

#17

**IN ARBITRATION PROCEEDINGS PURSUANT TO  
AGREEMENT BETWEEN THE PARTIES**

In the Matter of a Controversy Between:

The Office of the Ohio Attorney General	)	
	)	FMCS 16-54290-6
and	)	
	)	ARBITRATION
Ohio Civil Service Employees Assn.	)	
AFSCME Local 11	)	
	)	<u>OPINION AND AWARD</u>
	)	
	)	August 4, 2017
RE: Suspension, Darnell Truett	)	

Appearances

For the Employer:      Rory Callahan, Esq., AAG  
                                 Erin Butcher, Esq., AAG

For the Employee  
Organization:            Deborah Bailey, OCSEA Staff Rep.  
                                 DeBorah Moore-Payne, Steward, Legal Screening

RECEIVED / REVIEWED  
AUG - 4 2017  
OCSEA - OFFICE OF  
GENERAL COUNSEL

**Richard P. Gortz, Arbitrator  
30799 Pine Tree Rd.  
Pepper Pike, OH 44124**

## Introduction

Mr. Darnell Truett (“Grievant”) is a twenty-year employee of the Office of the Ohio Attorney General (“OAG” or “Employer”), employed in the Cleveland office as an office services specialist. According to the Position Description for his job, he is to pick up and sort mail, distribute mail to all sections of the office, operate postage machines, order supplies to maintain a full stockroom, operate copier, move packages and materials. Among his duties are; maintain the department vehicles (deliver to garage for oil changes, repair work and warrantee work), fill with fuel, wash vehicles, check and clean the vehicles, enter vehicle maintenance records into the computer system, as well as to deliver documents to various courts and other OAG offices.

Mr. Truett is a member of the bargaining unit represented by Ohio Civil Service Employees Association, AFSCME Local 11 (“OCSEA” or “Union”), and covered under the terms and conditions of a collective bargaining agreement (“CBA”), which at the time of the incident referred to herein, was in effect from September 1, 2012, through August 31, 2015.

On June 5, 2015, the Grievant was notified by the Employer that he was suspended for ten (10) days, to be served as an “at-work” suspension for “refusal to follow instructions of a supervisor, continued neglect of duty, excessive leave use, unjustified poor attendance, inefficiency, leaving a work area while on duty without prior approval from a supervisor, and general failure of good behavior”. In addition to the suspension he was required to attend professional development training as proscribed by the Human Resources Department. He was further

required to report to work on time, to work full days and/or comply with training requirements at peril of further discipline, up to and including removal.

On June 5, 2015, the Union filed a grievance of “violation of Article 15.2, 3.1, and any other relevant section of the Collective Bargaining Agreement”. The Union further claimed in the grievance, “Union grieves Management for the above violation of the contract. Union makes such claim when employee received a 10-day working suspension for the violations contained in the Notice of Discipline received on June 5, 2015”.

After processing through the grievance procedure without settlement, the undersigned was selected through a list provided by the Federal Mediation and Conciliation Service on December 20, 2016. After several postponements due to unavailability of various witnesses and a suitable site for hearing, the hearing was held in the State of Ohio Office Building in Cleveland on July 19, 2017.

Each party was ably represented, the Employer by Rory Callahan, Esq., an Assistant Attorney General, and the Grievant by Deborah Bailey, OCSEA Staff Representative.

Also present at the hearing were: For the Employer: Erin Butcher, Esq., Assistant Attorney General, Sheila Nowacki, OAG Office Manager and Kathleen Madden, Director of Human Resources. For the Union: DeBorah Moore-Payne, Steward, Legal Screening and Darnell Truett, Office Services Specialist, Grievant.

Witnesses were sworn.

The parties agreed that the Arbitrator was properly appointed, and that the issue was properly before the Arbitrator who is empowered under the CBA to render a final and binding decision. Parties waived any procedural or substantive objections to the hearing.

