its arguments are succinctly summarized in its post hearing brief. It is as follows:

## ARGUMENT

This grievance arbitration revolves around whether the Employer, the Ohio Department of Transportation, had just cause to terminate the Grievant, Mr. Brown. Mr. Brown contends that the Employer did not have just cause to terminate his 16 year employment with ODOT. ODOT has the burden of proving they terminated Mr. Brown for just cause. However, just cause was not followed, nor was it considered, in this disciplinary action against Mr. Brown.

### A. Just Cause Standard

Just cause is the employee's due process. It presupposes some uniform standard of behavior in the area of discipline and discharge. The test for just cause is set forth in the seven part formula created by Arbitrator Carroll Daugherty. The seven tests are as follows:

1. Was the employee forewarned of the consequences of his actions;
2. Are the employers rules reasonably related to the business efficiency and performance the employer might reasonably expect from the employee;
3. Was an effort made before discharge to determine whether the employee was guilty as charged;
4. Was the investigation conducted fairly and objectively;
5. Did the employer obtain substantial evidence of the employee's guilt;
6. Where the rules applied fairly and without discrimination; and
7. Was the degree of discipline reasonably related to the seriousness of the employee's offense and the employee's past record?

When any one of the tests is not met, it indicates that just cause was not followed in disciplining the employee or just cause was seriously weakened because some arbitrary, capricious or discriminatory element was present.

#### 1. Was the employee forewarned the consequences of his or her actions?

This element has not been met by ODOT. Mr. Brown had been disciplined in the past by a written reprimand for absenteeism, but it had been for sick leave use, not FMLA. (Testimony of Brown; E-1). ODOT contends that sick leave abuse and FMLA abuse/misuse are one in the same. In fact, a number of times during the arbitration, ODOT referred to Mr. Brown's leave as "sick leave." This, in spite of the fact that the collective bargaining agreement ("CBA") specifies sick leave and FMLA leave as different leaves. (J-1; 29.04, 31.03). The CBA, 29.04(B), states that unauthorized use or abuse of sick leave will "effect corrective and progressive discipline." If, as ODOT contends, this was a misuse of sick leave, then ODOT violated the CBA because it did not follow its progressive discipline policy. It went from a written reprimand to termination. To further distinguish, sick leave is paid leave. Mr. Brown was on unpaid FMLA leave.

Regardless, the FMLA policy of ODOT does not mention it is one and the same as sick leave. (J-8). It specifies that an employee must use all of his sick, vacation and personal leave while on FMLA leave, even when the leave is to care for a sick family member, versus the employee's own illness. (Id.). Under ODOT's policy, an employee has no choice but to utilize all his sick leave while on FMLA leave. (Id.).

Blevins, Mr. Brown's supervisor, testified that he had talked to Mr. Brown on a number of occasions about his FMLA usage, but not one of these "counselings" was documented. (Testimony of Blevins). However, Doug Jansen, the union steward, testified that he was present with Mr. Brown any time there was a verbal counseling, and he has no recollection of Blevins mentioning Mr. Brown's FMLA usage. (Testimony of Jansen). In fact, the written reprimand was over sick leave usage (oral surgery), according to Jansen, not FMLA usage. For those absences, Mr. Brown actually produced excuses. (U-3). The other absence that resulted in his written reprimand was because his house had caught fire. (U-11). However, ODOT refused to accept either of these reasons.

ODOT's FMLA policy is flimsy at best. Nowhere does it specify you must come back to work when time permits while on FMLA leave. (J-8). Nowhere does it specify that you must take FMLA leave in specific amounts of time. (Id.). Nowhere does it specify that when you are caring for a family member and off on FMLA leave, you must remain at the side of that family member. (Id.). Nowhere does it specify that you are not able to do other things while on intermittent leave, including selling tickets at a ball game. (Id.). It is assumed that you must initially take the intermittent leave for the purpose you specify,

but it does not spell out that an employee can do nothing during the time of intermittent leave. (Id.). In fact, it doesn't specify that you can be disciplined for misuse of FMLA leave, and ODOT's progressive discipline policy does not spell out you can be disciplined *at all* for misuse of FMLA leave. (J-8; J-2).

