ARBITRATION DECISION NO.:
24

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Ohio Civil Rights Commission

DATE OF ARBITRATION:
January 28, 1987

DATE OF DECISION:
June 5, 1987

GRIEVANT:
Marilyn McClutchen

OCB GRIEVANCE NO.:
G86-0354

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Daniel S. Smith, Esq.

FOR THE EMPLOYER:
Barbara A. Serve
Asst. Atty. Gen.

KEY WORDS:
Unauthorized Leave
Absenteeism
Removal
Medical Authorization
EAP

ARTICLES:
Article 24-Discipline
§24.01-Standard
§24.02-Progressive Discipline
§24.05-Imposition of Discipline

FACTS:

The Grievant is a Typist 2 with the Ohio Civil Rights Commission. She was removed from her position in September, 1986 for alleged "neglect of duty". This charge was based upon taking leave without authorization.

The Grievant had received memos on lateness and attendance problems and had been required shortly after her probationary period to attend a counseling session dealing with her "attendance pattern." In January 1986, Grievant received a memo which said her attendance problem was still unsatisfactory and which placed her under a 3-month restriction where any time requested off for illness had to be accompanied by a physician's statement. In addition, without documented necessity, no other leave time whatsoever would be granted during that period. The memo also warned that "unauthorized leave of absence is a removable offense." This action was all taken pre-contract.

The Grievant complied with the documentation requests either giving the appropriate documentation to her supervisor or her supervisor's supervisor. The Grievant was continually harassed about the form and timeliness of the documentation, yet it was always verifiable.

ARBITRATOR'S OPINION:

The removal was deemed not for just cause as the letters Grievant provided put the employer on notice of employee's chronic illness. Also, the Grievant made a good faith effort to notify the employer in a timely manner when she was ill and provided proper documentation to support her illness, which was obviously authentic even-though it was handwritten. The employer never requested that the Grievant provide documentation any more specific or in a different form than that which was provided, so it was unjust to later state that the documentation which was submitted was unacceptable.

Since the Grievant didn't follow the proper chain of command in providing documentation, which affected the timeliness of some documentation, and since one document was clearly untimely without justification, a suspension was deemed appropriate. However, the Arbitrator felt that Grievant was not actually removed for continued absenteeism but instead for violating a "chain-of-command" procedural rule for sick leave requests, and therefore removal is too drastic a remedy for this. It was also a violation of Section 24.05 of the Contract.

The Grievant's reinstatement was made dependent upon the requirement that she is medically determined able to meet all her work responsibilities, and, if she has a non-disabling chronic medical problem, she is to enroll in EAP immediately.

AWARD:

The Arbitrator reinstated Grievant with full backpay minus a 6-day suspension which the Arbitrator felt was justifiable.

TEXT OF THE OPINION:

IN THE MATTER OF THE ARBITRATION OF

Ohio Civil Rights Commission

and

AFSCME/OCSEA Local 11

Grievant:
Marilyn McClutchen
Grievance No.:
G-86-354
Hearing:
January 28, 1987

For OCRC:
Barbara A. Serve,
Assistant Attorney General

For OCSEA:
Daniel S. Smith, Esq.

Preliminary Matters:

In attendance at the hearing in addition to grievant, her counsel, and counsel of OCRC were the following persons: Shirley Taylor, OCSEA Staff representative, Paulette Robinson, OCB. Witnesses were: John A. Browne (OCRC) and Thelma Burton (OCRC) (sequestered). Management representative was Francis Smith, OCRC.

Both parties granted the Arbitrator permission to record for purposes of refreshing memory and acknowledged their understanding that the tapes would be destroyed simultaneously with the rendering of an opinion. Both parties accorded the arbitrator the right to publish this opinion.

Both parties stipulated that the matter was properly before the Arbitrator and that the issue was "WHETHER THE DISCIPLINE (REMOVAL) WAS FOR JUST CAUSE."

OCRC through counsel wished further information to be obtained either through testimony obtained by subpoena or by deposition. The evidence was held open at the end of the hearing pending receipt of medical information to be released by the Grievant. On April 14, 1987, OCRC agreed to close the record. Closing arguments by both parties were received by the Arbitrator on April 28 (OCRC) and April 30, 1987 (OCSEA).

Relevant Contract Provisions and Relevant Work Rules

A. Contract:

§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.