### **Issue before the Arbitrator**

The parties agreed that the issue before the arbitrator is:

*Was the grievant disciplined in the form of a ten (10) day working suspension imposed on June 5, 2015 for just cause? If not, what shall the remedy be?*

Joint exhibits submitted as follows:

- J-1: CBA dated September 1, 2012, through August 31, 2015
- J-2: Cover email from Anitra King, HR Associate, to Darnell L. Truett dated Friday, April 17, 2015, and attached Notice of Recommended Discipline and Pre-Disciplinary Conference from Kathleen C. Madden, Director of Human Resources to Darnell Truett.
- J-3: Notice of Discipline dated June 5, 2015, from Kathleen C. Madden, Director of Human Resources to Darnell Truett.
- J-4: Grievance of Darnell Truett dated June 5, 2016.

**Relevant sections of the CBA:**

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

- (1) Oral reprimand
- (2) Written Reprimand
- (3) Suspension
- (4) Termination

However, discipline imposed shall be commensurate with the offense.

**Article 3.1, Non-Discrimination**

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States, the State of Ohio and/or the most current Executive Order on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, or sexual orientation. The Employer prohibits sexual harassment and shall continue to take action to eliminate sexual harassment in accordance with prevailing and applicable federal and state laws. No employee shall be discriminated against, intimidated, restrained, harassed, coerced in the exercise of rights granted by this Agreement.

The Employer and the Union will promote the full realization of equal opportunity in state service through the recruitment and retention of a qualified, diversified work force. Equal Opportunity policies shall be an appropriate subject for Labor-Management Committee consideration.

The Employer may undertake reasonable accommodations or other actions, to fulfill or ensure compliance with the federal Americans with Disabilities Act of 1990 and any amendments thereto.

**Article 16, Arbitration**

**16.4 Witness, Evidence, Expenses.** ... Fees and expenses of the arbitration shall be borne equally by the Employer and the Union including fees and expenses of the arbitrator and hearing room and other expenses related to the arbitration proceedings.

16.5 Decision. The arbitrator shall be requested to render a decision as quickly as possible, but in any event, no later than thirty (30) calendar days after the conclusion of the hearing unless the parties agree otherwise.

**Article 26, Sick Leave**

Section 26.4, Notification. An employee who is unable to report for work, and who is not on previously approved day of vacation, sick leave, personal leave, or leave of absence, shall notify the employee's immediate supervisor that he/she will be unable to report for work. The notification must be made within one-half (1/2) hour after the time the employee is scheduled to report to work, unless emergency conditions prevent such notification. If the condition giving rise to the request for sick leave continues past the first day, the employee will notify his/her immediate supervisor every subsequent day on which sick leave will be requested, unless prior notification was given of the specific number of days to be taken off.

In the absence of being utilized for an approved Family Medical Leave condition or event, the employee shall also indicate that he or she is utilizing Family Medical Leave with notifying the immediate supervisor of the absence. Upon returning to work, an employee shall immediately submit to his/her supervisor a sick leave request form and any physician's statement which the Employer may request pursuant to Section 26.5 of this Article.

**Position of the Parties**

**Employer:** Grievant Truett was given a 10-day disciplinary "at-work" suspension after a year of written improvement plan, which had little or no effect, and verbal warnings. He previously received 1 and 2-day suspensions in the year prior to the 10-day suspension for violation of Section 26.4, Notification, for poor attendance, neglect of duty and failure to follow rules by neglecting to call-in to his immediate supervisor when absent. Discipline was proper and in accordance with Article 15.2, Progressive Discipline.

Testimony of Sheila Nowacki, OAG Office Manager:

Ms. Nowacki testified that she was the immediate supervisor of Grievant Truett and held that position since 2011. Her section managed the 9 state vehicles in the motor pool for official use by OAG employees. Among other duties, Mr. Truett is charged with maintaining those vehicles by scheduling and driving the vehicles to the dealerships for oil changes and regular maintenance, needed repair and washes. He is the only employee on-site charged with these duties. He makes "court runs", that is delivering documents to local and courts in NE Ohio as assigned. He also keeps an Excel log of approximately 500 items in inventory, which he is charged with keeping up-to-date. He is also is to keep records of vehicle repairs and is to send receipts for repairs to the Columbus main OAG office. He is required to notify his supervisor when he leaves the building to carry out his duties.