In *Jennings v. Mid-American Energy Company*, 282 F. Supp. 2d 954, 961 (2003), the Plaintiff left work on intermittent FMLA leave because of her arthritis. On the way home, she stopped at Toys-R-Us, and was spotted by a co-worker. Later that night, she was seen shopping by another co-worker. She was later terminated for misusing intermittent FMLA leave. The United States District Court for the Southern District of Iowa found that "[t]he FMLA contains no requirement that an individual on intermittent medical leave must immediately return home, shut the blinds, and emerge only when prepared to return to work. Such a rule would be both unreasonable and impossible...." (See Attachment A). Hence, if the FMLA doesn't prohibit other activity while on FMLA leave, and ODOT does not have a policy which strictly prohibits other activity while on FMLA, an employee is not restricted from other activity while on leave.

The U.S. Department of Labor's own website specifies that there are no restrictions on how an employee can spend FMLA time, so long as the company's policy does not have restrictions. Under *elaws-Family and Medical Leave Act Advisor*, frequently asked questions, the question is posed: "Are there any restrictions on how I spend my time while on leave?" The answer: *"[e]mployers with established policies regarding outside employment while on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave. Otherwise [emphasis added], the employer may not restrict your activities......"* (See Attachment B).

When he requested FMLA, Mr. Brown fully intended to, and did, assist his step-father in his everyday activities, including taking him to the doctor's office. (Testimony of Brown, Whaley; U-7). Because of chance, and his step-father's low blood counts, the medical procedure was to last longer than expected. As a result, he was able to leave for a time and go to the ball park. There was never any intent on his part to defraud ODOT in any way.

Mr. Brown was never given adequate notice that he had to remain by his stepfather's side during any period he was on unpaid FMLA leave. The ODOT FMLA policy does not specify this, nor does Federal Law require it. ODOT fails Just Cause test 1.

**2. Are the employers rules reasonably related to business efficiency and performance the employer might reasonably expect from the employee?**

There is no question that ODOT's FMLA policy and progressive discipline policy are related to efficient business performance. There is a question, however, about ODOT's archaean investigation procedures. The Investigator started following Mr. Brown from his mother's home and not from Mr. Brown's home. (Testimony of Long; E-9). There was obviously an assumption by ODOT that Mr. Brown would, at a minimum, go to his mother's home on April 3. The investigation report contained a number of details, down to street names, but failed to realize there is no interchange to Interstate 75 from Clifton Road in Cincinnati. (E-9). Long also failed to realize (most likely because he didn't follow Mr. Brown) that the route he tracked Mr. Brown on, is the exact route to the doctor's office, taken by Mrs. Whaley every time she went with her husband to the doctor. (Testimony of Whaley). The report contained a number of detailed flaws, including a 90 minute time frame when the Investigator did not have Mr. Brown in his sight. (Id.). Long video taped Mr. Brown's truck near the Reds Stadium, but video taped the wrong man selling tickets. (U-2). Long testified that when Mr. Brown came to his parents' house, he was wearing blue jeans and a blue shirt. (Testimony of Long). However, Mr. Brown was in fact wearing a red sweat suit, as evidenced in the video and shown at the arbitration. (U-2; Testimony of Brown).

Based upon this spotty investigation, Reel determined he had caught Mr. Brown red handed. He conducted an interview where no video or audio tape was taken. (Testimony of Reel). The only record of the interview with Mr. Brown was through Reel's notes, which were not even copious. Reel had a doctor's note from Mr. Whaley's doctor stating that Mr. Brown had been there, yet Reel "chose not to check on the note." (Id.).

Such sloppy investigation and interview procedures cannot be said to be reasonably related to the efficient business practices of ODOT. ODOT fails Just Cause test 2.

**3. Was an effort made before discharge to determine whether the employee was guilty as charged?**

There was never any effort to determine whether Mr. Brown was guilty before he was discharged. While Mr. Brown did receive a hearing, the report of Long, adopted by Reel, and Reel's report to ODOT's Chief Legal Counsel, were accepted by the hearing officer. (J-4). Reel did not check with Mr. Whaley's doctor to determine if the note presented was in fact authentic.

(Testimony of Reel). The hearing officer did not even ask if the note had been looked into, or if Mr. Brown had actually gone to the doctor's office with his stepfather. (Testimony of Brown, Muenchen).

An assumption was made that Mr. Brown took FMLA with no intention of assisting his stepfather, and to "report off work under false pretense [sic] to continue his side business of ticket scalping while claiming legitimate use of sick leave." (ODOT opening statement). When asked by Reel in his interview, Mr. Brown told Reel he had been at the Reds Stadium on both days. He was not attempting to cover it up. However, no one ever bothered to check to see if he had been at the doctor's office with his stepfather. The assumption was that because he had gone to the Reds Stadium, he must have intended to do so the day before, and thus lied about why he was requesting FMLA leave.

