

ARBITRATION DECISION NO.:

35

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Retardation
and Developmental Disabilities,
Columbus Developmental Center

DATE OF ARBITRATION:

DATE OF DECISION:

July 25, 1987

GRIEVANT:

Mary Garren

OCB GRIEVANCE NO.:

G-87-0409

ARBITRATOR:

Robert A. Carter

FOR THE UNION:

Carol Bowshier

FOR THE EMPLOYER:

Mike Fuscardo

KEY WORDS:

Just Cause
Consistent Enforcement

ARTICLES:

Article 24 - Discipline
 §24.01-Standard
 §24.05-Imposition
of Discipline

FACTS:

Expedited:

The Grievant was an employee of the Columbus Developmental Center. The Grievant, while away from the work site for lunch, called the Supervisor and told her she was ill and would not return for work after lunch. The following day was the first day of Grievant's vacation. When

Grievant returned to work, she was disciplined for failing to provide both a Request for Sick Leave Form and documentation signed by a health care professional.

MANAGEMENT'S POSITION:

Grievant was informed during the phone conversation when she called in sick that a leave form and documentation would be required. CDC's Sick Leave Directive outlined the policy for sick leave.

UNION'S POSITION:

CDC's Sick Leave Directive was reviewed in October, two months after the incident, and is irrelevant. Other employees had used sick time and were not required to submit documentation. The policy was not evenhandedly enforced. Documentation may be required by the Superintendent, but not by those below Superintendent. This requirement is discretionary and not mandatory. Sick leave may be used for illnesses which do not require professional treatment.

ARBITRATOR'S OPINION:

Management provided no credible evidence that Grievant was told before the absence that documentation would be required. The supervisor did not have the authority to tell her that. Only the Superintendent has the authority to require documentation. The purpose of requiring documentation is to prevent excessive or abusive use of sick leave. The use of sick leave in the manner Grievant used it had been permitted without requiring a Sick Leave Request Form as documentation. The lax behavior of management caused Grievant to believe her behavior was acceptable. Management based the discipline on a policy only enforceable at a higher level; enforced that policy unfairly, and did not give notice to the Grievant. Therefore, the grievance was granted and the Grievant was given 3 days back pay.

AWARD:

Grievance is granted.

TEXT OF THE OPINION:

EXPEDITED ARBITRATION

**OHIO DEPARTMENT OF MENTAL
RETARDATION AND
DEVELOPMENTAL DISABILITIES**

and

OCSEA/AFSCME

(Mary Garren Grievance)

Arbitrator:

Robert A. Carter

Appearances:

For ODMR/DD

Mike Fuscardo

For OCSEA/AFSCME

Carol Bowshier

DECISION AND AWARD

The issues presented in this proceeding, as stipulated to by the parties, are whether the three (3) day suspension issued to the grievant by the Ohio Department of Mental Retardation and Developmental Disabilities (hereafter MR/DD) was without "just cause" and therefore in violation of Section 24.01 of the parties' collective bargaining agreement and, alternatively, if said disciplinary action was imposed with "just cause", was the disciplinary action imposed in a timely manner in accordance with Section 24.05 of the agreement. By stipulation of the parties, the time for rendering a decision respecting these issues is extended to ten (10) working days from the date of the hearing.

Based upon the parties' joint stipulations of fact, the presentation of testimony and exhibits adduced at hearing and consideration thereof, the facts pertinent to the determination of these issues may be summarized briefly as follows:

Grievant, Mary Garren, has been employed at the Columbus Developmental Center operated by MR/DD for 9 years and is classified as a Hospital Aide. On August 17, 1986, grievant, while away from the facility on her lunch break, telephoned her immediate supervisor, Debbie Chandler, and advised that she had become ill and would be unable to return to work that day. As the grievant was scheduled to begin an 8 day vacation on the next day, she had no further discussions with her superiors regarding her absence from work on the afternoon of August 17 until her return from vacation.

Upon reporting to work subsequent to her vacation, the grievant was advised by her superiors that inasmuch as she had failed to provide both a Request for Sick Leave Form and "documentation" regarding her absence due to illness on the afternoon of August 17, 1986, disciplinary action was under consideration. Thereafter, and subsequent to a pre-disciplinary conference held on October 14, 1987, grievant received notice that she was being suspended for 3 days effective December 16, 1986, for failure to submit a Request for Leave Form and to provide any documentation of her illness.

It is the contention of MR/DD that the imposition of the suspension was with "just cause" for reason that grievant had been advised by her supervisor during their phone conversation on August 17 that both a Request for Leave and documentation of the illness would have to be provided by grievant when she returned to work and that grievant had failed to comply with these requirements. In support of this contention, MR/DD presented the testimony of Frank Koons, Employee Relations Specialist II, and a document purporting to contain statements of the grievant which were recorded in writing by Mr. Koons during the pre-disciplinary conference. (MR/DD Exhibit C). Furthermore, MR/DD contends that grievant was aware of the policies requiring submission of a Leave Request Form and documentation of illness by virtue of the fact that she had seen a staff memorandum (MR/DD Exhibit B) prior to August 17, 1986, and further, because grievant had reviewed CDC's Sick Leave Directive (MR/DD Exhibit A) subsequent to August 17, 1986.

