

ARBITRATION DECISION NO.:

82

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Workers' Compensation

DATE OF ARBITRATION:

DATE OF DECISION:

January 4, 1988

GRIEVANT:

Ralph Jones

OCB GRIEVANCE NO.:

G-87-1135

ARBITRATOR:

Andrew J. Love

FOR THE UNION:

Mr. Wylie

FOR THE EMPLOYER:

Mr. Duco

KEY WORDS:

Just Cause

Absenteeism

Progressive Discipline

ARTICLES:

Article 24 - Discipline

§24.01-Standard

§24.02-Progressive

Discipline

FACTS:

Grievant was employed by the Bureau of Workers' Compensation as a delivery worker. The Bureau allows excused absences, including sick leave, vacation days, and personal days. Grievant's disciplinary record included a verbal reprimand for tardiness, a written reprimand for tardiness and unexcused absence, and a 5-day suspension for unprofessional conduct and insubordination. Grievant requested leave at a time when he had only 4.6 hours for excused

absence. Under Bureau practice, an employee is verbally reprimanded after 24 hours of unexcused absence. After the next 24 hours of unexcused he or she is given a written reprimand. If unexcused absences continue, the employee is subject to suspension. Grievant's absences were accompanied by doctor's notes. The notes did not specify an illness. Some of the doctor's slips were for dates after the disciplinary action was initiated. The Director of Grievant's office testified that Grievant may have gotten short term disability. The Director was not aware that the doctor's note was produced at the pre-disciplinary conference.

UNION'S POSITION:

Grievant should have been told by management about the possibility of applying for short term disability. Grievant was not warned of progressive discipline (weak). Grievant provided a doctor's note at the pre-disciplinary conference. Grievant actually had medical problems, namely influenza.

MANAGEMENT'S POSITION:

Grievant was aware of the lack of time available for excused absences and was also aware of the potential for suspension. Grievant could have learned of short term disability from the union representative or his employee manual. Grievant had a history of poor work attendance and, was repeatedly counseled for that reason.

ARBITRATOR'S OPINION:

The Bureau followed all steps for progressive discipline. Although Grievant had the option of short term disability, the failure of the Bureau to point it out does not sufficiently weigh in favor of the Grievant to allow the grievance.

AWARD:

Two (2) day, rather than Three (3) day, suspension, with one-day backpay.

TEXT OF THE OPINION:

ARBITRATION

**BUREAU OF WORKERS'
COMPENSATION**

AND

**OCSEA LOCAL 11
AFSCME, AFL-CIO**

(Ralph Jones Grievance)

ARBITRATOR:
Andrew J. Love

FOR GRIEVANT:
Mr. Wylie

FOR BUREAU OF WORKERS'

COMPENSATION:

Mr. Duco

DECISION AND AWARD

The issues presented in this proceeding of whether the three day suspension of the Grievant by the Bureau of Workers' Compensation (hereinafter "Bureau") on April 14 through April 16, 1987 was without "just cause" and therefore in violation of Section 24.01 of the parties' Collective Bargaining Agreement; and, if not, what should the remedy be.

The following joint exhibits were admitted into evidence:

1. Grievance trail.
2. Prior disciplinary record of the Grievant.
3. Attendance Interruption Report (May 22, 1986 to March 6, 1987).
4. Request for Leave Forms.
5. Doctor's statements dated April 3, 1987 and February 20, 1987.
6. Contract between the State of Ohio and OCSEA Local 11 AFSCME.

In addition, additional exhibits were admitted into evidence:

1. Union Exhibit A Grievant's Request for Leave.
2. Union Exhibit B Certificate for Grievant to Return to Work on January 13, 1987.
3. Management Exhibit 1 Attendance Interruption Report from January 1, 1985 to August 26, 1985.

The parties to this grievance have entered into stipulation that the Grievant was employed at the Bureau from February 22, 1982 to the present. In addition, the Grievant has been employed as a Delivery Worker at the Bureau from September, 1984 until May 24, 1987. By way of background information, the Bureau allows for certain excused absences, which include sick leave, vacation days, and personal days. Any hours of time off by an employee is considered an unexcused absence, therefore, such employee will not be paid for that particular time off from work. In the instant case, the Grievant has received a verbal reprimand for tardiness in January, 1986; a written reprimand for tardiness and unexcused absence in May, 1986; and a five day suspension in July, 1985 for unprofessional conduct and insubordination as a result of his being refused time off for an unexcused absence.

The facts are as follows:

Janice Young, Director of the Columbus District Office for the Bureau, testified that the Grievant requested leave on February 4, 1987 for leave for the 18th day of February, 1987 and again for April 18, 1987 through February 3, 1987. Ms. Young stated that she signed the disapproval of such leave because the Grievant did not have anymore excused absence. At the time of the Grievant's initial request for emergency leave, he had 4.6 hours of vacation time remaining for excused absences.

Ms. Young testified that the Bureau's practice for disciplinary action for unexcused absences begins with verbal counseling after 24 hours of unexcused absences occur. After that, the next disciplinary action is a written reprimand if an additional 24 hours of unexcused absences by an employee occurs. If such unexcused absences continue, the employee is subject to suspension. Referring to joint exhibit 3, Ms. Young pointed out that the Grievant had unexcused absences for a

total of 38 hours beginning on September 3, 1986 and ending on February 23, 1987. She further stated, in respect to joint exhibit 5 (2 doctors reports) that the doctors excuse dated February 20, 1987 simply states that the doctor saw the Grievant in his office that day. it does not state any indication of illness. As to the second doctor's note, the witness pointed out that such statement was dated April 3, 1987, wherein the Grievant was observed by the doctor on February 6, 1987 and February 20, 1987 for flu related symptoms and for hypertension. It should be noted that the disciplinary action recommended occurred at least one month prior to the receipt of the statement from the doctor dated April 3, 1987.