Very little effort was made to determine whether Mr. Brown had intent to falsify his FMLA request. The easiest effort, contacting the doctor's office, was not even considered. ODOT fails Just Cause test 3.

**4. Was the investigation conducted fairly and objectively?**

The obvious answer to this is no. Carl Best approved leave for Mr. Brown after he had called Les Reel and asked him to have Mr. Brown followed. (U-8). The investigation done by Long was faulty. While he did succeed in learning that Mr. Brown had gone to the Reds Stadium to sell tickets while on FMLA, he failed to follow him the doctor's office to see if he did exactly what he said he was going to do when he applied for FMLA for April 3. (E-9).

Reel took Long's investigation report and ran with it. He called Mr. Brown to Columbus and goaded him into telling on himself. (E-11). A number of times during this interview he called Mr. Brown a liar, as evidenced by his own writing on his notes from the interview and from Mr. Brown's testimony. (Testimony of Brown; E-11). Reel told Mr. Brown he would likely resign as a result of the interview, and to get his papers in order. (Testimony of Brown). Reel also admitted in his testimony that he led Mr. Brown to catch him lying. (Testimony of Reel). Reel testified that he "chose not to check into the note" provided by Mr. Whaley's doctor's office, and that "once [Long] bought a ticket, confirmed it was on work time, [that] was all we needed." (Testimony of Reel). Based on the video taken by Long and presented at the arbitration, Long bought the ticket from the wrong guy. (U-2).

Reel's investigation interview was neither audio nor video taped. (Testimony of Reel). The only record of the investigation interview is Reel's handwritten notes that are vague at best. Still, Reel concluded that Mr. Brown was lying, regardless of what he was telling Reel, and forwarded his report on to Chief Legal Counsel.

The Hearing Officer determined that "there is just cause for disciplinary action," with no additional evidence. (J-4). She didn't ask about the doctor's note stating that Mr. Brown was present at the doctor's office on April 3. This decision was made in a one page synopsis and on the same day as the hearing. (Id.). This was not a very thoughtful decision.

Every decision made with regard to this termination was made based on the faulty investigation of Long and premature determination of Reel. None of it was done fairly and objectively, particularly when Reel said "all we needed" was for a ticket to be purchased. (Testimony of Reel). ODOT fails Just Cause test 4.

**5. Did the employer obtain substantial evidence of the employee's guilt?**

To establish guilt in this case, Mr. Brown had to intend to take FMLA unpaid leave to sell tickets, instead of for taking care of his stepfather. However, ODOT cannot show that was the case. Mr. Brown, on both days in question, was with his stepfather either at the house all day (March 31) or taking him to the doctor's office (April 3). His intent when he requested FMLA was to take care of his stepfather. (Testimony of Brown). In fact, the easiest way to prove he was not telling the truth was to contact the doctor's office where Mr. Whaley was being treated, and determine whether the note from it was valid, and whether Mr. Brown had been there. Yet this simple, possibly 15 minute task, was not done by ODOT. Every person involved that saw the doctor's note chose to ignore it.

Mr. Brown hid nothing when asked if he had been at the Reds Stadium. (E-11). He said he had been there, but he also said he had been taking care of his stepfather prior to going there. (Testimony of Brown; E-11). This didn't seem to matter. All that seemed to matter was making sure Mr. Brown was terminated.

Mr. Brown was not dishonest. When asked about the Reds Stadium he said he had been there on both days. (E-11). He also stated that he didn't have tickets to sell on either day, as he had made arrangements with a buddy of his to sell the tickets

for him. (Testimony of Brown). When he went to the Reds Stadium, he actually had to find his friend in order to help him sell the tickets. (Id.). Had Mr. Whaley's appointment been shorter in duration, he never would have gone to the Reds Stadium.

Mrs. Whaley testified that her son helped her on Monday, March 31 and on Thursday, April 3. (Testimony of Whaley). She testified that Mr. Brown had no other reason to go by her house on April 3, except to help her out with his stepfather. (Testimony of Whaley).

Long did not follow Brown to the doctor's office. Had he done so, he would have realized that Mr. Brown's mother was in front of him, and they both went to the doctor's office. Instead, he speculated as to Mr. Brown getting on the interstate and heading toward Cincinnati. (Testimony of Long; E-9). But Long also has a 90 minute gap in time when he didn't follow Mr. Brown. (E-9). Had he done that, he would have know Mr. Brown went to the doctor's office.

