

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

In the Matter of:

_____,

Discharge Grievance

Union,

and

_____,

Arbitrator Lee Hornberger

Employer.

DECISION AND AWARD

1. APPEARANCES

For the Union:

For the Employer:

2. INTRODUCTION

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between [Union] and [Employer]. The Union contends that Employer discharged Certified Nurse Aide (CNA) [Grievant] without just cause. The Employer maintains that [Grievant]'s discharge was justified by her allegedly providing false information for Employer records when she claimed FMLA leave and using FMLA leave of absence for a reason other than stated at the time the request was made.

Pursuant to the procedures of the CBA, I was selected by the parties to conduct a hearing and render a final and binding arbitration award. The hearing was held on June 18, 2012, in _____. At the hearing, the parties were afforded the opportunity for

examination and cross-examination of witnesses, and for introduction of relevant exhibits. The dispute was deemed submitted on July 26, 2012, the date the last post-hearing submission was received.

The parties stipulated that the grievance and arbitration were timely and properly before me, and that I could determine the issues to be resolved in the instant arbitration after receiving the evidence and arguments presented.

3. ISSUE

The parties stipulated that the issue to be resolved in the instant arbitration is whether there was just cause to discharge the grievant, and, if not, what should the remedy be.

4. RELEVANT CONTRACTUAL LANGUAGE

ARTICLE IV

Section 4.3 Work Rules

The Union recognizes the exclusive right of the Organization to establish work rules and regulations governing the conduct of employees and to require the observance of rules, regulations, and standards.

ARTICLE VII

GRIEVANCES

Section 7.1 Grievances

Step 5:

Powers of an Arbitrator. The arbitrator shall have no power to alter, amend, add to or subtract from the express terms of this Agreement or make any recommendation with respect thereto. It shall be the obligation of the arbitrator to make an effort to provide the parties with a decision within thirty (30) days following the conclusion of the hearing.

Section 7.4 Claims for Back Wages

All claims for back wages shall be limited to the amount of wages that the employee would otherwise have earned, less any unemployment compensation and all other employment compensation received from any source during the period in question.

ARTICLE IX

DISCIPLINE AND DISCHARGE

Section 9.1 Just Cause

The Organization will not discharge or suspend any employee for disciplinary reasons without just cause. Discharge will be proper written notice to the employee and the Union citing specific charges against such employee. Such notification shall be made immediately and shall be given the Union via written notification to a steward on duty with a copy sent to the Business Representative at the [Union]'s ____ address. The principles of progressive discipline will normally be followed, except in serious cases.

ARTICLE XI LEAVES OF ABSENCE

Section 11.5 Employment During Leave

If an employee uses a leave of absence for a reason other than the reason stated at the time the request is made, the employee may be terminated. Employees shall not engage in employment elsewhere while on leave, unless agreed to in writing by the Organization.

5. FACTS

Introduction

Employer ____ provides assisted living to elderly residents. Union represents ____ bargaining units of employees at the facility, including a unit of general employees which includes Certified Nurse Aides. The Union and the Employer have a long-term collective bargaining relationship in excess of twenty years.

Background

[Grievant] was hired by the Employer as a Certified Nurse Aide (CNA) on ___, 2008. She is a mother with two children. She signed for the Employee Handbook on April 9, 2009.

CNA duties included taking care of residents, answering alarms, and dressing and otherwise helping residents.

[Grievant] worked the night shift. The night shift is from 10:30 p.m. to 6:30 a.m. She was scheduled to work every Sunday night but got Mondays off. She gets more time with her children when she works the night shift.

There are usually four CNAs on the night shift. If a CNA is absent, the other three CNAs have to pick up the slack

Registered Nurse [1____] was the immediate supervisor of [Grievant]. [Grievant] preferred working the night shift so she could attend [ABC] during the day. On many occasions [Grievant] came to work sleepy. [Grievant] was passionate about [ABC]. She talked about it all the time.

[Grievant] has the medical condition of panic attacks, anxiety, and a little bit of depression. In May 2011 she was “certified” for panic attacks. Exh 9. She has been hospitalized for this a couple of times. She takes medication, including ___, ___, and a third medication as needed. She received a letter from Employer approving her taking the medications. The medications do not interfere with her job.

[Grievant] has been involved with [ABC] for two years. [ABC] did not interfere with her normal work schedule. She signed up for the [ABC] training a couple weeks ahead of time. ___ was the “[ABC]” certification. There was a pre-paid \$200.00 registration fee.

The Week Immediately Before Friday, August 19, 2011

[1____] heard of the ___ trip at least a week ahead of time. [Grievant] was asking for a substitute. [Grievant] was not trying to hide anything.