Evidence was entered of a memorandum of a meeting dated January 6, 2014, between Mr. Truett and Ms. Nowacki. He was advised by Ms. Nowacki of his excess absence. He was required to submit to her in writing a request prior to taking vacation time, and not to call in when taking vacation. He also was advised that he had continuing low leave balances.

An email from Ms. Nowacki to Mr. Truett dated January 24, 2014, was entered. In this email, Ms. Nowacki warned that Mr. Truett notify the department of the whereabouts of a Chevrolet Cruz. Mr. Truett delivered the car to a dealership for service and then took the next day off without notifying anyone of the location of the vehicle. A check showed the vehicle missing, leading to a search. Ms. Nowacki testified that Mr. Truett failed to notify her of the location of the vehicle when he called off, leading to an unnecessary search. The email states, "It is essential that we know where state property is and the absence of the Cruz is unacceptable."

On Wednesday, April 16, 2014, Ms. Nowacki sent an email to Mr. Darnell reminding him that she had specifically ordered him to send her an email about his verbal vacation request on the previous Wednesday, with copies to the managing attorney and others. He failed to do so. In the email, she also noted that on the previous Friday, while his duties included maintaining sufficient paper stock for printers and copiers in department cabinets, the cabinets were empty. He was reminded that he is expected to check the cabinets to ensure paper stock on a regular basis. He also indicated that he had nothing to do on the previous Monday, although he had committed to driving the prosecutors to the Justice Center with trial materials. The attorneys did not know if he was in, or who was to take them.

On February 21, 2014, Mr. Darnell was given a warning by Ms. Nowacki that his failure to file a dismissal notice on time with the court now necessitated an attorney appearing in court unnecessarily. He was reminded that court runs were to be made daily, and to contact his supervisor if he was unable to do so.

On Monday, June 16, 2014, Mr. Darnell was given another written warning. On the previous Friday, he was to cover for support staff at the reception desk, which is his assigned duty. Instead of personally covering the desk as required, he put the phones on "call forward" and left the site. He also removed a laptop computer which was placed there for safe keeping by an attorney who was going to deposition. The attorney was unable to find the laptop. He was also reminded that he was to notify his supervisor and the assistant to the managing attorney when he left the office during work hours. He left on Friday without notifying anyone.



On June 26, 2014, Mr. Truett was issued a Performance Improvement Plan (“PIP”) by Supervisor Nowacki for lack of organization, which negatively impacts upon the department. He was warned of lack of judgement. He was issued a list of expectations for improvement, and reminded that if a decision is to be made, he was to consult with Ms. Nowacki prior to doing so.

The plan states that, “Failure to follow this plan and participate in routine conferences on your adherence to the plan could result in disciplinary action, up to and including removal, either prior to or subsequent to the conclusion of this plan”. The warning was signed by Grievant Truett.

Supervisor Nowacki and Grievant Truett met twice weekly to review progress on the PIP. On September 15, she noted improvement by the Grievant toward meeting his goals. On August 20, she noted some regression including who he notifies by email. His lack of notifying some employees resulted in additional unnecessary work. He also was failing to follow through on completing tasks, resulting in some court runs not being made.

On July 21, 2014, Supervisor Nowacki noted that the Grievant was making progress in being more organized and noted a hope that he was heading in the right direction.

On September 25, 2014, Mr. Truett was notified by Kathleen Madden, Director of HR, of a verbal reprimand for taking unapproved leave without pay. His absences exceeded his FMLA certification, and he had been routinely maintaining low leave balances. One absence was not related to illness, and was not pre-approved. He

was notified that continued similar absences or FML abuse would result in additional discipline.