Reel took this investigation and thought he had Mr. Brown nailed down-except that Mr. Brown had actually gone to the doctor's office and helped his stepfather as he intended to do when he asked for leave the day before. Reel chose not to pursue this option. (Testimony of Reel).

There is no substantial evidence of Mr. Brown's guilt because there is no guilt. He never intended to use FMLA for anything but time to help his mother with his stepfather. Mr. Brown was not dishonest. Reel asserts that he was "repeatedly untruthful" with ODOT during the interview. He told Reel during the interview that he had been at the Reds Stadium. He also told him that prior to being at the Reds Stadium, he had been helping his stepfather. Reel's assertion is that Mr. Brown was lying because he didn't tell him about his vendor's license when Reel asked him if he had another job. (E-11). However, Mr. Brown didn't consider a vendor's license to sell tickets to be "another job." (Testimony of Brown). Reel repeatedly noted in his interview that Mr. Brown was "lying" or "that's a lie." which is not an objective opinion.

Mr. Brown did tell Mr. Reel that he was in the car with his parents, then said that he was following them in his truck. His testimony is understandable given the fact that he had been called a liar a couple of times already during the interview. (E-11). Not to mention Reel had told him at the beginning of the interview he would likely resign so he needed a union representative present. (Testimony of Brown).

There is no substantial evidence because the Grievant did exactly what he said he would do when he took leave, and that was take care of his stepfather. ODOT fails Just Cause test 5.

**6. Were the rules applied fairly and without discrimination?**

The rules were not applied fairly and without discrimination by ODOT. ODOT has a Progressive Discipline Policy and the CBA has a Progressive Discipline section. (J-1; J-2). However, neither was followed with Mr. Brown.

Mr. Brown has one other discipline that can be considered in his termination. (E-1). It is a written reprimand for leave abuse, but it was disputed by the Grievant. (U-3; U-11). When this disciplinary action occurred, instead of suspension or another written reprimand, ODOT chose to terminate a 16 year employee. This is contrary to both Progressive Discipline policies.

Mr. Brown was also denied the opportunity to participate in an Employee Assistance Program ("EAP"). (Testimony of Muenchen). According to the CBA, 24.09, an EAP is an alternative to discipline of an employee. When Mr. Brown was at his hearing on May 28, 2003, Mike Muenchen, the AFSCME staff representative who was representing Mr. Brown at the time, tried to get ODOT to allow him to do an EAP, in accordance with the contract, but ODOT would not let him. (Testimony of Muenchen; U-6). Mr. Muenchen testified that he had helped a number of other ODOT employees get into EAP's as an alternative to disciplinary action. (Testimony of Muenchen). He also testified that most of these EAP's had to do with discipline for paid leave abuse, not unpaid leave, and hence, he thought it was even more appropriate here, because Mr. Brown was on unpaid leave. (Testimony of Muenchen).

Mr. Muenchen also testified he didn't think Mr. Reel's interview was fair. He felt that Reel was accusing Mr. Brown of dishonesty, but that his line of questioning of Mr. Brown was deceiving because he told Mr. Brown he was under surveillance, then walked him into March 31, implying that Mr. Brown had been under surveillance on March 31, which was false. (Testimony of Muenchen). Mr. Munchen felt that during Mr. Brown's interview with Reel, Mr. Brown was forthcoming about the fact he was at the Reds Stadium. (Id.). He felt that Reel tried to define Mr. Brown as a liar by splitting hairs over the time frames mentioned (+/- 2 hours) and a Mr. Brown's second "job" as a ticket scalper. (Id.).

Doug Jansen, the local union steward, testified that it was common practice for employees to take sick leave and not to come back from work, even if they are feeling better or their appointment is done. (Testimony of Jansen). He stated that given the nature of field work, driving out to Lebanon and then driving out to the location of the team didn't allow enough time to do work, so most times, employees would not come back. (Id.). He said employees do everything on sick leave from getting haircuts to going to the grocery. (Id.). He also testified that progressive discipline was not followed in Mr. Brown's case. (Id.).

No employee has ever been terminated from ODOT for falsifying FMLA requests. Over the past three years, the few employees who have been terminated for violations of Directive WR-101, #18 or #25, were terminated because of other factors including violations of #18 and #25, or more severe acts than those Mr. Brown is accused of doing. (U-5). Of other disciplinary actions over the past three years for violations of either #18 or #25, or both, the most discipline ever received by an employee was a suspension. (U-12; **exclude Wiley, Litzenberg, Eichel [these were grievance settlements]**).