[Grievant] said to [1____] at least a week before Friday, August 19, 2011, that [Grievant] was going to call in because she was going to attend a [ABC] class out-of-town.

[1____] said to [Grievant], “You’re not going to use FMLA, are you?” [Grievant] responded “No.” Prior to Friday, August 19, 2011, [1____] talked on the phone with

Scheduler [2____] about [Grievant] calling in. [1____] did not realize it would turn out to be an issue. [1____] knew [Grievant] had used FMLA before. She was giving [2____] a “heads-up.”

[3____] worked the same shift as [Grievant]. [Grievant] informed [3____] on more than one occasion prior to August 19, 2011, that [Grievant] would be calling in on August 19, 20, and 21, 2011, to go to ____ for the [ABC] training. Exh 8.

[Grievant] initially tried to get a replacement for her at work for the August 19-21, 2011, weekend. She did not find a replacement. She decided to drive to and from ____ on Sunday, August 21, 2011. According to [Grievant], it was okay to arrive in the middle of the ____ class.

When [Grievant] worked at the Employer, she had a young couple living at her house. They paid nominal rent and watched her children. The couple left one night with no prior notice. While she was at work, they packed up and left.

Friday, August 19, 2011, Activity

[2____] prepares the schedule for the CNAs. She talked with [1____] Friday morning, August 19, 2011, before [Grievant] called in. [1____] gave [2____] a heads-up. [1____] said [Grievant] was interested in leaving ____ for that weekend and trying to get substitutes. [1____] was concerned that [Grievant] might call in that weekend.

[Grievant] called the Employer three times that weekend. She called in at 8:23 p.m., Friday, August 19, indicating FMLA; 8:24 p.m., Saturday, August 20, indicating FMLA; and 7:35 p.m., Sunday, August 21, 2011, not indicating FMLA. The voice-mail receiver records times in five-minute window periods so these times could be several minutes off either [2____].

According to [Grievant]'s sister [4 ____], [Grievant] suffers from panic attacks. Panic attacks run in the family. [4 ____] has been present during these attacks. On August 19, 2011, [Grievant] was very emotional. She had been crying. She was stressed out. [Grievant] was upset because she was going to ____ and [4 ____] could not go with her. [5 ____] is a friend of [Grievant]. They met via [ABC] classes. [5 ____] is familiar with the [Grievant]'s panic attacks. She has been with [Grievant] after the panic attacks. They talk regularly. [Grievant] lets [5 ____] know when she is having a rough time. [5 ____]'s house is "a secure place for" [Grievant]. [5 ____] has a basement bedroom where [Grievant] and her children sometimes stay.

According to [5 ____], [Grievant] was having a rough day on Friday, August 19, 2011. Things were not going right with the children or daycare. [Grievant] stayed at [5 ____]'s home Friday evening. [Grievant] was distraught and emotional. "She was not in any condition to go to work."

[6 ____] is a Registered Nurse Supervisor who works at the Employer. He is a close friend of [Grievant]. According to [6 ____], [Grievant] suffers from panic attacks. Prior to Friday, August 19, 2011, he knew that [Grievant] had signed up for the [ABC] training.

According to [6 ____], on Friday [Grievant] was "very nervous, distraught." They talked with each other. [Grievant] was almost "manic." He tried to calm her down. [Grievant] stresses over things such as work, money and relationships.

According to [Grievant], on Friday, August 19, she was "on edge" before the children were picked up by their father. After the children were picked up, her world fell apart. She was struggling for someone to watch the children. The rental couple situation had just fallen apart.

On Friday, [Grievant] talked with [6 ____], her sister, and [5 ____]. She had to leave [6 ____]'s by 9:00 p.m. Friday, to go to [5 ____]'s house for the night. She decided that she could not work Friday night because she was "an emotional wreck." She stayed in the basement bedroom at [5 ____]'s Friday night.

[Grievant] called into the Employer at 8:23 p.m., Friday, August 19, indicating FMLA.

Saturday, August 20, 2011, Activity

On Saturday morning, [Grievant] taught two [ABC] classes. According to [5 ____], "it uplifted her." Exercise makes her feel better. She does ten classes a week. The [ABC] classes went "okay" that Saturday.

[4 ____] talked with [Grievant] by telephone on Saturday, August 20, 2011. "She was still upset." [Grievant] felt basically the same on Saturday as she had felt on Friday. She was trying to get the basement cleaned up in her home where the young couple had stayed. [Grievant] on Saturday eventually got the rental car for the trip to _____. She rents cars for trips because of the poor condition of her own car. She did not know if she would be well enough to drive to ____ on Sunday. She got the car just in case.