On cross-examination Ms. Young stated that she does consider extenuating circumstances which could militate against disciplinary action. However, in the case of the Grievant, she felt that there were no extenuating circumstances. Furthermore, the Grievant did not advise Ms. Young of any illness or extenuating circumstances until April of 1987.

Referring to Management Exhibit 1, Ms. Young stated that this exhibit reveals that the Grievant has a tendency toward high absenteeism during the winter months. She also referenced an acknowledgment by the Grievant for his first disciplinary action, which was a verbal reprimand for tardiness, wherein the Grievant stated that "I will do my utmost to improve this terrible record."

Ms. Young testified that interrupted attendance has a devastating effect in the Bureau where the Grievant is assigned to process some 800 to 900 claims daily. When an employee in this capacity fails to report to work, Ms. Young must pull a file clerk to do the work of the absent employee. As a result that person's job cannot be completed. As an additional consequence the claims of those persons who have filed for unemployment compensation do not get timely results.

On further cross-examination, Ms. Young stated that if the Bureau had been made aware that the Grievant was going to be off for 10 days in February, 1987, for flu, and that adequate doctors' excuses would have been provided, the Grievant may have been eligible for short term disability. This could have possibly changed the number of hours of unexcused absences. She further stated, however, that she was not certain whether such short term disability would be approved. Furthermore, she stated that she was not aware that the April 3, 1987 doctor's excuse was presented at the pre-disciplinary conference. When asked about union exhibits A and B (January and February Requests for Leave, which were approved in part, and the Certificate to Return to Work on January 13, 1987) Ms. Young stated that much of this did not play into the determination that the Grievant should be disciplined, because much of the leave requested in those exhibits was for excused absences due to the fact that the Grievant had available hours in either sick leave or vacation time. It was only until those available excused absence categories were exhausted did the determination for unexcused absences come in to play.

The Grievant testified that his Request for Leave contained in Union Exhibit A was due to severe influenza for two weeks in January, 1987. He indicated that he followed the procedure of notifying the employer within 30 minutes of the scheduled time to appear. He called in each day. On February 18, 1987, the Grievant testified that he suffered a relapse of influenza and was off for six consecutive days. He identified the doctors statement dated February 20, 1987 (joint exhibit 5) as the applicable statement for this period. The Grievant further testified that he stated to his immediate supervisor and to Ms. Jones that he had suffered a relapse of influenza. The purpose for the April, 1987 statement was to validate the Grievant's illness for the month of February. He stated that this statement was submitted at a pre-disciplinary conference in respect to the recommendation of a three day suspension for his unexcused absences.

On cross-examination, the Grievant testified that he was aware of the amount of leave available. He further acknowledged excessive absenteeism in 1986. He stated that he was not aware that his illness could have been considered as a short term disability. He further stated that he was not advised of progressive discipline. In addition, the Grievant acknowledged that he was

placed on notice by the Bureau that he could be subject to further disciplinary action, such as a suspension, if he continued to take unexcused absences.

Turning to the issues, this Arbitrator finds that the Bureau has clearly established that "just cause" existed for taking disciplinary action against the Grievant. This Arbitrator's review of the exhibits satisfies the evidence necessary to show that disciplinary action is warranted in this case. This Arbitrator finds that the February 20, 1987 doctors statement contained in joint exhibit 5 does not even state an illness. It merely states that the Grievant appeared in the doctor's office. Both the Grievant and his doctor should have been aware that merely a statement indicating that the Grievant appeared in this doctors office would not be sufficient for any employer to establish that the Grievant was being treated for a condition that prevented him from working. The Grievant has demonstrated a history of unexcused absences for at least one and one-half years from the date of his last disciplinary action. He was further advised that other unexcused absences could result in disciplinary action. It was not until April 3, 1987, when the Grievant, at the behest of his union representative, obtained another statement from the doctor indicating that the Grievant was suffering from influenza during February, 1987. Moreover, the Grievant should have been aware, either through his representative or from his employee manual or from management personnel that he could possibly have received short term disability for his illness. Nevertheless, in light of the Grievant's history of unexcused absences and his own failure to resolve this problem, it has been proved that "just cause" exists for the disciplinary action taken. In addition, the Bureau has followed the steps required for progressive discipline.

Turning to the issue as to whether the remedy imposed against the Grievant, to wit: a three day suspension, this Arbitrator does recognize that the Grievant may have, indeed, suffered a relapse but that he should have requested short term disability leave if it were available. This Arbitrator, in weighing the need for the Grievant to be available for work due to the large number of claims that must be processed in the Bureau and the fairness and appropriateness of the suspension as the disciplinary action taken, determines that a two day suspension is commensurate with the Grievant's offense.

Accordingly, the grievance is DENIED, but the Grievant shall receive back pay in the amount of one day's pay.

January 4, 1988

DATE

ANDREW J. LOVE, Arbitrator

COUNTY OF FRANKLIN

STATE OF OHIO