Mr. Muenchen testified to the inconsistencies between Mr. Brown's disciplines and the discipline of other employees. (Testimony of Muenchen). Mr. Muenchen represented another employee, Kenny Dawes, who had called into work to say he would be in late. (Id.). Dawes never showed up for work, and no one knew his whereabouts. (Id.). However, Dawes only received a counseling from his supervisor. (Id.). He noted there were also inconsistencies with regard to the weight given to Mr. Brown's years of service. (Id.). He said that years of service are always considered to mitigate disciplines, and here, Mr. Brown's were not. (Id.).

Based upon the past disciplines of other employees and the unfair investigation interview that led to Mr. Brown's discipline, Mr. Brown's termination was neither fair nor consistent. ODOT fails Just Cause test 6.

**7. Was the degree of discipline reasonably related to the seriousness of the employee's offense and the employee's past record?**

The only discipline that can be included in Mr. Brown's past record, is his written reprimand from July 2002. (J-1, §24.06). According to the CBA, §24.02, the Employer "will follow the principles of progressive discipline." ODOT's own policy states the progressive discipline for a first violation of Directive WR-101, #18 is suspension/removal. (J-2). Based upon the fact this was the first time Mr. Brown had been accused of falsifying an official document, suspension should have been the worst discipline administered-this assuming Mr. Brown intended to falsify the FMLA leave request. ODOT's policy on progressive discipline for a first violation of Directive WR-101, #25 is discretionary. (J-2). Given the tone and direction of the interview wherein Mr. Brown was allegedly "dishonest," the penalty, if any, should never have been so severe.

Additionally, ODOT's own policy states: "ODOT is dedicated to the policy of progressive constructive discipline. Disciplinary actions should be imposed at the lowest level possible with the intent of giving the employee the opportunity to correct his/her behavior so long as the discipline is commensurate with the infraction." (J-2). ODOT has failed to follow its own policy. ODOT chose to give Mr. Brown the maximum penalty for both infractions.

Mr. Brown has also been an exemplary worker. Based upon his evaluations, all done or signed off on by Blevins, he worked well with others, was good at his job, and was learning new tasks. (U-1). However, all of this was ignored when Mr. Brown was disciplined.

Mr. Brown could not help his personal circumstances and had no choice with regard to helping care for his mother and stepfather. He did not violate the FMLA policy as it stands currently. He had the appropriate medical documentation on file to describe why he needed intermittent leave. (U-9). He also had the appropriate medical documentation to show he did accompany his mother and stepfather to the doctor's office on April 3. (U-7). However, all of these things were ignored by ODOT. They wanted him terminated, and they acted inappropriately in meeting that end. ODOT fails Just Cause test 7.

## CONCLUSION

ODOT has the burden of proving that Mr. Brown's termination was for just cause. To show just cause, ODOT must meet the established seven tests. ODOT has failed to do so. They arbitrarily and quickly terminated a 16 year ODOT employee without regard for his personal circumstances, his tenure with ODOT, the discipline of other employees for the same violations, or the truth. They have caused Mr. Brown a great deal of financial strain and emotional distress.

The grievance should be upheld, and Mr. Brown should be reinstated immediately, with back pay and benefits from the date of termination to the date of this decision. He should also receive attorneys' fees and expenses. Had ODOT followed proper procedure, Mr. Brown would not be in this position.

The Grievant respectfully requests that the grievance be affirmed and that this Arbitrator maintain jurisdiction for up to 60 days.

## DISCUSSION

Generally, in an employee termination case, an arbitrator must determine whether an employer has proved clearly and convincingly that a discharged employee has committed an act warranting discipline, and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 147, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen, and Helpers of America*, 102 Lab. Arb. 555 (1994). Most arbitrators will not substitute their own judgment for that of an employer unless the penalty imposed is deemed excessive given any mitigating circumstances. *Verizon Wireless and CWA, Local 2336*, 117 Lab. Arb. 589 (2002). However, any judgment rendered must be based upon the Collective Bargaining Agreement and any applicable law. The applicable law in this case is Family Medical Leave Act of 1993 (herein "FMLA"). The parties by reference have incorporated the law into the Collective Bargaining Agreement. In Article 31.05 the parties have agreed as follows:

31.05 Application of the Family and Medical Leave Act

> *"The Employer will comply with **all provisions** of the Family and Medical Leave Act. For any leave which qualifies under FMLA, the Employee may be required to exhaust all*