§24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file)

B. Written reprimand;
C. Suspension;
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and /or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

B. Work Rules:

1. K. Unauthorized Leave

All time away from the employee's normal working schedule must be approved by the immediate supervisor or designee. Anytime an employee is off work without having approval or is away from the office without having followed established accountability procedures, he or she will be considered to be on unauthorized leave, and appropriate action will be taken. Such action shall include loss of pay for the time period in question or the application of the Commission's Progressive Disciplinary Procedure.

2. C. Reporting Absent From Work

OCRC employees are required to report off work by notifying the Supervisor (or appropriate designee) by 8:15 a.m. This falls within the two-hour period established by State Personnel Procedure Memo No. 4 (page 2, line 9).
This memo stated, in part;

". . . an employee who is unable to report for work will notify the immediate supervisor or other designated person. Such notification must be made within two hours after the scheduled reporting for work time on the first day of absence --- unless emergency conditions make it impossible. Subsequent notification beyond the first day of absence will be governed by the nature of the circumstances and the requirements established by the appointing authority."

Facts:

Grievant was hired as a Typist II by OCRC on May 28, 1985. Her probationary period ended September 18, 1985. On November 22, 1985, Thelma Burton, Administrative Assistant, wrote a memo to the file detailing a counseling session on that same date with Grievant (Employer F). The memo indicated that the session dealt with a lateness that day, the proper use of leave forms, and attendance problems. The memo was copied to the regional director. The memo was apparently not seen by the Grievant.

On January 6, 1987, Ms. Burton addressed a Memo to the Grievant (Employer Exhibit G). This memo was copied to the N.E. Regional Director, the Executive Director, and the Chief of Administration. This memo concluded that the Grievant's "attendance pattern" was still unsatisfactory. The Grievant was informed that for the following three months (1-7-86 to 3-6-86) she was placed under the following "restrictions":

1. "Any time off for illness must be accompanied by a physician's statement. (A general statement from your physician covering any chronic conditions that you may have would be sufficient to cover absences related to any condition covered in the statement.)" (Emphasis added).

2. "No other leave time (Personal Vacation or Compensatory) will be granted during this period unless there is a documented necessity for the time off." (Emphasis added).

The memo warned "that unauthorized leave of absence is a removable infraction" (emphasis added).

On March 14, 1986, Dr. Aladar Gelehrter, M.D. furnished a letter to the Grievant in which he indicated that the Grievant was under his care for "anxiety neurosis" and that he advised her "to seek professional help with one of the community agencies (Union Exhibit #3). In her testimony, Ms. Burton admitted seeing this letter and said it was given to her “around the date it was written". Why the letter was not made a part of Grievant's file was unanswered and remains unclear.

On March 21, 1986, Mr. James, ACSW, of Murtis H. Taylor Multi Services Center wrote a letter, received by OCRC on March 26, 1986, which stated that the Grievant had been referred by her physician, was exhibiting "situational stress reaction patterns”, and would have a "good prognosis" with counseling (Union Exhibit 2). Ms. Burton testified to receiving this letter but said "that she didn't have the time to read it.”

On March 27, 1986, Ms. Burton wrote a memo to the Grievant entitled "Written Warning Reprimand for Absenteeism." (Employer's Exhibit #3A). This memo, again copied to three superiors, detailed the Grievant's use of sick leave from her initial hire to the date of the memo. The memo indicated oral counselings on September 18, 1985, November 22, 1985, January 6, 1986, and March 14, 1986. The memo indicated that the Grievant was not applying for sick leave in advance nor telephoning promptly when late. The Grievant was warned that "further absenteeism will be construed as "Neglect of Duty” and will result in further disciplinary action."

On April 9, 1986, Dr. Basil Mihu wrote a letter which indicated that the Grievant had kept her appointment at Murtis H. Taylor on April 9, 1986 and that her next appointment was April 17, 1986 (Union Exhibit #4). This document is not marked received by OCRC; however, Ms. Burton, in her testimony agreed that she had seen it. She noted, however, that the letter was given directly to Mr. Browne by the Grievant.

June 16 through June 18, 1986, Grievant was given a three (3) day suspension for neglect of duty "in that you did not comply with a request or (sic) improve your attendance." This suspension

was issued prior to the current contract and was hence unappealable. This suspension is not at issue in this grievance.

The Grievant was scheduled to return to work on June 19, 1986. Early on that morning, a person who identified herself as Grievant's social worker called in and reported that Grievant was too ill to work. The person who took the call, Miss Harmon, Grievant's immediate supervisor told the caller that the Grievant must call in herself. At 1:00 p.m., Grievant called and reported sick (Employer's Exhibit #6). Grievant called the next day, June 20th at 8:11 a.m. and reported herself ill (Employer's Exhibit). Ms. Burton was not in the office these two days. Grievant returned to work on June 23rd.

