ARBITRATION DECISION NO.:
198

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

EMPLOYER:
Department of Aging

DATE OF ARBITRATION:
June 29, 1989

DATE OF DECISION:
August 17, 1989

GRIEVANT:
Denise Stewart

OCB GRIEVANCE NO.:
03-00-(88-09-28)-0013-01-03

ARBITRATOR:
Hyman Cohen

FOR THE UNION:
John T. Porter

FOR THE EMPLOYER:
Egdillio J. Morales

KEY WORDS:
Removal
Absenteeism
Progressive Discipline
Just Cause

ARTICLES:
Article 24 - Discipline
§24.01-Standard
§24.02-Progressive
Discipline
Article 25 - Grievance
Procedure

FACTS:
The grievant was employed as an Account Clerk 3 with the Ohio Department of Aging. She

injured her upper back April 1987 in a work related accident. The grievant began missing work and was absent 113 days on sick and personal leave with doctor's excuses from April 1987 to July 1988. She was diagnosed as able to work in an employer ordered exam. A verbal warning was received by the grievant in June 1988 for not completing leave forms properly and leaving work without approval. Two letters informing the grievant that she was expected to return to work were sent in July and August 1988. The grievant was dismissed on August 31, 1988 for neglect of duty, poor attendance and failure to respond to direct orders to return to work.

EMPLOYER'S POSITION:

The employer argues that the grievant was dismissed for just cause. It is argued that her absences were excessive and her doctor's excuses were not sufficient to justify leave. An employer ordered examination resulted in an opinion that the grievant could return to normal work. The employer argues that the grievant had notice of impending discipline through letters informing her that she was expected to return to work.

UNION'S POSITION:

The employer had no just cause for dismissing the grievant. Her absences were due to constant back pain caused by injuries from a work related accident. The Bureau of Workers Compensation classifies her as "permanently partially disabled." The union disputes the grievant's receipt of letters sent informing her of the employer's expectations and impending discipline. The grievant was no longer living at the address used by the employer.

ARBITRATOR'S OPINION:

The-Arbitrator believes that the grievant's 38% absenteeism from April 1987 to July 1988 is excessive and interferes with the operation of the office. Dismissal is a proper penalty for excessive absenteeism even in the case of illness. The grievant's doctor's excuses are questionable and the employer ordered an examination which resulted in a report which stated the grievant could work, therefore, the grievant's condition is in question.

The employer failed to impose progressive discipline. The verbal reprimand fifteen months after the injury was not for excessive absenteeism and would not have been timely if it had been. The letters sent notifying the grievant that the employer expected her to return to work made her aware of the employer's dissatisfaction but did not meet progressive discipline requirements. A mitigating factor is that prior to the injury the grievant was an exemplary employee.

AWARD:

Reinstatement without back pay.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

OHIO DEPARTMENT OF AGING

-and-

OCSEA/AFSCME, Local 11

Grievant:
Denise Stewart

ARBITRATOR'S OPINION

FOR THE STATE:
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DATE OF THE HEARING:
June 29, 1989

PLACE OF THE HEARING:
Office of Collective Bargaining
State of Ohio
65 E. State Street, 16th Floor
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ARBITRATOR:
HYMAN COHEN, Esq.
Impartial Arbitrator
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* * * * *

The hearing was held on June 29, 1989 at Office of Collective Bargaining, State of Ohio, 65 E. State Street, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:30 a.m. and was concluded at 5:00 p.m. Post-hearing briefs were

submitted on July 13,1989.

* * * * *

On September 12,1988 **DENISE A. STEWART** filed a grievance with the **OHIO DEPARTMENT OF AGING**, the **"State"**, in which she alleged that she was terminated without just cause.

Pursuant to Article 25 of the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO, CLC**, the **"Union"**, she requested a Level 3 hearing. On October 4 a Level 3 hearing was held before Douglas M. Russell, Deputy Director/Labor Relations, Ohio Department of Aging, after which he rendered a written decision dated October 17, 1988 sustaining the discharge of the Grievant. Under the grievance procedure contained in Article 25 the grievance was eventually carried to arbitration.