In October of 2014, the Grievant failed to replace a leaking tire on a state car for which he was responsible to maintain, and failed to install new license plates which he had in his possession, after being notified to do so a week prior. An attorney from the office took the car to Columbus and noted the low tire pressure. The license plates were expired, causing the attorney to unknowingly take a car with improper plates on the trip. Mr. Truett called off the next day. Supervisor Nowacki took the car to the dealership to have the tire and plates replaced.

November 3, 2014, Grievant received a 2-day disciplinary suspension for “violations of the policies and procedures of the Attorney General’s Office”. Specifically, he was cited as exceeding FMLA certification with absences, maintaining a low leave balance, allowing a state vehicle to be used with expired plates and registration tags, and being insubordinate on November 3, 2014, when he had been instructed to set up chairs for a presentation. It was noted that he sat and watched as his supervisor set up the chairs which he refused to do. It was also noted that the actions leading to the suspension were considered; “insubordination, refusal to follow instructions, neglect of duty, nonfeasance, excessive leave use, leave abuse and a general failure of good behavior”.

On January 12, 2015, Grievant Truett was again suspended for 3 days for violation of Policies and Procedures, specifically excessive and unapproved absence and failure to call in to his supervisor when absent, despite being warned continually to do so.

On 2/6/166. Supervisor Nowacki held a counseling session with the Grievant and again specified a plan for improving his performance.

On March 4, 2015, in a note to the "file", Ms. Nowacki writes that Mr. Truett has received a bi-weekly review since January 2014. At the review of February 13, 2015, Mr Truett was notified that the Chevy Cruz needed an oil change and that it was his responsibility to keep records to ensure maintenance was done on a timely basis. Then, on February 27, 2014, Fleet Manager Cody noted that the Cruze had the oil changed twice within 2 weeks, and invoices for one of the oil changes were not submitted as required. He also left the car at the garage overnight without telling his supervisor of its location. He had not kept track of the oil changes, causing an unnecessary second oil change, and failed to report the car out of the building overnight, as required.

Dated March 11, 2015, the OAG and OCSEA/11 entered into a consent agreement wherein a 3-day disciplinary suspension was reduced to 2 days to be served March 16 and 17, 2015. A 2-day suspension served in November was reduced to 1-day in the record.

On Friday, March 13, 2015, Mr. Randi Ostry of the OAG office notified Union Representative DeBorah Moore-Payne, reiterating that Mr. Truett, along with all employees in Ms. Nowicki's section must call the immediate supervisor when absent, in accordance with the policy manual and CBA. The reason he is required to talk to the supervisor is to coordinate on scheduled duties which must be covered by other department employees.

Mr. Truett took off on February 19 to take his mother to the hospital. He was required by his supervisor to bring in documentation of the hospital visit by March 19. No documentation was provided.

On April 6, the Grievant called in at 3:00 a.m. to state he was taking the day off. He did not talk to his supervisor directly, as required, and did not note that he was scheduled to cover the front desk for two hours. Ms. Nowacki covered in his absence.

The Grievant again called in absent on April 7, 8 and 9, and again failed to talk to his immediate supervisor on any of the dates. He took off again on April 10, and did talk to his supervisor. This took his leave balance to 3.8 hours.

He was required to submit a medical excuse for the days off. He submitted a "return to work" slip only covering for Friday, April 10. The other 4 days were not covered by the slip, as required in the absence policy.

Director of HR Kathleen Madden testified that the purpose of discipline and counseling of the Grievant was an attempt to change his behavior and bring him in compliance with policies, procedures and the CBA. The Director further testified that the Grievant was not treated differently in any respect from other employees, and was given many opportunities to improve his performance. "At work" suspensions were used in cases of excessive absence since it was incongruent to require an employee off work who was being disciplined for not being at work. Further, he was needed at work to perform assigned tasks.

The Director also testified that it is department policy that a supervisor may require proof of absence when an employee's leave balance is below 16 hours.

The Employer's progressive discipline policy was entered into evidence to show progressive discipline steps, which may include:

- 1) Verbal reprimand
- 2) Written reprimand
- 3) Suspension
- 4) Fine
- 5) Demotion
- 6) Termination

Violations include: failure to timely provide a medical verification when required, pattern abuse, unjustified poor attendance, neglect of duty, failure of good behavior.

