VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION,	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	
and	*	Case No. 33-00-20070315-0051-01-05
	*	
	*	Donnia Pearson, Grievant
OHIO VETERANS HOME	*	Removal
	*	

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Robert Robinson, Staff Representative
OCSEA/AFSCME Local 11/AFL-CIO

For the Ohio Veterans Home:

Joe Trejo, Labor Relations Specialist
Ray Mussio, Labor Relations Specialist
Office of Collective Bargaining

#992

I. HEARING

A hearing on this matter was held at 9:20 a.m. on September 27, 2007 at the Ohio Veterans Home in Sandusky, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties by direct appointment pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO ("Union") were Robert Boger, Lydell Hollinger, Vanessa Brown, Frank Green, Dorothy Miller, and the Grievant, Donnia Pearson. Testifying for the Ohio Veterans Home ("Agency") were Bill Mayo, Denise Griffaw, Craig Selka, John Cook, and Donna Green. A number of documents were entered into evidence: Joint Exhibits 1-9, Union Exhibits 1-3 and Management Exhibits 1-4. The oral hearing was concluded at 3:05 p.m. Post-hearing briefs were timely filed and exchanged by the Arbitrator on October 19, 2007, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. BACKGROUND

At the time of her removal on March 15, 2007, the Grievant was a Custodial Worker at the Ohio Veteran's Home, an agency of the State of Ohio which has a collective bargaining agreement with OCSEA governing the terms and conditions of employment of State employees in numerous classifications. Her record from date of hire, September 14, 1998, is clean until July 2006 when she began to accumulate the following attendance-related discipline, most of which went ungrieved.

Date	Discipline	Infraction
7/13/06	1-day paper suspension	AWOL
9/12/06	Counseling	A-02 Excessive Tardiness
11/06/06	Verbal reprimand	A-02 Excessive Tardiness
11/20/06	Written reprimand	A-02 Excessive Tardiness
12/12/06	3-day fine suspension	AWOL and Improper Conduct Vacated by NTA decision 4/05/07
1/29/07	4-day suspension	AWOL

The incidents leading to her removal occurred on February 22 and March 1, 2007, before her grievance on the three-day fine was heard. The first incident happened shortly after the Grievant's scheduled lunch break which was set for 12:00 noon to 12:30 p.m. A few minutes after 12:30 she was seen by Housekeeping and Laundry Manager William Mayo, and Housekeeping Supervisor Denise Griffaw, off her assigned work area (3-South) walking with her sister on the second floor near the treasury department. Both supervisors said something to her but neither the Grievant nor her sister answered and so they followed the two sisters as they went down the staircase to the first floor. On the way they ran into two other managers, Greg Selka and John Cook, who had also observed the two women and had noted the time to be 12:38 (by Cook's watch) as the sisters entered the tunnel. Mayo and Griffaw caught up with the sisters at the storeroom where the Grievant said she had gone to get the floor machine. Her sister admitted they were out of their work area and that the time was 12:35 p.m. The next day Mr. Mayo sought a pre-disciplinary meeting for a violation of Rule A-06, extending lunch or break, or being out of the work area without permission.

After the pre-disciplinary hearing was scheduled but before it was held, Supervisor Brenda Jones saw the Grievant on the second floor lobby allegedly at 7:10 a.m. on March 1, ten minutes into her shift and after she had punched in (at 7:01) but before she had gotten to her work unit on the third floor. She had not yet exhausted her sixty minutes of annual grace time, so she was not charged with punching in late. She was, however, charged with being out of her

work area without her supervisor's permission. This infraction was added to the charge arising from the February 22 incident after the video confirmed that she did not go directly to her work area after clocking in, but left and then entered by another door several minutes later.

At her pre-disciplinary meeting on March 5, the Grievant said that on February 22 she had gone directly from lunch to get the floor appliance, and that she was being singled out because others do not have to ask permission to get this machine. As to the March 1 incident, she admitted she was late for work. She stated that after she clocked in she went back out to park her car and then ran into the housekeeping supervisor at the elevator when she was headed to her unit. The pre-disciplinary hearing officer found that her explanations did not fit the facts and so found just cause for discipline. The Grievant was accordingly removed on March 15, 2007 because at the time this was her "4th corrective action at the level of fine or suspension." (Jt. Ex. 9)

A grievance protesting lack of just cause was filed that same day and subsequently fully processed to arbitration where it presently resides without procedural defect on the stipulated issue of: *Was there just cause to terminate the Grievant, Donnia Pearson? If not, what shall the remedy be?*

III. PERTINENT PROVISIONS OF THE CONTRACT

ARTICLE 24 - DISCIPLINE

24.01 - Standard
Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

IV. POSITIONS OF THE PARTIES

Position of the Agency

Extended Lunch Break Issue

The Agency argues that the Grievant was to be working at 12:30 as stated even by the Union witnesses Hollinger and Weikle. The Grievant, too, was on notice of this fact. Yet she clearly was not on her unit at this time nor did she have permission of her supervisor to be off it.

The Agency suggests that the Grievant knew she was caught and so made up the excuse of going to get the scrubber.

With respect to the Union's claims, the Agency counters in the first place that while it is true the clocks are not reliable, the Grievant admitted she did not leave the break room until 12:30. Second, whether she needed permission to get the floor machine is irrelevant because had she been in the storage room at 12:30 she would have been working, not taking an extended break. Third, discharge is not too severe a penalty in this case. Union witness Boger testified there were removals based on minor infractions after only one or two priors. In the instant case, even though her prior three-day suspension was set aside in arbitration, at the time of her removal she had felt the full impact of the progression up through her ungrieved four-day suspension.