[Grievant] was suffering panic attacks on Friday and Saturday.

According to [6 ____], on Saturday, [Grievant] "was not in any condition to go to work." She left [6 ____]'s house to go to [5 ____]'s house. [6 ____] rented a car for [Grievant] to use on Sunday.

[Grievant] stayed at [5 ____]'s house Saturday night. [Grievant] had a rental car with her for the drive to _____. [Grievant] was still trying to decide whether to drive to ____ Sunday morning. "She was not stable emotionally." [5 ____] felt uncomfortable

with [Grievant] going to ____.

[Grievant] called into the Employer at 8:24 p.m., Saturday, August 20, 2011, indicating FMLA.

Sunday, August 21, 2011, Activity

[Grievant]'s cell phone records show that she called her mother from ____ at 6:23 a.m., Sunday, and called the Employer from ____ at 6:31 p.m., Sunday. [Grievant] left ____ for ____ around 6:40 a.m., Sunday morning, August 21, 2011. The drive to ____ went okay. She arrived at the [ABC] class during the lunch period. The class ended early around 5:00 p.m. ____ time. She left ____ with the goal of getting to work by 10:30 p.m. ____ time. She thought she had enough time to do this. But she got caught in ____ traffic. She had to call the Employer from ____ to give notice of a non-FMLA absence.

At 6:31 p.m. Sunday, August 21, 2011, [Grievant] called into the Employer, not indicating FMLA. According to [4____], on Sunday afternoon, August 21, 2011, [Grievant] texted [4____] and let her know that [Grievant] was stuck in traffic in ____.

Monday, August 22, 2011, Activity

[2____] listens to the call-ins to the Employer on Monday mornings and confirms them. She forwards the voice-mails to Human Resources.

Sometime After Sunday/Monday, August 21/22, 2011

[1____] talked with [Grievant] after Sunday, August 21, 2011. [1____] did not know there was an issue at that time. [Grievant] told [1____] that she took Friday, August 19, off "to rest," drove to ____ on Saturday, August 20, and attended the [ABC] event in ____ on Sunday, August 21, 2011. At that time, there was no discussion of [Grievant]'s reasons for calling in. [1____]'s post-____ conversation with [Grievant] was "before

August 24.” [1____] was the supervisor on at least August 20 and 21, 2012. [1____] asked [Grievant] “what was your weekend like?” It was a typical conversation. [1____] knew [Grievant] had not worked Friday night, August 19, 2011. [Grievant] told [1____] that she “wanted to rest.” [Grievant] also said she drove to ____ and back and had a “good time” during the weekend. [Grievant] told [1____] that she did not stay over and did not have a hotel room in _____. [Grievant] told [1____] that she drove “through the night” to _____. [1____] was not investigating. She was just having a conversation. According to [1____], [Grievant] did not have an obligation to tell her the truth during this conversation. [Grievant] said that she had hoped to return to work Sunday night, August 21, 2011. She said she could not get back. [1____] reported this conversation by telephone to [2____], a benefits person in Human Resources. [Grievant] had previously said nothing about using FMLA.

Human Resources Director [7____] testified that [1____] talked with [Grievant] after [Grievant] returned from _____. He has no explanation for the August 23 date rather than August 24 on [2____]’s statement. Exh 14. When he spoke with [1____], it was very clear to him that she had spoken with [Grievant].

[Grievant] does not agree with [1____]’s testimony that [Grievant] told [1____] that [Grievant] had rested on Friday and driven to ____ on Saturday.

August 23 and/or 24, 2011, Activity

[2____] spoke with [1____] after [Grievant] returned to work. [1____] gave [2____] the heads up on the buzz in the unit. [2____] testified that it is “possible” that her written statement should say August 24 rather than August 23, 2011. Exh 14.

August 30, 2011, Human Resources Interview With [Grievant]

During the August 30, 2011, interview with [Grievant], [Grievant] was told that the Employer had witness statements. [7____] asked her to explain. [Grievant] responded “I work for a bunch of women and they tend to be a bunch of back stabbers.” She denied she had prior conversations with co-workers. She had no medical explanation for FMLA. She said she had not sought medical attention on Friday, August 19, or Saturday, August 20, 2011. [7____] did not specifically ask [Grievant] what time she went to ____.

According to [7____], his interview of [Grievant] lasted “a maximum of ten minutes.” “She was nervous.” The Director of Nursing was there. [7____] is “sure it’s a very stressful time when an employee comes in” for an investigative interview. He asked [Grievant] “Is there anything else I need to consider?”