On April 23, 2015, a Pre-Disciplinary Conference was held regarding Mr. Truett's continuing violation of policy. The Employer-recommended discipline was for a 10-day suspension. Mr. Truett was represented by the OCSEA, which requested additional documentation on the charges. AG's office provided additional documents to the Union.

In a letter dated June 5, 2015, HR Director Kathleen Madden issued a 10-day at-work suspension to the Grievant for "refusal to follow instructions, neglect of duty, excessive leave use, leave abuse failure to timely notify a supervisor of absence from work, unjustified poor attendance, inefficinty, leaving a work area while on

duty without prior approval from a supervisor and general failure of good behavior”.

The Employer argues that the record is substantial in showing that the Grievant violated policies as well as terms of the CBA, and that the Employer worked diligently to improve his work practices to little avail. The Employer requests denial of the grievance.

### **Position of the Union**

The sole witness of the Union was Grievant Darnell Truett.

Mr. Truett testified that the reason for his excessive absence is Crone’s disease, in which episodes are not predictable. He stated that it was difficult for him to retain food, had diarrhea and that he bled from the rectum, causing embarrassment.

He had no excuse for not calling his supervisor when he was out ill. He denied he had communication difficulty with Ms. Nowacki, and that he always followed her instructions as he understood them. In the week he was absent, he was ill, and when his mother was ill, he called in at 2 a.m. because he had to take his mother to the hospital.

Upon cross, he indicated he erred in not getting an invoice for the oil change. He agreed that he did not provide documentation for his one-week absence, and only asked his doctor for a note for Friday of that week. He agreed that he had no FML leave at the time he took the week off.

Upon redirect, Mr. Truett stated that he did not apply for FML for his Crone's disease due to his embarrassment with the symptoms. He was further embarrassed to discuss it with his supervisor or Union representative due to both being female. In closing, the Union argues that while the Grievant did some things which shouldn't have been done, and exercised poor judgement, his illness should mitigate the 10-day suspension and a lesser penalty imposed.

### **DISCUSSION AND CONCLUSION**

There is little or no dispute as to the facts of this case. Although the Arbitrator is charged by the parties with determining if the 10-day suspension imposed by the employer was for just cause, the Union questioned only if the length of the suspension was too severe given the facts of the case and, and given mitigating concerns of the Grievant's health. The Union is not contesting timely investigation by the Employer, lack of fair investigation, lack of clear, fair and unambiguous rules known to the grievant, proper statement of charges, nor lack of an opportunity for the Employee to answer to the charges. Accordingly, the only issue to be considered and an opinion rendered is as to the severity of the 10-day suspension given facts in the case.

The CBA enumerates progressive discipline steps as follows:

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

- 1 Oral reprimand
- 2 Written Reprimand
- 3 Suspension
- 4 Termination

However, discipline imposed shall be commensurate with the offense.

The record of the Grievant's absence and performance issues begin on January 6, 2014 and end, for purposes of this case, on June 5, 2015, when he was issued an "at-work" suspension.

There is no controversy as to whether the employer followed the first three steps of the contractual Progressive Discipline procedure. Accordingly, I find that the Employer followed the provisions of the Collective Bargaining agreement in imposing the 10-day suspension.

Ohio law permits a public employer to issue "at-work" suspensions, which are to have the same weight and count equally to "off-work" suspensions. OAG Director of HR Kathleen Madden testified that the AG's office issues "at-work" suspensions in lieu of time off from work, especially for violation of absence policies. She testified that it appeared illogical to suspend an employee for not appearing for work. The employee has been hired because there is work to do. Accordingly, this "at-work" suspension, and those leading to the latest suspension is here treated as any other suspension, either at-work, or off work.

Article 26, Sick Leave sets out, in Section 4, the requirement for an employee who is absent from work to notify the direct supervisor.