In consideration of these contentions it must first be observed that no credible evidence was presented by MR/DD that the grievant had been advised by her supervisor (Debbie Chandler) during their phone conversation on August 17 that grievant needed to provide either a Request for Leave or "documentation" upon her return to work. In fact, Debbie Chandler was not even called as a witness in these proceedings. Moreover, Mr. Koons, by his own admission, was unable to recall any of the alleged statements made by grievant which would have demonstrated that she had been notified by Ms. Chandler of her responsibilities pertaining to her use of sick leave on August 17, 1986 and further acknowledged that MR/DD Exhibit C was not a verbatim transcript of the pre-disciplinary conference and had, in fact, been prepared some 10 days after the date of the conference. In regard to MR/DD Exhibit A, evidence that grievant reviewed MR/DD's sick leave policies in October, 1986, has no relevance to the issue of whether grievant had prior notice of the applicable policies since this review occurred almost two months after the incident which resulted in discipline. As a consequence, OCSEA/AFSCME's timely objections to the admission of MR/DD Exhibits A and C are hereby SUSTAINED.

MR/DD Exhibit B demonstrates that grievant was advised prior to August 17, 1987, that any employee who leaves the work area due to sickness would be required to provide documentation prior to receiving approved sick leave. However, a comparison of MR/DD Exhibit B with the CDC Sick Leave Directive (Joint Exhibit 5) reveals that the directive specifies that the Superintendent may require an employee to provide satisfactory written documentation, signed by a health care professional, to justify sick leave use. (See Joint Exhibit 5, IV-B). In consideration of the language used in this directive, it is clear that there is no intention to create a mandatory requirement that all sick leave used by employees of CDC be justified in writing by a health care professional nor is there any indication that anyone, other than the Superintendent, has authority to require such documentation. In sum, if the Superintendent's authority to require such written documentation under this directive is discretionary, there is, no authority for the implementation by persons of lesser authority of a mandatory requirement for documentation as was attempted by the author of MR/DD Exhibit B.

Moreover, it is equally clear under this directive that employees may use sick leave for illnesses which do not require professional medical treatment although the Superintendent has the discretion to request documentation where some basis for that request exists (i.e. excessive or abusive use of sick leave). Again, as MR/DD Exhibit B is totally inconsistent with the CDC Sick Leave Directive on this point, it can not be used as a basis for imposing disciplinary action. The authority to implement corrective measures to discourage the abuse of sick leave, as was attempted through the policy enunciated in MR/DD Exhibit B, must be derived from, and consistent with, the authority conferred upon the Superintendent in the CDC Sick Leave Directive (Joint Exhibit 5).

In addition, grievant offered testimony that, in fact, the CDC sick leave policy is not consistently enforced and that the requirement for "documentation" expressed in MR/DD Exhibit B has not been imposed upon other staff units. This testimony was corroborated in part by the testimony of both Kathy Frye, a Hospital Aide, and Clarence Pemberton, a Therapeutic Program Worker, who testified that they both have left work early due to illness and were not required to provide either medical documentation or a Sick Leave Request Form upon their return to work. In fact, Ms. Frye testified that she had left work early on August 17, 1986, the same day that grievant could not return to work, and was not subjected to any adverse consequences as a result of not providing medical documentation or a Request for Leave Form.

Pursuant Joint Exhibit 5, XII. entitled UNIFORM ADMINISTRATION OF DIRECTIVE, the sick leave policy is to be administered in a uniform, fair and equitable manner to all employees. It must be concluded, based upon the evidence presented, that this policy has not been uniformly applied

and, perhaps most importantly, was not uniformly applied with respect to the use of the sick leave by the grievant and another employee on the same day since grievant was disciplined and the other employee was not. Such a result is also violative of Section 29.03 of the parties' collective bargaining agreement which requires that sick leave policies be fair and reasonable, that such policies not be arbitrary or capricious and further, includes the recognition that such policies should be fairly applied throughout the State. (emphasis supplied)

It is a well-settled principle of arbitration that " Arbitrators have not hesitated to disturb penalties, assessed without clear and timely warning, where the employer over a period time had condoned the violation of the rule in the past - lax enforcement of rules may lead employees to believe that the conduct in question is sanctioned by management." Elkouri, How Arbitration Works, pages 683,684.

Accordingly, the 3 day suspension of the grievant dated November 28, 1986, was without "just cause" and therefore, in violation of Section 24.01 of the parties' collective bargaining agreement. MR/DD is ordered to (1) restore all pay and seniority credits lost by grievant during the period of her suspension and, (2) remove and/or delete all references and documents from grievant's personnel file pertaining to the subject matter of this grievance.

As it has been determined that the suspension herein was not premised upon "just cause", it will not be necessary to consider the issue of whether the decision to impose discipline was made in a timely manner in accordance with Section 24.05 of the contract.

THE GRIEVANCE IS GRANTED.

July 25, 1987
DATE

ROBERT A. CARTER

COUNTY OF FRANKLIN
STATE OF OHIO