According to [Grievant], the investigatory interview meeting with [7____] lasted around four minutes. He only asked her a few questions. When she talked with [7____], he said he had witness statements saying that she had said she was going to call in FMLA for those three days. According to [Grievant], these individuals are “lying” when they say she said she was going to call in.

September 1, 2011, Discharge

[7____] and Director of Nursing [8____] investigated the discharge decision. This resulted in the September 1, 2011, discharge notice to [Grievant]. The discharge notice stated:

[[Grievant]] provided false information for our records when she claimed FMLA leave Friday, August 19 [,] and Saturday, August 20. [[Grievant]] used FMLA leave of absence for a reason other than stated at the time the request was made. This is a violation of Sec 1, 18b of the Employee Handbook, Section 11.5 of the General Unit agreement & abuse of FMLA. Exh 2.

Before the discharge, [7____] received witness statements, interviewed those

employees, and interviewed [Grievant]. [Grievant] had “telegraphed” that she was going to take the days off. The voice mail tapes told him that she claimed FMLA for the first two days. After considering the employees’ statements and the other information, it was clear to him that there was a misuse of FMLA and he decided to terminate [Grievant]. If there is a personal call-in, there is “no problem,” other than accumulating a point under the absentee point system. Employees have to call in at least two hours ahead of time. There is a voice-mail recording. Someone listens to the recording later.

The Employer has considerable problem with employee use of FMLA. The CNA group uses FMLA leave beyond the national average, and more than the other employee groups at the Employer concerning intermittent leave. 31% of CNAs are eligible for intermittent FMLA. The national average is 2%. The dietary group is 7%. The Employer’ unionized workforce is 16.3% eligible for intermittent FMLA leave.

The Employer does not have a program to catch anyone. If specific information is received, there will be an investigation. There have been two prior FMLA episodes. There was “concrete evidence.” The situations were investigated and the employees discharged. There has been no prior situation where there was a false FMLA claim and the employee was not discharged.

If an employee calls in and claims FMLA, it is accepted unless there have been multiple FMLA reasons on file. In that case, the employee would be asked for which reason.

Under the absentee policy, the employee’s anniversary year is used. At five, six, and seven absences there is a conversation with the employee. The eighth absence is a verbal warning. The ninth absence is a written warning. The tenth absence is a three day

suspension. The eleventh absence is discharge. On the employee's anniversary date, the absence record is set back to zero.

[7____] knew from prior paperwork that [Grievant] had FMLA certification for "anxiety" and "panic attacks." Exh 10. [7____] "assumed it was for a panic attack." This apparently meant that, in his opinion, the FMLA claim that weekend was for an alleged panic attack. [Grievant] had not seen a doctor. [7____] had no one who had actually seen [Grievant] on Friday or Saturday. According to [7____], there was no evidence that it was not FMLA except for [Grievant] telling people ahead of time that she was going to have three days off. It was "blatantly clear to [him] that ... the employee was telegraphing" she was not going to work that weekend. [Grievant] had not told the truth about not telling other employees ahead of time.

The Union provided [7____] with statements. [7____] believed statements from [Grievant]'s friends and relatives would be biased. There would need to be a doctor there to verify. There would need to be someone who had experienced it before.

The fact that [Grievant] had worked at the [ABC] gym on Saturday was important to [7____]. [7____] was familiar with anxiety and depression.

According to [7____], panic attacks can come on instantly. Sometimes they go a [2____] in seconds, sometimes hours. The individual can sometimes then be exhausted. [ABC] is a physical thing. According to [7____], [ABC] would give some panic attack persons some type of relief.

October 14, 2011, Step 4 Meeting

According to [7____], at the October 14, 2011, Step 4 meeting there were no

statements provided from [4____] or [6____]. The phone records were given to him. There is no identification of whose phone number it is. The telephone companies did not recognize the records. [7____] did not provide to the Union at the Step 4 meeting the times of the weekend three phone calls to the Employer's voice-mail system. [5____]'s name and information never came up during the grievance process. He never heard of it until the arbitration hearing. [7____] did not hear of the [Grievant]'s problems, children's' problems, etc, until the arbitration hearing.

Secretary-Treasurer [9____] has been the Union liaison with the Employer for twenty-three years. The Employer was provided with a copy of the cell phone records at the Step 4 meeting. The Employer was told that the phone records were from Verizon. She saw a copy of the employee statements before the Step 4 meeting. She received a copy to keep after the Step 4 meeting.

According to [Grievant], she indicated at the Step meeting that she had stayed at [5____]'s house.

[Grievant] obtained the cell phone records from Verizon. These records do not contain text message information. Exh 12. The records reflect, in part, the following calls.