**Section 26.4, Notification. An employee who is unable to report for work, and who is not on previously approved day of vacation, sick leave, personal leave, or leave of absence, shall notify the employee's immediate supervisor that he/she will be unable to report for work. The notification must be made within one-half (1/2) hour after the time the employee is scheduled to report to**



**work, unless emergency conditions prevent such notification off. (*emphasis added*).**

Time and again, the Grievant was notified orally and in writing to contact Supervisor Nowacki directly to discuss the reason for his absence and discuss what he had on the schedule for the day so that she could cover with other employees in the Department, or herself. Time and again, the Grievant failed to call in, or call in and leave a message, rather than talk to his supervisor directly. Accordingly, I find that on numerous occasions, the Employee violated terms of the CBA and violated oral and written orders of his supervisor to follow the rules when calling in.

With regard to the charge that he maintained a low leave balance, below that which the employer considered minimum (16 hrs.), I find that the Employee did use excessive leave. Leave includes vacation time, sick leave time and personal leave. For an employee with 20 years, the CBA grants 80 hours of sick leave, 32 hours of personal leave, and 240 hours of vacation time. The Grievant accrued 352 hours per year of leave, or 44 work days. This is nearly 9 weeks of paid leave, which the employee continually used and repeatedly fell below the minimum 16 hours, and occasionally fell into unpaid leave status.

Positions are filled because the Employer has a body of work to be performed. In the case of the Grievant, his duties were varied and important to the running of the Attorney General's Office. Each time he called off, schedules of other department employees and/or the supervisor had to be modified to cover Mr. Truett's schedule.

When he was at work, there is ample uncontroverted evidence that his performance was marginal, at best. Time and again, he failed to follow directions of his

supervisor, and his regular work duties, such as keeping accurate records of vehicle maintenance, court deliveries, relief of the receptionist, etc.

On at least one occasion, the Grievant improved his performance for several months following a warning and/or discipline. In each case, he reverted to his previous absence pattern, neglect of duty, poor performance, failure of good behavior and even insubordination. The Employer gave him more than enough counseling sessions and opportunities to correct behavior, without permanent improvement.

At some time, an employee who, after receiving numerous opportunities to improve including specific counseling must be put on notice that he is on the cusp of losing his job. The Employer is entitled to have the assigned workload performed well, without taking valuable supervisory time to follow-up and correct, or fill in due to excess absence. The Employer, in this case, went “the extra mile” in an attempt to correct the Grievant’s behavior.

With respect to the Grievant’s plea that he had Crone’s disease, for which he failed to notify his Employer due to embarrassment and working for female supervisors, I find the claim to have no effect upon this case. The Grievant submitted no medical evidence of his claim to the Employer, nor did the Union present same in evidence during the hearing (although such evidence “after-the-fact” would not be considered probative). The Employer acted upon the information it had at the time. Should the Grievant have a debilitating disease which he believes mitigates his requirement to attend work regularly, it is incumbent upon him to present same to the Employer for evaluation. Such evidence was not presented and this Arbitrator cannot take the Grievant’s testimony into account without proof, and

without knowing how the Employer would weigh it. If the Employee had a problem which he believed entitled him to special consideration, it was incumbent upon him to properly present it to the Employer. The fact that his supervisor is female cannot be weighed here.

In any event, an Employer is entitled to have regular attendance of employees so that work can be scheduled and with the secure knowledge that it will be accomplished properly and timely. The Grievant's attendance and work record made that difficult. I find that the penalty imposed, a 10-day at-work suspension, is "commensurate with the offense" as required by Article 15.

Accordingly, after weighing the provisions of the CBA, the testimony and evidence presented by the Employer and Union, I find that the imposition of a 10 day at-work suspension by the Employer was for just cause.

### **AWARD**

The grievance of Darnell Truett dated June 5, 2015, alleging violation of the CBA is denied.

Entered this 4<sup>th</sup> day of August, 2017 in Pepper Pike, OH

A handwritten signature in black ink, appearing to read "Richard P. Gortz". The signature is fluid and cursive, with a large initial "R" and "G".

Richard P. Gortz, Arbitrator