On June 19, 1986, Dr. Jones from Murtis H. Taylor Multi Services Center wrote a letter indicating that Grievant was seen June 19th, was ill, and would be able to return to work on June 23rd (Union Exhibit #1). This letter is on the letterhead of the Center and is handwritten. Ms. Burton testified that on June 23rd the Grievant did not provide her with any documentation of illness. Mr. Browne testified that he had seen the letter of the 19th which had been placed in his box. While he could not remember when he saw it, he stated that he had to have seen it within 5 days of the 23rd. Mr. Browne testified that the letter did not constitute "appropriate" documentation because the letter was "handwritten" and because the letter "did not relate the nature of the medical problem."

On June 26, 1986, the Grievant filed a request for leave on July 8, 1986. The form was placed in Mr. Browne's box. The request asked for LWOP to attend court for a 3 hour period. Mr. Browne found the form on July 7, 1987. He testified that he spoke to the Grievant about the request that afternoon. He testified that he asked the Grievant why she was going to court. She replied that the reason was "personal". He asked her for documentation; she said she did not understand why documentation was needed. The conversation according to Mr. Browne ended inconclusively. He did not tell her that he would not approve the leave.

On July 8, 1986, the Grievant left work for the period requested. Subsequently, the leave was attributed to Unauthorized Leave Without Pay. At her predisciplinary hearing on July 7, 1986, Grievant provided OCRC with a letter from the Cleveland Municipal Court verifying her appearance. The letter was dated July 24, 1986 (Union Exhibit #J).

On July 8, 1986, Mr. Browne wrote to the Center asking for a notarized statement from the Center stating that Grievant was being seen (Employer Exhibit #H). No release signed by Grievant accompanied the letter. No answer was received. Mr. Browne said he wrote the letter after going to the Center on July 7, 1986. He testified that he went to the Center to verify the authenticity of her prior illnesses. He stated that he did not tell Grievant of his doubts, did not tell her that he was going, nor did he secure a medical release from her. He said he was "unaware" that the provision of medical information required a release by the patient. On July 7, 1986, Mr. Brown was unable to speak with the Grievant's counselor who was not at the Center when Mr. Browne arrived.

Mr. Browne testified that even after the predisciplinary hearing that he doubted that the Grievant was really under medical care. He said that medical diagnosis was necessary for documentation to be "appropriate" so that "we (OCRC) can make plans." He said that he had never communicated this reasoning to the Grievant.

On July 22, 1986, Mr. Browne wrote the Grievant indicating that the intention of the OCRC was to remove her from her position. By letter of July 25, 1986, Mr. Brown added a reason for the intended removal, i.e., "neglect of duty".

On July 25, 1986, the Executive Director of the Murtis H. Taylor Center wrote a letter stating that the Grievant was being seen at the Center on an "on going basis". The letter stated that she had been seen by Dr. Jones the 19th of June. The letter requested a release before further information could be provided (Union Exhibit #5). This document was presented at the predisciplinary hearing

on July 29, 1986.

On September 3, 1986, the OCRC removed the Grievant from her position effective September 5, 1986. The general reason was "neglect of duty". The particular instances specified were these:

1) Subsequent to your three (3) day suspension ending June 18, you failed to report for duty as scheduled and were off for an additional two more days (June 19, June 20). Additionally, you failed to comply with the agency s policy of notifying your immediate supervisor by 8:15 a.m. on June 19, the day following your suspension.

2) Upon notification to the office on June 19th at 1:00 p.m., you indicated that you would bring in a doctor's statement when you returned to work. However, upon your return, you failed to provide your supervisor with any appropriate form of medical documentation in support of your alleged illness on June 19 and June 20.

3) On July 7, 1986, you asked to take time off on July 8th for court leave. You were informed that if you were going to court that documentation for court leave was required. On July 8th, you left the office without discussion with your immediate supervisor and without permission and you were gone for approximately one hour. Because you failed to provide any appropriate documentation prior to your leave and because you neglected to notify your immediate supervisor of your intention to leave work, you were placed on an unauthorized leave without pay.

On September 16, 1986, the Union grieved this decision for the Grievant citing the following contract violations.