*applicable paid leave prior to the approval of unpaid leave" [emphasis added].*

It is clear that during a number of the hours the Grievant was on approved FMLA leave during the days of March 31, and April 3, he also engaged in his private or supplemental employment of scalping tickets outside of the Red's baseball park. It is also an undisputed fact that the Grievant has a vendor's license to engage in such activity and has possessed it for several years. As stated above, the Grievant was terminated for:

**#18 Falsifying any official documents**

**# 25 Violation of ORC 124.34-failure of good behavior, dishonesty**

The record supports the Union's contention that the Grievant applied for and was approved to take intermittent FMLA leave to assist in the care of his stepfather on March 31 and April 3, 2003 (Ux 8, Ex 3, 4, 6). In this case, the Employer's investigation failed to produce conclusive evidence, that on either March 31 or April 3, 2003, the Grievant did not provide some assistance to his stepfather and mother. On the other hand, it is also clear that during a substantial portion of time while on FMLA leave on March 31, 2003 and April 3, 2003 the Grievant was engaged in his supplemental employment of scalping tickets to Red's games (See Ex 11, Reel's and Brown's testimony).

From this arbitrator's extensive experience with the parties and the Collective Bargaining Agreement, it is reasonable to conclude that engaging in supplemental employment while on sick leave is grounds for disciplinary action under Article 29.04 of the Collective Bargaining Agreement. However, the instant matter deals with FMLA leave and in Article 31.05 of the Collective Bargaining Agreement the Employer has agreed it will follow all provisions of the Act. Therefore, the question is whether engaging in outside employment during intermittent FMLA leave is a sufficient basis to terminate the Grievant under the provisions of FMLA.

The record also establishes the fact the Grievant was warned not to engage in his supplemental job of ticket scalping while on approved sick leave (See Ex 2, and testimony of Carl Best and Union Steward Jansen). However, there was no evidence submitted that ODOT has in place a uniformly applied, agency-wide no work policy regarding approved leaves (including FMLA), upon which this supervisory warning was based. Absent proof of fraudulently obtaining an FMLA leave, the existence and uniform enforcement of such a policy is critical to the ability of an employer to deny an employee his/her job following intermittent FMLA leave (*Pharakhone v. Nissan North America, Inc.*, 324 F.3d 405 (6th Cir. 2003)).

While there is no question that the Collective Bargaining Agreement extensively addresses the inappropriate use of sick leave and penalties for

sick leave abuse (Article 29.04, Jx 1), there is no evidence to demonstrate that the parties have agreed that FMLA leave, if obtained in accordance with the law, is subject to the same contractual or managerially determined conditions as is the unauthorized use of sick leave and/or abuse of sick leave (Article 29.04). Given the placement and wording of Article 31.05, it appears the parties have distinguished leave under FMLA from all other leaves.

Arguably it may be reasonable to assert that engaging in gainful employment while on FMLA leave is instinctively improper, the current state of the law and court rulings need to be complied with in meeting the contractual obligations contained in Article 31.05. In order for an employer to assert a superior right over the legal right of an employee (under FMLA) to be reinstated to his job following FMLA leave, an employer must have established policies in place prohibiting engagement in gainful employment while on approved leaves, and these policies must be uniformly applied.

According to FMLA regulations an employer may refuse an employee his/her right to reinstatement as follows:

TITLE 29 -- LABOR
SUBTITLE B -- REGULATIONS RELATING TO LABOR
CHAPTER V -- WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR
SUBCHAPTER C -- OTHER LAWS
PART 825 -- THE FAMILY AND MEDICAL LEAVE ACT OF 1993
SUBPART C -- HOW DO EMPLOYEES LEARN OF THEIR FMLA RIGHTS AND OBLIGATIONS, AND WHAT CAN AN EMPLOYER REQUIRE OF AN EMPLOYEE?

29 CFR 825.312

§ 825.312 Under what circumstances may a covered employer refuse to provide FMLA leave or reinstatement to eligible employees?

(a) If an employee fails to give timely advance notice when the need for FMLA leave is foreseeable, the employer may delay the taking of FMLA leave until 30 days after the date the employee provides notice to the employer of the need for FMLA leave. (See § 825.302.)

(b) If an employee fails to provide in a timely manner a requested medical certification to substantiate the need for FMLA leave due to a serious health condition, an employer may delay continuation of FMLA leave until an employee submits the certificate. (See § § 825.305 and 825.311.) If the employee never produces the certification, the leave is not FMLA leave.

(c) If an employee fails to provide a requested fitness-for-duty certification to return to work, an employer may delay restoration until the employee submits the certificate. (See § § 825.310 and 825.311.)