FACTUAL DISCUSSION

The Grievant was employed by the State as an Account Clerk 3 on July 1, 1985. On April 15,1987 the Grievant was injured while at work. While attending a class on State time she sat down on a chair which broke causing her to hit her head against a table after which she fell to the floor and injured the upper part of her back.

Immediately after her accident she requested and was granted fifty-six (56) hours of sick leave between April 16 through April 24, 1987. Between April 26 and the beginning of October the Grievant's attendance at work was subject to sporadic periods of vacation, personal leave and several periods of leave without pay. From October 5 through November 7,1987 she was on leave without pay. The Grievant worked between November 23 through December 4. Between December 6 and January 2, 1988 the Grievant was absent from work for a substantial number of hours based upon vacation time, sick leave, personal leave and leave without pay. During that period of time (December 6 through January 2,1988) her attendance at work consisted of roughly two (2) days. Between January 3,1988 and February 27,1988 she was absent from work and was on leave without pay. Between February 28 and March 12 she was on leave without pay for twenty-four (24) hours; between March 13 and March 26, 1988 she was on leave without pay for thirty-two (32) hours. Between March 27,1988 and June 19, 1988 she was on leave without pay for sixty (60) hours. She was also on sick leave for twenty-three and one-half (23.5) hours and on vacation for seventeen (17) hours spread over three (3) weeks.

On June 20 the Grievant worked six (6) hours after which during the week of June 19 she was on vacation for ten (10) hours and on leave without pay for twenty-four (24) hours. Between June 27 through July 1 the Grievant was on leave without pay for forty (40) hours. June 20, 1988 was the last day that the Grievant worked for the State. She was discharged, effective August 31,1988.

Having set forth the Grievant's attendance record I turn to the testimony by the witnesses for the parties from which emerges, the issues in this case.

The State's Case:

C. L. Frye is the Chief of the Human Resources Division of the Ohio Department of Aging. Frye said that by mid-November 1987 the Grievant had submitted a number of doctor's excuses for her absenteeism. The doctor's excuses did not have a diagnosis, a prognosis or a treatment. The State then received a doctor's letter that the Grievant would be off until December 31, 1987. Two (2) weeks into January, 1988 the State had not heard from the Grievant. Frye said that he was told by the Agency Director to write to the Grievant and order her to return to work. There was no acknowledgment of his letter and in mid-January, 1988 he received a letter from the Grievant's

physician, Dr. Leatherman, indicating that she would not supply the State with information on the Grievant's treatment or when she would return to work. Frye indicated that “five (5) different physicians” provided the State with notes indicating that she would be absent for various periods of time.

Shortly before January 25, 1988 the Bureau of Workers' Compensation called the State because they had a suspicion that the Grievant was employed elsewhere. The Bureau wanted the State to make a request in writing directed to the Bureau of Workers' Compensation requesting its permission to have the Grievant examined by another doctor. In Frye's letter to the Bureau he indicated that the reason for making the request was “because of the extended time that her claim had been pending and the vagueness of the diagnosis” given by the Grievant’s physicians concerning her “estimated date to return to work”. Pursuant to a letter dated February 2, 1988 by Frye the Grievant was informed that she had been scheduled for a medical examination at the State's expense for February 29,1988. The letter was accompanied by a medical release which the Grievant was requested to return by February 16,1988. The medical release which was to be signed by the Grievant would grant permission by her attending physician, Dr. Sue Leatherman, to release her full medical records and reports to the State. The Grievant never returned the executed release.

Dr. W. Jerry McCloud, examined the Grievant on February 29, 1989 the scheduled date of her appointment. His evaluation, concluded with his findings that “she may have a myositis of the right rhomboids or the right paraspinas, which should not interfere with her quality of life activities nor her productive activities as an Account Clerk”. Furthermore, Dr. McCloud stated that it was his opinion that the Grievant “is capable of resuming her work activities without restriction”.

On June 20, 1988 the Grievant was given a verbal warning by her direct supervisor, Barbra Davis, Accounting Administrator, for several reasons among which, was taking time off without prior approval. After receiving a copy of the verbal warning the Grievant
came into the office and received a copy of Dr. McCloud's medical opinion. After doing so she left work and since that date has not returned.