8/19 ... 8:19PM ... - - - - - ____ ... ____ ...
8/20 ... 8:20PM ... - - - - - ____ ... ____ ...
8:21 ... 6:23AM - - - - - ____ ... ____ ...
8:21 ... 6:31PM ... - - - - - ____ ... ____ ...

[Grievant]'s Activities Since Discharge

[Grievant] continued to teach the local [ABC] classes after the September 2011 discharge. The numbers assigned to her vary from week to week. She is able to do extra classes once in a while.

She has applied for CNA positions "at a lot of places." She has applied to at least

two local major CNA utilizers. On the other hand, she has not applied to some other local major CNA utilizers.

[Grievant] has “gone back to school.” She is taking basic prerequisite courses at _____. She lives with her mother.

6. CONTENTIONS OF THE PARTIES

1. For the Employer

The Employer contends that [Grievant] knew in advance that she was not going to work as scheduled on Friday-Sunday, August 19-21, 2011, because she wanted instead to go to a [ABC] class in ____ that weekend. She falsely claimed on Friday and Saturday evenings that she could not work at the Employer and took FMLA leave for those two pre-planned absences. [Grievant] was dishonest with the Employer. She furnished false information for the Employer’s records. She used leave for reasons other than the reason claimed. The Employer has consistently discharged employees found to have falsely claimed FMLA leave.

According to the Employer, the overwhelming weight of evidence proves that [Grievant] did as the Employer alleges. [Grievant] has serious credibility problem. Her story should not be believed. The Employer had many reasons to conclude that [Grievant]’s absences from work on Friday and Saturday nights were due to her prearranged trip to ___, and not to any sudden onset of a panic attack. Contrary to her self-serving assertion that she intended to work all three days that weekend, the testimony and evidence from disinterested witnesses is irrefutable. [Grievant] had no intention of coming to work those three days. She had every intention of calling off for all of them.

The employee has the duty to mitigate damages by seeking a position similar to

that which was lost. [Grievant] failed to mitigate her damages. She did not exercise due diligence and failed to make reasonable efforts to mitigate her damages.

The Employer contends that it had just cause to discharge [Grievant] and requests that I deny the grievance.

2. For the Union

The Union contends that the Employer did not establish just cause for the discharge of [Grievant]. The Employer presented no real evidence to contradict [Grievant]’s need for FMLA for her medical condition of anxiety when she asked for leave on Friday and Saturday. [Grievant] has lost everything as a result of this unsupported discharge. She deserves to be returned to work with full back pay and to be made whole.

It is the Employer’s burden to establish that it had just cause to discharge [Grievant]. The Employer is claiming fraud in obtaining FMLA. Fraud is often thought of as a crime of moral turpitude and, when crimes are involved, the standard an Employer has to meet is typically “beyond a reasonable doubt.” Some arbitrators hold, however, that in such circumstances the standard of proof is “clear and convincing.” Elkouri & Elkouri, How Arbitration Works (6th ed), pp 949-950. The Employer’s evidence does not establish that [Grievant] “provided false information for our records.”

[Grievant] followed the appropriate procedures for calling in for FMLA.

The Union requests that I rule that the Employer had no just cause to discharge [Grievant] and that the Employer be required to reinstate [Grievant] with full seniority and make her whole.

7 DISCUSSION AND DECISION

The Collective Bargaining Agreement provides that an employee cannot be discharged without just cause. Article 9.1 It is well established in labor arbitration that where, as in the present case, an employer's right to discharge an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proving that the discharge of an employee was for just cause. Therefore the Employer had the burden of persuading me that the discharge of [Grievant] was for just cause.

“Just cause” is a term of art in collective bargaining agreements. “Just cause” consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which she was discharged. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discharge; the existence of a reasonable relationship between an employee’s misconduct and the punishment imposed; and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that [Grievant] was not discharged for just cause and that she should be reinstated with benefits, full seniority, and partial back-pay. [Grievant] planned on going to the Sunday [ABC] training class. It was very important to her. She unsuccessfully tried to get replacements for the weekend. [Grievant] was certified for FMLA intermittent leave for anxiety attacks. She had a history of anxiety attacks.

On or immediately before Friday, August 19, 2011, [Grievant]’s live-in babysitter family left with no prior notice. She was stuck with resolving this unanticipated problem.

She had anxiety attacks and appropriately called in FMLA on Friday and Saturday. The Employer did not know of the Friday and Saturday anxiety attacks. [Grievant] left for ____ after 6:23 a.m., Sunday. The Employer was not informed of this until much later.