(d) An employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period. Thus, an employee's rights to continued leave, maintenance of health benefits, and restoration cease under FMLA if and when the employment relationship terminates (e.g., layoff), unless that relationship continues, for example, by the employee remaining on paid FMLA leave. If the employee is recalled or otherwise re-employed, an eligible employee is immediately entitled to further FMLA leave for an FMLA-qualifying reason. An employer must be able to show, when an employee requests restoration, that the employee would not otherwise have been employed if leave had not been taken in order to deny restoration to employment. (See § 825.216.)

(e) An employer may require an employee on FMLA leave to report periodically on the employee's status and intention to return to work. (See § 825.309.) If an employee unequivocally advises the employer either before or during the taking of leave that the employee does not intend to return to work, and the employment relationship is terminated, the employee's entitlement to continued leave, maintenance of health benefits, and restoration ceases unless the employment relationship continues, for example, by the employee remaining on paid leave. An employee may not be required to take more leave than necessary to address the circumstances for which leave was taken. If the employee is able to return to work earlier than anticipated, the employee shall provide the employer two business days notice where feasible; the employer is required to restore the employee once such notice is given, or where such prior notice was not feasible.

(f) An employer may deny restoration to employment, but not the taking of FMLA leave and the maintenance of health benefits, to an eligible employee only under the terms of the "key employee" exemption. Denial of reinstatement must be necessary to prevent "substantial and grievous economic injury" to the employer's operations. The employer must notify the employee of the employee's status as a "key employee" and of the employer's intent to deny reinstatement on that basis when the employer makes these determinations. If leave has started, the employee must be given a reasonable opportunity to return to work after being so notified. (See § 825.219.)

**(g) An employee who fraudulently obtains FMLA leave from an employer is not protected by FMLA's job restoration or maintenance of health benefits provisions. [emphasis added]**

**(h) If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (g) of this section. [emphasis added]**

In 1993 Congress enacted the Family and Medical Leave Act, 29 U.S.C. § 2601 et seq., in light of its finding that, "there is inadequate job security for employees who have serious health problems that prevent them from working for temporary periods." 29 U.S.C. § 2601(a)(4). In order to address this problem, Congress essentially promulgated a set of entitlements that

benefit eligible employees who meet the statutory requirements set forth in 29 U.S.C. § 2611(2). Chief among these entitlements is the right to take up to twelve weeks of unpaid annual leave for certain medical and family circumstances, including serious health conditions faced by an employee or one of the employee's immediate family members. 29 U.S.C. § 2612(a)(1). Another entitlement is the right to take intermittent leave under certain circumstances, such as to attend appointments with a health care provider for necessary treatment of a serious health condition pursuant to 29 U.S.C. § 2612(b). *Hodgens v. Gen. Dynamics Corp.*, 144 F.3d 151, 159 (1st Cir. 1998). "These rights are essentially prescriptive, setting substantive minimums for conduct by employers." *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712-13 (7th Cir. 1997).

Under 29 U.S.C. § 2612(a)(1)(C), an eligible employee is entitled to take family medical leave "in order to care for the spouse, or a son, daughter, or parent of the employee, if such spouse, son, daughter, or parent has a serious health condition." Under U.S.C. § 2611(11), a "serious health condition" means "an illness, injury, impairment, or physical or mental condition that involves either (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." Under the FMLA regulations, "continuing treatment by a health care provider" includes:

> *A period of incapacity (i.e., inability to work, attend school, or perform regular daily activities due to the serious health condition,*

*treatment therefore, or recovery there from) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition that also involves: (A) treatment two or more times by a health care provider, or (B) treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of a health care group.*

29 C.F.R. § 825.114.

Particularly germane to the instant matter are the provisions that provide protection for employees exercising their rights. An employee who takes FMLA leave is entitled "to be restored by the employer to the position of employment held by the employee when the leave commenced." 29 U.S.C. §§ 2612(a)(1)(A), 2614(a)(1)(A). Under 29 U.S.C. § 2615(a)(1), an employer may not "interfere with, restrain, or deny the exercise of or attempt to exercise any FMLA right." And pursuant to 29 U.S.C. § 2615(a)(2), an employer may not discharge or in any other manner discriminate against any individual for opposing any practice made unlawful by the FMLA. Claims brought under § 2615(a)(2) are generally referred to as "discrimination" or "retaliation" claims. The FMLA authorizes an employee to seek redress in a private civil action. 29 U.S.C. § 2617.