On July 8 Frye sent a letter to the Grievant indicating that the State “was expecting” her to return to her assigned job duties at her “regular time on Tuesday, July 12, 1988”. Frye's letter also indicated that the Grievant had been absent since June 21, 1988, a period of twelve (12) working days.

On July 19, 1988 Frye sent a letter to the Grievant that he had scheduled another medical examination at the State's expense for August 9, 1988. The examination would be conducted again by Dr. McCloud. The Grievant did not respond to the letter nor did she show up for the medical examination of August 9,1988.

On August 9,1988 Frye sent a letter to the Grievant indicating that he was informed by Dr. McCloud's office that the Grievant failed to keep the scheduled appointment on August 9, 1988. Frye also indicated that his letter was “a direct order” for the Grievant to return to work on August 15,1988. In his letter Frye also indicated that her failure to comply would make her subject to disciplinary action. Frye went on to state that from June 20, 1988 to August 9, 1988 the date of his letter which constituted a “direct order” for the Grievant to return to work, there was no contact with the Grievant. However, during this period of time Frye said that the State received two (2) or three (3) separate notes from doctors who indicated that they were treating the Grievant.

After the Grievant failed to keep the appointment with Dr. McCloud on August 9 and her failure to comply with his direct order Frye indicated that he arranged for a pre-disciplinary meeting to take place. Frye indicated that the response of the Union and the Grievant at the pre-disciplinary hearing was that there were “mitigating circumstances” and that “her injury was work related”. At the hearing the Grievant indicated that her “condition was extreme” and that she “could not fend for

herself and do things for herself". As the Hearing Officer, Frye summarized the testimony and recommended that the Grievant be terminated. Frye indicated that his reasons for his recommendation were as follows: (1) Over an extended period of time the Grievant had been absent. Although the State received a number of doctor's notes concerning the Grievant there was no prognosis and diagnosis set forth in the notes. (2) The doctor's notes were from five (5) doctors. (3) The State arranged for two (2) medical examinations and the Grievant failed to appear at the second medical examination. (4) The Union said that the Grievant could not fend for herself but Frye received information from William Nightingale, Comptroller of George J. Igel & Company, Inc. that she submitted an employment application to the Company in which she indicated that she could fend for herself. (5) There was no evidence that the Grievant's condition was aggravated after June 20,1988.

Frye said that at the pre-disciplinary hearing, the Union or the Grievant stated that she was unable to respond to the State's letters because she was no longer at the address to which the State was sending mail. Frye stated that the return receipts for the letters sent to the Grievant indicated the last address of the Grievant which was in the State's records. He testified that it "was possible" that the Grievant's condition changed between February 1988 and June 1988. As a result the State scheduled a second medical examination for the Grievant which was to take place on August 9, 1988.

Frye acknowledged that the Grievant had not been disciplined for Missing work. He further acknowledged that her failure to appear at work is an appropriate subject for discipline. Frye indicated that leave without pay is generally suggested when no other leave is available for an employee. He acknowledged that such requests for leave without pay are usually granted.

Frye acknowledged that the Grievant's record prior to April 15 was not examined in determining that she should be terminated; nor was the Grievant's level of performance ever questioned by the State. Frye indicated that the State never considered the Grievants performance evaluations in its decision of termination.

Frye indicated that it was possible that although his letter dated July 8,1988 stated that he was "expecting" the Grievant to report to work on July 12, 1988, it "was possible" that the Grievant had submitted a doctor's note which stated that she would be reporting back to work on July 15, 1988. Frye said that the State "did not believe" the doctor's statements submitted by the Grievant.

Frye acknowledged that with respect to a prior illness of the Grievant that occurred before April 1987 he sent a memorandum to the Grievant requesting that she provide him with a physician's release so that she could return to work. Frye admitted that there was a difference in the language he used in his July 8 letter referring to "expecting" the Grievant to report to her assigned job on July 12, 1988 and his August 9,1988 letter which constituted a "direct order" for her return to work on August 15,1988.

Frye acknowledged on cross examination that on January 19, 1988 he sent a letter to the Grievant which indicated that in the last medical statement received by the State, it indicated that she could return to work on December 30,1987. In his letter he indicated that it was a "direct order" for the Grievant to return to work and that if she failed to comply, she would be considered "away without leave and subject to disciplinary action".