(1) Article 9,

The employer violated the employee's rights to confidentiality under the guidelines of the EAP program. The employer insisted that the employee reveal the medical problem for which she was being treated although it is to be kept confidential. Medical excuses which were provided were rejected by the employer because they did not contain the condition of the employee.

(2) Article 24, Section 24.01

R is in violation of said article inasmuch as the discharge was not for just cause. The Employee provided legitimate excuses for her absences and the employer chose not to accept these excuses which were obtained from both medical and court administration.

(3) Article 24, Section 24.02

The employer never issued a verbal warning with a notation to the employee's file as indicated in the Progressive Discipline mandate of this section. Therefore, it does-not exist or have bearing on further disciplinary action.

(4) Article 24, Section 24.04

Although the employee was entitled to a pre-discipline meeting prior to her suspension none was held.

(5) Article 24, Section 24.05

Once a final decision to discharge the employee was made the employer failed to notify the Union in writing which is in violation of this Article.

(6) Article 29, Section 29.01

Although the employee had used all available time (i.e., sick leave, vacation and personal leave) the employer failed to grant approved leave without pay in order for her to obtain medical treatment.

(7) Article 31, Section 31.03

The Employer failed to respond to the Employee's request for leave for a court appearance in a timely and prompt manner.

By stipulating that the grievance is properly before the Arbitrator, the Union waived Nos. 4 and 5.

The hearing adduced other relevant information. Ms. Burton testified to continuing problems communicating with Grievant. After the January 6, 1986 reprimand, Grievant placed leave forms and other documentation in Mr. Browne's basket. Ms. Burton testified that this method was incorrect, that she told Grievant so, and that she was repeatedly ignored. Grievant testified that she was told that only Mr. Browne could approve her leave which is why she placed the items in Browne's basket. This stalemate was complicated by the fact that Mr. Browne's duties kept him away from his office (and hence his "in-basket") for days at a time. Ms. Burton testified that she was upset by the Grievant's failure to follow the chain of command. Ms. Burton also testified that she was aware of the Grievant's treatment, especially after the April 9th letter (Union Exhibit #4). Mr. Browne testified that he became aware of "office problems" with the Grievant in February of 1986. He could not remember if he ever inquired as to why Grievant was having absenteeism problems. However, at some point in time, he said he had awareness that she took medicine and that it (the medicine) affected her behavior. Lastly, Mr. Browne said he felt no need to take or send a medical release to the center because the letter of June 19, 1986 said "if further information is needed please feel free to contact this Center." (Union Exhibit #1).

Grievant testified that on the evening/morning of June 18th/19th she attempted suicide. She asked her caseworker to call her office. When told that she had to notify the office herself, she did at 1:00 p.m. The record submitted at the hearing before the Arbitrator tends to substantiate this incident, as well as the Grievant's ongoing treatment.

The Grievant said that she placed request for leave forms and other documentation in Director Browne's basket because she understood that after the written reprimand only he could approve the leave. She further testified that no one told her not to place the forms there. Grievant presented no explanation as to why the documentation presented at the pre-disciplinary hearing had not been presented before that time.

The Grievant maintained that she submitted no documentation with the June 26, 1986 leave form because she believed that such documentation was no longer necessary. She testified that she knew documentation was necessary prior to her suspension but believed that since she had been punished, the special discipline rules no longer applied.

Discussion

To adequately assess whether the removal in this case was for "just cause" requires a review of the Grievant's work record almost from her initial hire. However, such a review must be balanced by an awareness that the suspension imposed was under a different contract and was unappealable.

The OCRC was aware during the Grievant's probationary period of absenteeism problems. Yet, she was retained beyond her probationary period. During the period after probation until suspension, the Grievant apparently was counseled 4 times and received 1 written reprimand prior

to suspension. Such a process would seem to meet the demands of progressive discipline. The purpose of the suspension was to explicitly warn the Grievant that further excessive absenteeism could result in removal.

However during this same period, problems also arose with documentation. In the January 6, 1986 memo, Ms. Burton explicitly told the Grievant that requests for sick leave needed a physician's statement. (The Arbitrator interprets this requirement to mean that requests for future sick leave must have had a showing of a verifiable appointment while requests for approval of sick leave taken because of unforeseen illness had to be accompanied with doctor excuses obtained at the time of illness but turned in upon return to work.)

On January 6th, Ms. Burton indicated that "A general statement from your physician covering any chronic conditions that you have would be sufficient to cover absences related to any condition covered in the statement." The letters furnished by Grievant dated March 14, 1986, Match 21, 1986, and April 9, 1986 certainly provided notice of an ongoing chronic problem of the Grievant.