After [Grievant] returned to work, she told her immediate supervisor that she rested on Friday and drove to ____ on Saturday. The Employer believed [Grievant]'s "Friday rest – Saturday drive" statement. The statement was not true.

Relying, in part, on [Grievant]'s Friday rest – Saturday drive statement, the Employer discharged [Grievant] on September 1, 2011.

On October 14, 2011, the Union provided the Employer with the phone records that verified that [Grievant] was in ____ at 6:23 a.m., Sunday, and hence [Grievant]'s "drive Saturday" statement was incorrect.

Since [Grievant] was having anxiety attacks on Friday and Saturday, she was FMLA qualified. She was not able to leave ____ until Sunday morning.

[Grievant] did not provide false information for the Employer's records when she claimed FMLA leave on Friday, August 19, and Saturday, August 20. She did not use FMLA leave of absence for a reason other than stated at the time the request was made. She did not violate Employee Handbook, Section 1, 18b; CBA, Section 11.5; or abuse FMLA leave. Exh 2.

There is enough responsibility to go all the [2____] around in this case. This responsibility includes [Grievant]'s Friday incorrect rest – Saturday drive statement, the failure to clear this up at the August 30, 2011, investigative meeting, and the Employer's response to being provided with the phone records on October 14, 2011.

The Employer makes several serious arguments concerning the situation. I have

seriously considered each of them.

The Employer argues that the phone records are a fabrication. This argument does not control because based on a preponderance of the evidence the phone records are genuine and accurate. The Union provided a copy of the phone records to the Employer at the October 14, 2011, Step 4 meeting. This was before the Employer provided the Union with the times of [Grievant]’s phone calls to the Employer. The phone records have the exact times that correspond with the later revealed Employer records. The phone records were not sprung at the June 2012 hearing. Everybody had time to consider them and gather evidence concerning them. The phone records produced by the Union look somewhat different from the phone records attached to the Employer’s post-hearing written submission. The Union produced records were obtained from the phone company after the phone calls. The Employer produced records appear to be a phone bill. It is reasonable that the two would look somewhat different.

The Employer argues that [Grievant] falsely claimed FMLA leave and provided false information for the Employer’s records. This argument does not control because [Grievant] did not falsely claim FMLA leave or provide false information in asking for the leave. [Grievant] was having anxiety attacks or in after effects from anxiety attacks when she called in FMLA on Friday and Saturday. [Grievant]’s “Friday rest” and “Saturday drive” comments to [1____] were made after [Grievant] returned from ____ and were not made as part of the procedure to obtain FMLA leave.

The Employer argues that [Grievant] asked her co-employees to cover for her during the weekend in question. This argument does not control because [Grievant] did ask her co-employees to cover for her. [Grievant] did not anticipate or communicate an

intention of asking for FMLA leave until she was involved with panic attacks on Friday and Saturday.

The Employer argues that it conducted a fair, prompt, and thorough investigation. This argument does not control because even though the Employer conducted a good faith investigation, the investigation incorrectly took the “rest - drive” post-____ [Grievant]- [1____] conversation and placed it pre-weekend, took undated and/or possibly incorrectly dated statement/s from witness/es, did not take a written statement from [1____] concerning the crucial Friday rest – Saturday drive conversation, cf Exh 13, did not adequately respond to the phone records once they were provided on October 14, 2011, and did not conduct a lengthy investigative meeting with [Grievant] wherein, for example, [Grievant] might have been asked specific questions addressing the Friday rest – Saturday drive conversation and exactly what happened day to day during the weekend.

The Employer argues [Grievant]’s story does not add up and [Grievant] had a serious credibility problem. This argument does not control because [Grievant]’s story does add up once it is realized that (1) she was in ____ at 6:23 a.m., Sunday, (2) the Friday rest-Saturday drive conversation was after the weekend, not before the weekend, and (3) there was serious evidence of [Grievant] having anxiety attacks on Friday and Saturday.

The Employer argues that the ____ [ABC] class lasted from 8:30 a.m. to 5:30 p.m. This argument does not control because [Grievant] was in ____ at 6:23 a.m., Sunday, and then drove to _____. She would inherently not have been in ____ for another ____ hours. When she got to the class site during the lunch hour, she signed the [ABC] sign in sheet.

The Employer argues that there is no [2____] for the Employer to determine and document the veracity of each employee’s FMLA claim and that absenteeism is typically

occurring with CNAs. This argument does not control because this case involves whether [Grievant] provided false information in claiming FMLA leave on Friday and Saturday, and the related issues of the timing of the rest-drive conversation with [1___], the Friday-Saturday anxiety attack situation, and [Grievant]’s location at 6:23 a.m., Sunday.