Sue Hammond, Chief, Fiscal Management of the Department, testified on the problems created by the Grievant's absenteeism. She indicated that the Grievant's absenteeism had a direct impact on the functions that the Grievant generally performed in the office and had a detrimental impact on her own activities. Hammond testified that she wanted to free up time for herself. In order to do so, she created two (2) assistant positions. As a result of the Grievant's absenteeism, Hammond said that she was unable to free up time because her assistants were not "freed up".

Hammond referred to the various functions performed by the Grievant such as, stuffing checks in envelopes and to assure that they are batched and mailed; placing in the computer the amount of each voucher; keeping accounts payable current for easy reference for grants; and also maintaining vendor accounts. These functions according to Hammond are clerical support functions and must be performed daily. When the Grievant was not in the office someone "has to step in". The complications arising out of the Grievant's absenteeism stem from not knowing that the Grievant would be out for an extended period of time. According to Hammond from December 20,1987 to June 20, 1988 the State had little notice of the length of the Grievant's absences. This created a hardship since the assistant could not predict when she would actually fulfill her functions of an assistant, or perform the Grievant's duties.

Nightingale interviewed the Grievant for a data entry clerk position for Igel & Co., Inc. on August 18,1988. When he called Frye to inquire about her employment for the State, Frye requested a letter setting forth the information which the Grievant supplied to his company in filling out the application for employment. Among other things, Nightingale stated the Grievant wrote on her application for employment that she was employed with the State from July "1986 to the present". Under activities that she enjoys she listed on the application, "swimming, dancing, singing, jogging, bowling, etc." Although the Grievant listed such activities Nightingale acknowledged that she did not indicate that she currently engages in those activities. The Grievant indicated "n/a" or not applicable under the category of "physical defects".

Nightingale stated that the Grievant walked into the room unassisted. He was on the second floor where the interview took place. There is no elevator in the building where he works. The interview with the Grievant took one (1) hour during which time she took a typing test. Nightingale acknowledged that he did not see the Grievant walk up the stairs.

The Union's Case:

The Grievant said that after she was injured on April 15, 1987 she was taken to Grant Hospital Emergency Room where x-rays were taken. The evaluation by the doctor at the time was that she had sprained the upper part of her back. She returned to work two (2) to three (3) weeks thereafter. However, she continued to suffer "constant pain" frequently taking Tylenol. She also takes Flexoril and Elovil which are "pain killers". She said that she could not stretch her arms; she was unable to wash dishes, or do housework, and she was confined to bed rest. The Grievant said that her back gets better and worse and she never knows when her back will "flare up". She said that she undergoes therapy at Grant Hospital under the supervision of Dr. Everhart. The therapy consists of heat massages, bending, stretching, reaching and exercises at home and light swimming. She is prohibited from lifting and jogging. At the time of the hearing she was able to participate in more activities than the activities she engaged in soon after she suffered her injury. The Grievant said that the injury on April 15 has prevented her from sitting too long (the longest she can do so is up to one (1) hour). She said that stress has a lot to do with causing her back problem to "flare-up".

The Grievant did not recall receiving Frye's January 19, 1988 letter wherein he stated that the letter was a "direct order" for her to return to work forty-eight (48) hours after receipt of the letter. However, she acknowledged that she recalled signing off on it thus indicating that she signed the receipt for the certified mail.

The Grievant indicated that Dr. Leatherman was her primary doctor and that she was under her care. She also stated that Dr. Nancy L. Graesser also was an attending physician. The Grievant testified about her examination by Dr. McCloud. She said that he looked behind her and saw her back and asked whether she sat a lot at her job. She told him that her back hurt. According to the

Grievant the entire visit with Dr. McCloud lasted ten (10) minutes.

The Grievant acknowledged receiving Frye's July 8,1988 letter in which he stated he was "expecting" her to return to work on July 12, 1988. She indicated that she felt that she complied with Frye's letter by submitting a "doctor's excuse". The Grievant indicated that she did not recall receiving Frye's July 19 letter. She states that she would have gone to visit Dr. McCloud if she had received the letter. She further stated that the return receipt does not indicate that she received Frye's July 19 letter.