Car Parking Issue

The Agency submits that the video clearly shows the Grievant entering to punch in at 7:01 and then leaving to return through the basement several minutes later. She admitted as much at her pre-disciplinary hearing and in arbitration. The Union's claim that she did not know this was wrong is beneath a response. The Union's disparate treatment argument was unproven as its witnesses either could not name names or, when they did, were of old unreported incidents, of employees in other classifications not similarly situated or only perhaps resulted in discipline. Finally, the allegedly missing witness statement was provided to the Union by the witness, not the Agency, at the Grievant's request and is, by its author's testimony, a false statement.

The Agency concludes that it had just cause to remove the Grievant. Her actions on both days justified removal. The Agency could have proceeded separately on each incident. That it consolidated the two means the second incident should be treated as an aggravating circumstance. Since the Grievant rejected the offer of a last chance agreement she left the Agency no choice but to remove her.

Position of the Union

The Union submits that the charges against the Grievant in both incidents show the length the Agency will go to discipline or terminate someone for they rest entirely on lies, deception, manipulation of the facts and intimidation.

Extended Lunch Break Issue

First, the Grievant did as all do, going for a sweeper after lunch without having to call for permission. Second, the policy memos on which it relied were enforced for only short periods of time. Third, the Agency went solely by John Cook's watch which was claimed to show 12:38 whereas Mayo testified Dorothy Miller admitted it was 12:35. This proves there are serious discrepancies in the clocks which surveillance cameras would have revealed had they been used.

Car Parking Issue

The Union admits that punching in before parking should never have been an accepted practice. It contends the practice nevertheless continues even though employees were reluctant to testify, and those who did testify were guarded to protect others from discipline. Had this not been an accepted practice, the Grievant had no reason to do it because she still had plenty of time in her sixty-minute bank to park before punching in.

Admitting that Sims' written statement was submitted in error, the Union urges the Arbitrator to rely on the Grievant's and Sims' honest testimony. The bottom line is that neither one of these thought clocking in before parking was a problem because they saw Management tolerating what others do. The Union says the cameras should have been used to document who was on the elevator as well as it would have resolved discrepancies in the time and who was there. Moreover, the Agency has treated these two employees differently. William Mayo got a copy of the video right after the Grievant was reported. He thus saw Sims coming in seconds before the Grievant, leaving and then returning. He could have charged her then but did not do so until after the Grievant's pre-discipline and removal papers. The Union concludes that this is just another case of lax enforcement at this agency.

As to remedy, the Union says this should have been about a fine or suspension. For years the Agency has imposed three disciplines at the level of fine or suspension before moving to removal for minor infractions. Every single infraction in her file is of this type, and once the three-day fine was overturned in arbitration she should have had her discharge reduced to a suspension.

The Union concludes that there was no just cause to discipline the Grievant. It asks that it be overturned and the Grievant made whole.

V. OPINION OF THE ARBITRATOR

Even as some Union witnesses testified, a lunch break from 12 noon to 12:30 p.m. includes the time to travel to and from the work assignment. Were this not the case, employees at the Sandusky facility could lunch in Cleveland or Columbus and provide few productive hours for their day's pay. The Grievant herself admitted she did not leave the break room that day until 12:30. Inasmuch as that was when she should have been back on her unit or in the storage room collecting the machine, she extended her break by the amount of the travel time, 5-8 minutes depending on the watch used. Given that within the past year she had been counseled and reprimanded several times for tardiness and absenteeism, she should have known she was at risk of further discipline if she was caught. Discipline is accordingly justified.

With respect to the second incident which occurred only a week later, the Grievant unquestionably left to park her car after punching in at 7:01. Either the cameras or the time clock (or both) are off because the camera shows her entering the main lobby after 7:01. This discrepancy is irrelevant inasmuch as the Grievant admits that she left after punching in to park her car instead of going directly to her work assignment. But the camera reveals two employees leaving after punching in, the Grievant and Leah Sims. Yet Ms. Sims was not disciplined for it until after the Grievant was removed and her grievance filed even though Housekeeping and Laundry Manager Mayo had viewed the video and seen both women leaving the main lobby to go outdoors. The evidence of there being other housekeeping employees routinely congregating

in the lobby area after punching in and being seen by Mr. Mayo is inconclusive, but the fact that this one employee, who was unmistakably on the same elevator as the supervisor who reported the Grievant but did not also report Ms. Sims until weeks later when the Grievant's removal was at stake, and then that the reviewing manager also took no action against Sims when the evidence was first in front of him is per se disparate treatment. Thus, while discipline is warranted for the lunch break incident, none is for the parking incident.

As to remedy, the Agency argues removal is justified despite the December 12, 2006 three-day fine having been overturned inasmuch as the Grievant "felt the full force" of her disciplinary actions during the pendency of this case. I disagree. Yes, the Grievant no doubt knew she was on a path to removal, but she also had some kind of expectation of being exonerated at her NTA. Moreover, Arbitrator Pincus' make whole remedy demands that the fine not be counted in the progression. Therefore, the Grievant in the instant case was discharged without just cause and will receive a five-day suspension.

VI. AWARD

There was not just cause to terminate the Grievant, Donnia Pearson. The Grievant will be reinstated to her former position with a five-day suspension. The Grievant is granted full back pay and benefits less five (5) days. The Arbitrator retains jurisdiction for a period of sixty (60) days on the sole matter of remedy.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
February 14, 2008

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