The Employer argues that [Grievant] was evasive during the investigative meeting. This argument does not control because (1) the Employer was under the incorrect assumption that the Friday rest-Saturday drive comment was made before the weekend rather than after and asked no specific questions to clarify this, (2) the Employer did not ask specific questions of [Grievant] to find out exactly why she did not come to work on Friday or Saturday, (3) the meeting lasted “a maximum of ten minutes,” (4) [Grievant] was “nervous” and (5) “it’s a very stressful time when an employee comes in” for an investigatory interview.

The Employer argues that *Meijer, Inc*, 108 LA 631 (Daniel, 1997), controls. This argument does not control because (1) the *Meijer* grievant had received prior disciplines for the same reason for which that grievant was eventually discharged, and (2) the *Meijer* grievant intentionally lied ahead of time about why he was asking for leave. [Grievant] neither had prior disciplines for dishonesty or FMLA leave abuse nor made misrepresentations in her Friday or Saturday FMLA telephone calls.

The Employer argues that *Seeger v Cincinnati Bell Telephone Co*, 681 F3d 274 (6th Cir 2012), controls. This argument does not control because the “honest belief” test and the CBA “just cause” requirement are different. In *Seeger*, Seeger appealed the District Court’s order dismissing his claim that Bell violated FMLA when it terminated his employment on the ground of disability fraud. The Sixth Circuit (Judges Griffin and

Siler) held Bell's honest belief that Seeger committed disability fraud shielded Bell from liability. According to the Sixth Circuit, a plaintiff is required to show more than a dispute over the facts upon which the discharge was based. The honest belief rule does not require that the employer's decision-making process be optimal or that it left no stone unturned. The inquiry is whether the employer made a reasonably informed decision before taking an adverse employment action. The falsity of a defendant's reason for terminating a plaintiff cannot establish pretext under the honest belief rule. As long as the employer held an honest belief in its reason, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless. An optimal investigation of interviewing the employee and some or all of his witnesses is not a prerequisite to application of the honest belief rule.

Senior District Judge Tarnow dissented. He believed a reasonable jury could conclude that Bell's given reason for discharging Seeger was not an honest belief. According to the dissent, the overwhelming weight of evidence supports Seeger's contention that Bell's investigation was so poor and one-sided as to be unworthy of credence and thus not sufficient to satisfy an honest belief.

The Union makes several serious arguments concerning the situation. I have seriously considered each of them.

The Union argues that [Grievant] did not make the "Friday rest - Saturday drive" statement to [1____]. This argument does not control because [Grievant] made this statement to [1____] during either the Tuesday, August 22, shift, or the Wednesday, August 23, shift. [1____] testified with clarity that after Sunday, August 21, she worked with [Grievant]. [1____] asked [Grievant] "How did your weekend go?" [Grievant]

responded that she took Friday off to rest, drove to ____ on Saturday, and the event was on Sunday. During cross-examination, [1____] testified that she worked with [Grievant] a “day or two after [[Grievant]] got back” and [1____] believed the conversation was on August 23. On cross-examination, [1____] testified that during the conversation [Grievant] further indicated she was hoping to come to work Sunday night but she could not get back. [1____] was “not investigating.” It was just a “conversation.” [Grievant] testified that “I don’t agree with [[1____]’s] testimony that I told her that I rested on Friday and I drove to ____ on Saturday.” [Grievant]’s denial of making the “Friday rest – Saturday drive” statement may be the result of a mistaken recollection or an error in perception. The Employer did not get a written statement from [1____] concerning this crucial conversation. Cf Exh 13. The Employer’s October 20, 2011, Step 4 response alludes to “[Grievant] telling employees of her intent to take work off **to rest up** for and attend a [ABC] training class in ____.” Exh 4. Emphasis added. The Employer obtained a signed typed statement from [2____]. The statement does not have a typed date but “8-24-11 Wed” is written on it. [2____]’s statement says, in part: “... I spoke with [[1____]] on Tuesday morning, August 23rd [[1____]] also stated that the reason for [Grievant]’s call in on **Friday night was so she could rest** and that **Saturday night’s call in was so that she could drive** down there and that she attended the conference on Sunday. ...” Exh 14. Emphasis added. [2____] testified that it was “possible” that the date should be August 24 instead of August 23. [7____] prepared a typed statement dated August 31, 2011. Exh 16. His statement indicated, in part “... 8-24-11 [] [2____] emailed statement to me regarding her conversation with [] [1____].” [7____] called [1____] and discussed the weekend [Grievant] situation with [1____]. There is no reference in the

[7____]’ statement about the “Friday rest - Saturday drive” conversation. Based on my carefully listening to and watching [1____]’s testimony on direct and cross-examinations, the Friday rest - Saturday drive statement was made by [Grievant] to [1____] two or three days after [Grievant] returned from _____. When this conversation was communicated by [1____] to [2____] and [7____], they incorrectly merged the post-weekend [Grievant] statements with the pre-weekend [Grievant] statements.