The Grievant recalled receiving the August 9, 1988 letter in which Frye indicated was a "direct order" for her to return to work. She acknowledged that her signature appeared on the return receipt. However, she did not report to work because she was still suffering from her back injury and she had furnished the State with a doctor's excuse. The Grievant stated that she was staying at her mother's house with her daughter who was eleven (11) years old. She stayed with her mother because she could not take care of herself. Furthermore, she stayed at her mother's house longer than a month.

The Grievant indicated that she was approved for workers' compensation and has received payments. She stated that she received checks in the amount of $200 a week. For a period of time she received an overpayment from the Workers' Compensation Bureau. As a result recently, she had not received anything from the agency. She said that once she fully reimburses the Bureau of Workers' Compensation for the overpayments, she will continue to be eligible for benefits. The Grievant stated that she was considered to be "permanent partially disabled" by the Bureau of Workers' Compensation.

The Grievant stated that she would contact her doctors before her leave was up to get another slip. She acknowledged that she would call one (1) of the doctors or request their secretaries for doctor's notes.

DISCUSSION

The parties agreed that the issue to be resolved by the Arbitrator is as follows:

"was the grievant's employment with the Ohio Department of Aging terminated with just cause? if not, what should the remedy be"

The State contends that the Grievant was discharged for "neglect of duty, poor attendance and failure to respond to direct orders to return to work". I have concluded that the focal point of the State's case is the "poor attendance" or excessive absenteeism of the Grievant. Once that is established the other issues (which relate to the absenteeism of the Grievant) can then be considered.

I.

EXCESSIVE ABSENTEEISM

From April 15, 1987, when the Grievant sustained her injury, through July 1, 1988, excluding vacation time, the Grievant was absent from work a total of approximately 905 hours or roughly 113 days. The total of 905 hours was based upon the Grievant's exercise of sick leave, personal leave and leave without pay.[1] Thus, the Grievant has been absent roughly thirty-eight percent (38%) of her scheduled work days, excluding vacation time.

It is fairly well established that discharge of an employee is justified for chronic, excessive

absenteeism, even when the employee's absences are due to illness. In this connection, the Arbitrator in Cleveland Trencher Co., 48 LA 615 (Teple, 1967) observed:

“At some point the employer must be able to terminate the services of an employee who is unable to work more than part time, for whatever reason. Efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity. Other arbitrators have so found, and this Arbitrator has upheld terminations in several appropriate cases involving frequent and extended absences due to illness * *.” at pages 618-619.

In Keystone Steel & Wire Co., 43 LA 703 (Klamon, 1964), the Arbitrator sustained the discharge of an employee for excessive absenteeism despite the legitimacy of the health reasons which caused the employee's excessive absenteeism. The Arbitrator in Keystone referred to an unpublished award by Arbitrator Ralph T. Seward, which, in relevant part, provides as follows:

“An employee's personal affairs, domestic crises, the needs of children or relatives, etc. may often excuse isolated absences from work or even a series of absences. But when a pattern of repeated absenteeism continues indefinitely--month after month and year after year--a point must eventually be reached where a reason for the absences becomes immaterial and the question becomes simply whether the Company can properly be required to retain on its payroll an employee who cannot reasonably be relied on to come to work”. At page 714.

I have concluded that the Grievant's absenteeism since April 15, 1987 was excessive. Furthermore, the Grievant's excessive absenteeism was accentuated between January 3,1988 through July 1, 1988, when she was absent from work, based upon leave without pay and sick leave, for a total of 491.5 hours or forty-seven (47%) of the total 1,040 scheduled work hours. There is no question but that an “employer has a right to expect an employee to be available for work with reasonable regularity to perform work in his classification regardless of the validity of his illness”. United States Plywood Corp., 46 LA 436, 439 (Anderson, 1966). The . evidence warrants the conclusion that the Grievant was not available for work with reasonable regularity since April 15,1987 and especially since January 3, 1988 through July 1, 1988.

a. Pattern of Doctor's Notes

In addition to the excessive absenteeism of the Grievant, there is the pattern of frequently obtaining and submitting to the State a series of doctor's statements, each successively extending her return to work date. For example, on June 14,1988, the Grievant obtained a statement from Dr. Nancy Graesser indicating that she was able to return to work on the following day, June 15,1988. On June 15,1988 the Grievant obtained a statement from Dr. Leatherman that she will be able to return to work on June 20,1988 on which date the Grievant received another note from Dr. Leatherman to “excuse her from work June 20 through July 4”. On the following day, July 5, the Grievant received a note from Dr. Leatherman that she was able to return to work on July 15. On July 14 the Grievant obtained a statement from Dr. Everhart-McDonald indicating that “she should not return to work until August 5 at the earliest”. On August 2, the Grievant obtained another note from Dr. Everhart-McDonald indicating that he estimated date of return is August 31,1988.