ODOT contends that it had a legitimate, non-discriminatory reason for terminating the grievant based on his alternative income-generating activities on specific occasions during the time that he was on approved intermittent FMLA leave. But, as one federal court has recognized, there is

no provision in the FMLA restricting an employee's use of FMLA to the exclusive pursuit of medical treatment. "The FMLA leave contains no requirement that an individual on intermittent medical leave must immediately return home, shut the blinds, and emerge only when prepared to return to work." *Jennings v. Mid-American Energy Co.*, 282 F. Supp. 2d 954, 961 (S.D. Iowa 2003).

In a 2003 Sixth Circuit case, *Pharakhone v. Nissan North America, Inc.*, 324 F.3d 405 (6th Cir. 2003), an employee who took FMLA leave to assist in caring for his wife and new baby was terminated because some of the leave time was used by the employee to help manage a restaurant that his wife had recently purchased. The court in that case upheld the employer's termination of the employee because the employee handbook contained a policy prohibiting unauthorized work while on FMLA leave. The court noted that an employer need not reinstate an employee if application of a uniformly applied policy governing outside or supplemental employment resulted in the employee's discharge. The right to implement and enforce such a policy is based on the provisions of 29 C.F.R. § 825.312(h), which provides:

> *If the employer has a uniformly applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer, which does not have such a policy, may not deny benefits to which an employee is entitled under FMLA on this basis unless the FMLA leave was fraudulently obtained as in paragraph (g) of the section.*

An employer can justify its discharge of an employee based on his violation of a company-wide no-work policy that is documented, shared with all employees, and consistently applied. In the absence of such a policy, ODOT was required to meet the Grievant's entitlement, as a qualified employee, to be restored to his original or an equivalent position upon his return from leave.

However, what is also present in this case is the Grievant's behavior during the investigation conducted by Les Reel. I concur with the Union's criticism regarding the questionable reliability of note taking versus written statements and recorded interviews. Often the nuances and qualifying utterances that accompany witness statements are missed or omitted when only interviewer notes are relied upon to validate statements. However, I found Mr. Reel's testimony, along with that of the Grievant, substantiated the fact that the Grievant was evasive and untruthful in his initial responses to some of Mr. Reel's questions. During Reel's investigation the Grievant first stated he left his stepfather/mother's house on 3/31/03 at 1:30 p.m. to go to the stadium to sell tickets. He later admitted the time was 11:50 a.m. (See Ex 11, p. 17, 19). In addition, the Grievant also stated he drove his parents to his stepfather's doctor on April 3, 2003, and later stated he drove separately behind them in his truck (Ex 11, p. 20).

The Grievant was initially untruthful in some of his responses, and it was only Reel's persistence that helped to discern the truth. Under the Employer's Disciplinary Guidelines (Jx 2), I find this behavior to be sufficient grounds to apply progressive discipline, but insufficient in gravity to support the termination of a sixteen (16) year employee, who has consistently received satisfactory performance ratings (Ux 1). In his most recent evaluation, his long-time supervisor stated (to justify his rating), "*La'Mon is doing a good job*" (Ux 1, 12/3/02 evaluation).

However, it should be made clear to the Grievant that if ODOT would have had in place a non-work policy that met the test of Section (h) of §825.312 of the FMLA (as currently interpreted by the Sixth Circuit (*Pharakhone v. Nissan North America, Inc.*, 324 F.3d 405), the decision in this case would have been decidedly different.

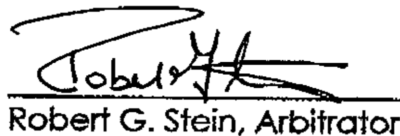
**AWARD**

The grievance is sustained in substantial part.

1. The Grievant shall be returned to work no later than two (2) pay periods from the date of this Award. He shall be made whole for all lost wages and benefits, less three (3) workdays, and shall have his seniority restored to the date of his termination within the same time period. Record of his termination shall be removed from his personnel file, and it shall be replaced with the progressive disciplinary step of a three (3) day suspension for violating WR-101, Rule # 4, Interfering with and/or failing to cooperate in an official investigation.

2. The Arbitrator shall retain jurisdiction over the implementation of this Award for a period of sixty-60) calendar days.

Respectfully submitted to the parties this 29th day of April, 2004.



Robert G. Stein, Arbitrator



FROM : CHAPHARTMANSTEIN/RGSTEIN PHONE NO. : 330 676 1199 Apr. 30 2004 12:54PM P3