The Employer contends that [Grievant] failed to sufficiently mitigate her damages because her job search was allegedly not sufficiently diligent. A wrongfully discharged grievant must make reasonable efforts to mitigate damages by seeking and accepting replacement employment. [Grievant] was not required to apply for each and every job that might exist. She need only make a reasonable effort. The Employer had the burden of proving that [Grievant] failed to mitigate her damages. The Employer had the burden of proving that there were substantially equivalent employment opportunities available, and that [Grievant] failed to use reasonable diligence in looking for employment. Elkouri & Elkouri, *How Arbitration Works* (6th ed), pp 1224-1228; and Elkouri & Elkouri, *How Arbitration Works* (6th ed, 2010 Cum Supp), pp 467-468. [Grievant] applied for CNA jobs at several local employers of CNAs. She failed to apply for CNA jobs at several other prominent employers of CNAs. To a certain degree, she returned to attending college which partially limited her availability for employment. Some employers of CNAs would not wish to hire her because of the reason for her discharge from Employer. Based on the totality of the circumstances, the back-pay award is reduced by twenty percent because of partially incomplete mitigation attempts.

While on FMLA leave, [Grievant] worked at her [ABC] job Saturday morning,

August 20, 2011. The Employer indicates “section 11.5 of the CBA provides, in pertinent part, ‘If an employee uses a leave of absence for a reason other than the reason stated at the time the request is made, the employee may be terminated.’” Employer Brief, p 18.

[Grievant]’s voice mail messages requested leave for “FMLA.” [Grievant]s had an approved designation for intermittent leave for panic attacks with “episodic flare-ups.” Exh 10. Based on the totality of the evidence, [Grievant] was having episodic flare-ups that Friday and Saturday. It is undisputed that panic attacks can come on instantly, sometimes they go a [2____] in seconds, sometimes in hours, and [ABC] would give some panic attack persons some type of relief. It was reasonable for [Grievant] to believe that she could legitimately work the [ABC] job on Saturday morning. [Grievant] did not take the FMLA leave in order to work at [ABC]. The [ABC] job was consistent with [Grievant]’s Employer’ job. It was also consistent with [Grievant] having panic attacks.

The crucial points in this case concerning just cause include (1) [Grievant] left ____ for ____ no earlier than 6:23 a.m., Sunday, August 21, 2011; (2) [Grievant] did not drive to ____ on Saturday; (3) [Grievant]’s statement to [1____] that [Grievant] rested on Friday and drove on Saturday was not true; (4) [Grievant] was having anxiety attacks on Friday and Saturday; (5) [Grievant] was certified for intermittent FMLA leave for anxiety attacks; (6) [Grievant] would reasonably believe on Friday and Saturday that she was entitled to call in for FMLA leave because of the anxiety attacks; (7) the Employer had a copy of the phone records as of October 14, 2011; and (8) the CBA and the totality of the circumstances.

The crucial points in this case concerning back-pay include (1) [Grievant] failed to a degree to mitigate her damages; and (2) the CBA and the totality of the circumstances.

This decision neither addresses nor decides issues not raised by the parties.

8. AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, the grievance is granted in part and denied in part. There was not just cause to discharge [Grievant]. The Employer will reinstate [Grievant] to her former position with full benefits and no loss of seniority and with eighty percent back-pay. As of the date of her reinstatement, the number of absences on [Grievant]'s Attendance Tracking Form for March 19, 2012, to March 18, 2013, will be three. The twenty percent reduction of the back-pay will be calculated after the interim earnings and unemployment compensation, if any, are deducted, not before.

The back wages shall be limited to the amount of wages that [Grievant] would otherwise have earned, less any unemployment compensation and all other employment compensation received from any source during the period in question. CBA, section 7.4.

I will retain jurisdiction of the present grievance until November 30, 2012, to resolve disputes, if any, regarding the remedy directed herein. If, on or before 4:30 p.m., November 30, 2012, the Union or the Employer advises me by e-mail or other writing of any dispute regarding the remedy, my jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If I am not advised of the existence of a dispute regarding the remedy directed herein by that time and date, my jurisdiction over this grievance shall then cease.

Dated: August 13, 2012

/s/Lee Hornberger
Lee Hornberger
Arbitrator