This pattern of obtaining a doctor's statement extending her date of return to work on or close to the date when the previous note from a doctor indicated that she was able to return to work, began on or about October 14,1987. Quite often, the doctor's notes extending the Grievant's return to

work was submitted to the State on or about the date when a previous doctor's note indicated that she was able to return to work.

The series of doctor's notes extending the Grievant's absence from work from October, 1987 through the date of her discharge, created problems for Hammond in terms of the efficient operation of her office. As Hammond indicated, there was inadequate advance notice of the Grievant's absences. As a result, her plan to relieve herself of some of her duties by creating two (2) assistant positions could not be implemented. Furthermore, the Grievant's absenteeism caused problems with the operation of the office inasmuch as the Grievant's clerical support functions was required to be performed on a daily basis. The Grievant's absenteeism caused someone to “step into” her position to perform the required duties. In effect, the efficiency of the office could hardly be maintained with the potential “on again” but realization of the “off again” pattern of the Grievant.

b. Irregularity of Absence

Between October, 1987 through July 1, 1988, the Grievant's absenteeism was unpredictable and irregular. For example, between October 5 through November 7, 1987 the Grievant was on leave without pay. From November 7 through December 4, 1987 the Grievant worked. There followed a period of absenteeism, as a result of taking sick leave, personal leave and leave without pay until early March when she returned to work. It is enough to state that the irregularity and unpredictability of the Grievant's absenteeism interfered with the efficient operation of the Division of Fiscal Management.

c. The Doctor's Notes

Between October 1987 and through July 1988, the Grievant obtained notes from primarily Dr. Leatherman. Occasionally, she received notes from Drs. Graesser and Everhart-McDonald. At times the notes consist of printed forms, with the dates filled in, which indicated the period of care by the doctor and the date when the Grievant was able to return to work. Several notes set forth the Grievant's condition in the following terms: “thoracic strain”; “severe upper back pain” and “chronic” or "severe post traumatic myofascial pain syndrome”. There were occasions when the Grievant acknowledged that she received doctor's notes by calling the doctor or receiving “a couple of slips written by the secretary”. . Thus, the Grievant received several doctor's notes based upon her complaints rather than an examination by the doctor.

Essentially, the State argues among other things, that most of the doctor's notes submitted by the Grievant are vague, curt and her testimony is self-serving. The notes are deficient in failing to indicate that the Grievant is disabled or unable to work during the various periods when she was absent.

When confronted by the facts presented in this case, the arbitrator's choices are limited. First of all, there is the difficulty of getting a doctor to be a witness at the arbitration hearing. Perhaps a post-hearing inquiry of the doctor could have been requested. Moreover, it may very well be that the notes are a courtesy extended by the doctors. In any event, as stated in Arbitration and the Absent Employee by Howard Block and Richard Mittenthal, 37th Annual Meeting of the NAA, (BNA, 1985):

“We recognize that employees occasionally obtain a doctor's note even though they are not ill or disabled. Such notes may be available for a price. However deplorable this practice may be, the arbitrator cannot identify the situations in which notes are being improperly issued. That is a

matter of proof. Only if the employer takes the initiative and develops evidence of fraud can the arbitrator respond". At page 82.

As Block and Mittenthal state, whether the notes have been improperly issued is a matter of proof. In this connection I turn to consider the proof submitted by the State:

d. Dr. McCloud's Examination

Frye indicated that the Bureau of Workers' Compensation contacted him because of a suspicion that the Grievant was employed elsewhere. As a result, and at its expense, the State scheduled a medical examination for the Grievant on February 29, 1988 which would be performed by Dr. McCloud. After examining the Grievant, Dr. McCloud submitted a written evaluation which he concluded by stating:

"In summary, this individual may have a myositis of the right rhomboids or the right paraspinas, but does not have any other problems. These findings should not interfere with her quality of life activities nor her productive activities as an account clerk. I did review her job description and basically discussed those activities with her.
It is my opinion that this patient is capable of resuming her work activities without restriction."