The second restriction of January 6, 1986, at first blush, seems to prohibit properly requested and appropriate non-sick leave. However, the restriction could more reasonably be read to mean that such leave requests be properly documented.

The three letters put the employer on notice of employee's chronic illness while the January 6, 1986 letter put the employee on notice as to documentation problems. The suspension which preceded the current problems was apparently for excessive absenteeism. The use of the generic phrase "neglect of duty" obscured the issue.

The removal letter of September 3, 1986 again cited neglect of duty; however, three specific instances were alleged. The record shows that the Grievant was absent on June 19 and 20th. Where the absence occurs because of unexpected illness, the requirement is to call in. The Grievant made a good faith effort to notify the employer on June 19, 1986. She employed a means of reporting which was reasonable and calculated to result in actual receipt of notice (See 11 LA 419). OCRC did, in fact, receive notice. The next day, the Grievant herself called within the time limits. The Arbitrator finds that the Grievant did not fail to properly report off sick. The Grievant's next responsibility was to provide proper documentation to support her illness. The letter of June 19, 1986 seems entirely adequate to that task. The fact that the letter was handwritten does not lessen its authenticity. Moreover, taken in connection with the letters of March 21st and April 9th on the same letterhead, the letter constitutes appropriate documentation. The lack of a statement of diagnosis in that particular letter does not lessen its value as documentation to support the illness on the days in question. Earlier letters had provided a diagnosis. If the employer required information "to plan", the employer could have requested a specific statement on the length, severity, and prognosis of the Grievant's illness. How the Grievant was to adequately respond to Mr. Browne's suspicions and planning needs is unclear to the Arbitrator since Mr. Browne admits he never discussed them with the Grievant. The Grievant had adequate documentation to support the absences on June 19 and 20, and she provided them in a timely fashion to the employer. However, the Grievant provided that documentation to the wrong person in the chain of command. As a result, the knowledge of her documentation was delayed until approximately June 30th. Thus, the Grievant's supervisor was not supplied with the documentation in a timely and appropriate manner.

The second incident leading to the removal again hinged upon improper placement of the forms in question. Clearly, the Grievant requested leave in a timely fashion and for a legitimate reason. However, she again directed the form improperly in terms of the chain of command, but the form was found before the time for the requested leave had arrived. The conversation between Mr. Browne and the Grievant as reported by both Mr. Browne and the Grievant remains unclear. Two things seem clear, however. One, he did not refuse her leave request. Two, she did not bring

the verification he requested immediately back with her. In fact, no verification appeared until the pre-disciplinary hearing. Looking at the court letter, the Arbitrator can see no reason why a similar letter could not have been obtained on July 8, 1986 by the Grievant and brought back with her to work to present to her employer.

The Grievant was not removed for a continued absenteeism. Given the prior progressive discipline for absenteeism, removal for further absenteeism would be justified. However, in essence, Grievant was removed for violating procedural rules with respect to chain-of-command for sick leave requests and for failure to document a leave request in a timely manner. Removal for those reasons is too drastic a remedy and violates the contract §24.05 which requires that discipline be reasonable and commensurate with the offense.

However, the Grievant was not without fault. Her refusal to recognize Ms. Burton's proper place in the chain-of-command and her tardiness in responding to reasonable requests for documents certainly were offenses which merited commensurate discipline. A six day suspension should have been imposed.

The discipline in this case is complicated by the question of Grievant's health and her consequent responsibility for her behavior. During the hearing, some obscure references were made to Grievant's relationship to the EAP program. Any imposition of discipline in this case needs to deal with Grievant's medical situation.

Decision

The grievance is sustained; discipline is modified. The Grievant is entitled to back pay from September 15, 1986 (includes a 6 day suspension) to the date of this decision. Grievant is to be reinstated under the following conditions.

1. She shall be reinstated one day after she furnishes the employer a statement by a medical doctor which indicates either (a) that she is well and can meet all her work responsibilities, or (b) that she has a chronic medical problem for which she is receiving proper medical treatment and the prognosis is good that she can meet all her work responsibilities.

2. If the medical statement indicates a chronic medical problem, the Grievant is to be enrolled immediately in the EAP. The employer will make the same accommodations, if any, for the Grievant in EAP that are made for any other EAP employee.

Date: June 5, 1987
Rhonda R. Rivera, Arbitrator