During the week of February 29,1988 the Grievant was absent by taking twenty-four (24) hours of leave without pay and after two (2) weeks of work she again took leave without pay, this time for thirty-two (32) hours during the week of March 21, 1988. There followed a pattern of several weeks of work and intermittent periods of absenteeism. In any event, after receiving Dr. McCloud's evaluation, dated February 29, the State failed to impose discipline against the Grievant or otherwise impress upon her the seriousness with which it treated her absenteeism.

e. George J. Igel & Co., Inc.

Frye was contacted in August, 1988 that the Grievant was seeking employment with George J. Igel & Co., Inc. On the employment application form, she indicated "n/a" or not applicable in response to the category calling for a listing of "any physical defects". The Grievant indicates that she did not fill out the Igel & Co. employment application truthfully concerning her response of "n/a" as to whether she had "any physical defects". However, from the perspective of the State, the Igel employment application form constitutes objective evidence from which to conclude that the Grievant's condition was not as serious as she or her doctors had claimed it to be. Furthermore, she stated on the form that she could start to work "any time".

The inference to be drawn from the Grievant's employment application is that it casts some doubt on the seriousness of her condition and her inability to work. The employment application form was filled out by the Grievant on August 1, 1988. It is of great weight that on the following day, August 2, 1988, the Grievant obtained a note from Dr. Everhart-McDonald which indicated that she was continuing to treat the Grievant for "severe post-traumatic myofascial pain syndrome * * " The doctor estimated her date of return to be August 31, 1989. I have concluded that the Grievant's condition at least around August 1, 1988, if not before that date must be viewed with some skepticism.

I cannot give much weight to the fact that the Grievant indicated on the employment application form that she enjoys swimming, dancing, jogging and bowling. She did not disclose that she had performed these activities during any particular period of time, or at any time after April 15,1987.

f. Failure to "Recall" Receiving Letters from the State

On January 19, 1988, Frye sent a letter to the Grievant stating that the last medical statement that he received indicated that she could return to work on December 30,1987. Frye went on to state that the letter was a "direct order" for her to return to work "48 hours after receipt of this letter". The Grievant testified that she "recalled" signing off on the receipt for certified mail but she did "not recall" receiving the letter. It is sufficient to state that since the Grievant recalled signing off on the letter, she was placed on notice of the contents of the letter.

On July 19, 1988 Frye sent a letter to the Grievant advising her that at the State's expense, she had been scheduled for a medical examination by Dr. McCloud for August 9, 1988. The Grievant said that she did not recall seeing the letter. She added that she would have seen Dr. McCloud had she received the letter. The Grievant added that there was no copy of the return receipt which accompanied the copy of the letter submitted by the State.

I have concluded that the Grievant received the July 19 notification of her medical examination for August 9, 1988. On cross-examination she said that she did not show up for the examination because she had "moved" from her residence and was staying at her mother's house due to her back injury. The Grievant stated that her mother "did not pick up the notice in time". As an employee of the State, and in light of previous letters sent by the State to her last known residence concerning her absenteeism, it was incumbent upon the Grievant to notify the State as to where she was residing and where it could send mail.

The factors referred to so far such as the Grievant's excessive absenteeism, the pattern of doctor's notes submitted by the Grievant, the manner in which the notes were obtained, the irregularity of her absenteeism, Dr. McCloud's evaluation, the Grievant's employment application with Igel & Co., and the Grievant's failure to recall receiving the State's letters at her last known address--all of these factors, rather than any single factor, in my judgment, establish a case of neglect of duty by the Grievant. However, these factors are offset to an extent by the State's failure to impose progressive discipline and its inaction in the face of the Grievant's excessive absenteeism and neglect of duty.

II.
PROGRESSIVE DISCIPLINE

Article 24, Section 24.02 of the Agreement provides as follows:

"The Employer will follow the principles of progressive discipline. Disciplinary actions 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 * *".

The Grievant received a verbal warning on June 20,1988. Frye acknowledged that the Grievant was not disciplined for "missing work" or for absenteeism. He said that the Grievant was disciplined for several reasons: for not completing requested leave forms "in the appropriate manner"; the dates that she was off were incorrect; she left early on June 15 without prior approval and "that she was capable" of performing her duties as indicated by Dr. McCloud's evaluation. Even if the June 20,1988 verbal reprimand was issued for excessive absenteeism it was after roughly seven (7) months of excessive absenteeism. It was issued much too late to place the Grievant on notice that she must correct her absenteeism or face discharge.

The State contends that the Grievant "never provided any indication that progressive discipline could be corrective". The answer to this contention is that the State is unable to know that the Grievant would not respond positively to corrective discipline, since it had never been applied. The imposition of progressive harsh penalties against a continuing errant offender, quite often, has a way of discouraging such conduct in the future. On the other hand, I have inferred that the Grievant was aware that her excessive absenteeism was not condoned by the State given its scheduling of two (2) medical examinations of her condition by Dr. McCloud and in light of Frye's "direct order" to her to return to work in his letters of January 19, 1988 and August 9, 1988.

It should be pointed out that Frye's letter dated July 8,1988 to the Grievant "expecting" her to report to work on July 12, 1988 is not "direct order". When Frye wanted his letter to serve as a "direct order" to the Grievant to return to work he knew how to state those terms in simple and unequivocal language. This is not to suggest that the word "expecting" in Frye's letter dated July 8,1988 is to be ignored as some polite or courteous request. It is a statement which hints of a strong anticipation that the Grievant is to return to work on July 12, 1988. In stating that these letters served as notice of the State's dissatisfaction of the Grievant's absenteeism, nevertheless, I am not unmindful of the State's failure to impose any disciplinary action against her.

CONCLUSION

The facts of the instant case are different from the facts of the Stoughton decision which involved the same parties to this dispute. In Stoughton, which was rendered on December 2, 1987 I reinstated without pay, a 65 year old woman who was discharged for neglect of duty, which included poor attendance and tardiness. In Stoughton there was detailed medical evidence on the grievants condition. For reasons of pride she did not divulge her medical condition to the State. Furthermore, she was a satisfactory part-time employee before she became a full time data entry operator. Despite the State's imposition of progressive discipline, I believed that the equities weighed in favor of the grievant so that she should be given another opportunity to be employed by the State.

In this case, Dr. McCloud's evaluation of the Grievant's medical condition, her false employment application to Igel & Co, the excessive absenteeism, the irregularity of her absenteeism the pattern and nature of the doctor's notes which she submitted, her failure to recall receiving the State's letters to return to work and to take a second physical examination, must be balanced against the State's neglect in imposing progressive discipline which is set forth in Section 24.02 of the Agreement. In light of the State's violation of Section 24.02 in a case where it is especially appropriate to apply progressive discipline, the Grievant is to be reinstated without back pay. In arriving at this conclusion I have also given weight to the fact that the Grievant was

considered an exemplary employee by the State before April 15,1987.

Although the State has acted with extraordinary forbearance, patience and restraint in dealing with the Grievant, she should be made aware that this decision places her on notice that there is a limit to her excessive absenteeism which no employer should be required to endure. Thus, balancing the State's violation of Section 24.02 against the evidentiary record which establishes the Grievant's neglect of duty and excessive absenteeism, she is to be reinstated without back pay.

AWARD

In light of its failure to comply with Section 24.02 of the Agreement, the State failed to prove that the Grievant was discharged for just cause. Balancing the State's violation of Section 24.02 against the evidentiary record which establishes the Grievant's neglect of duty, including her excessive absenteeism, she is to be reinstated without back pay.

This decision may be taken into account by the State in evaluating the disciplinary penalty appropriate to any future violation of duty by the Grievant should any occur and shall be without prejudice to the State if following any future absence of the Grievant, it can adequately prove that the Grievant cannot be expected to be reasonably regular in future attendance at work.

Dated: August 17,1989
Cuyahoga County
Cleveland, Ohio

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[1] During this period of time, the Grievant was off from work for vacation and her birthday for an additional 131 hours or 16.5 days.