ARBITRATION DECISION NO.:
252

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

EMPLOYER:
Department of Commerce

DATE OF ARBITRATION:
April 17, 1990

DATE OF DECISION:
April 30, 1990

GRIEVANT:
Pam Jones

OCB GRIEVANCE NO.:
07-00-(89-12-27)-0059-01-09

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
Carol Bowshier

FOR THE EMPLOYER:
Rachel Livengood

KEY WORDS:
Removal
Job Abandonment
Mitigation
Management Duty to
Investigate

ARTICLES:
Article 24-Discipline
§24.01-Standard

FACTS:

The grievant was an Administrative Secretary employed by the Ohio Department of Commerce. She requested and was granted the morning off of work for personal business. The grievant did not come in or call back that day. The next three days the grievant was absent from work. Her husband called in on the first day of her absence and stated that the grievant could not come to the phone. The grievant explained the circumstances surrounding her absence on her first day back. She had been kidnapped by acquaintances of her husband. Based solely on that information the grievant was removed for absenteeism.

EMPLOYER'S POSITION:

There is just cause for removal. The grievant was absent without authorization for three and one half days. The penalty for three consecutive unauthorized absences is removal. The grievant's excuse for the absences, being kidnapped, is not credible. The employer is not responsible for investigating the grievant's claims. In the past year the grievant has received a verbal reprimand, a written reprimand and a one day suspension, all for tardiness.

UNION'S POSITION:

There is no just cause for removal. The grievant did miss three consecutive days of work, however, the absence was caused by circumstances beyond her control. Being kidnapped is a valid mitigating circumstance. The grievant offered proof of the event but the employer rejected it. The employer has a duty to investigate prior to imposing discipline. The grievant is also a ten year employee with no prior AWOL and an excellent work record.

ARBITRATOR'S OPINION:

At the conclusion of the hearing the arbitrator notified the parties that there was no just cause for removal and the grievant would be going back to work. The arbitrator attempted to have the parties negotiate a settlement but the union and management were unable to reach an agreement.

The grievant did miss three consecutive days of work as stated. However, there are mitigating circumstances and procedural errors present. The grievant is credible and her explanation that she was kidnapped is believable. This was beyond her control and therefore a valid mitigating circumstance. This event prevented her from calling in to the employer or coming to work.

The employer has some duty to investigate before imposing discipline. Additionally, the employer has more resources to investigate than the union. The employer cannot rely on the subjective judgment of its supervisors to impose discipline. Therefore, the three day absence is overcome by mitigating circumstances and procedural error.

AWARD:

Grievance sustained. It was suggested by the arbitrator that the employee be placed into a different but comparable position because the grievant's relationship with her supervisors had been so damaged. The grievant will be reinstated with full back pay, insurance benefits restored immediately and no discipline on her record. The arbitrator retained jurisdiction over the award for two years to ensure compliance with the decision and to prevent discrimination against the grievant. The union has the right to bring any evidence of unfair treatment of the grievant to the arbitrator for two years, after giving notice to the employer.

NOTE: See Corresponding Cases 252 A and 252 B

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO
Union

and

Ohio Department of Commerce
c/o Office of Collective Bargaining
Employer

Grievance:
07-00-(12-27-89) 0059-01-09
Grievant:
(Pam Jones)
Hearing Date:
April 17, 1990
Opinion Date:
April 30, 1990

For the Union:
Carol Bowsheir

For the Employer:
Rachel Livengood

Present at the hearing in addition to the Grievant named above and the advocates named above were Joyce A. Kady, Chief of the Enforcement Division (DOC) (witness), Vicki Treciak, Human Relations Specialist (DOC) (witness), Roger Coe (OCB), Dennis Williams, OCSEA Staff Representative (observer), Randolph M. Burley, Chief Steward (witness), Officers Winden and Jones, City of Columbus Police Officers (witnesses by subpoena).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Stipulated Issue

Was the Grievant removed for just cause?
If not, what shall the remedy be?

Stipulated Facts

1. The Grievant has 10 years of service to the State of Ohio.

2. The Grievant has received a verbal reprimand, a written reprimand and a one day suspension for tardinesses as prior disciplinary actions.

3. Joseph Jones, the Grievant's husband, called supervisor Joyce Kady on November 1, 1989 to inform her of the Grievant’s absence.

4. The Grievant has received no prior disciplinary action for failing to call in to report her absence.

5. The Grievant was terminated from employment on December 15, 1989.

6. All disciplinary policies were not negotiated between the parties.

Stipulated Documents

1. The contract
2. Grievance Trail
3. Disciplinary Trail
4. Performance evaluations
5. Disciplinary policy
6. Sick Leave policy
7. Short Term Leave policy
8. Bi-Weekly Attendance Report

Facts

The Grievant, at the time of the incidents in question, was an Administrative Secretary who had been employed in DOC for 10 years. During that 10 year period, she had been promoted three times. Her evaluations for the first 9 of those 10 years placed her performance in the upper one fifth of performance categories. In the last year, her evaluation slipped to the upper two fifths. These evaluations were made and signed by her Supervisor Joyce Kady. In 1989, the Grievant received her first discipline. She received a verbal reprimand, a written reprimand, and a one day suspension for tardiness. These disciplinary measures all occurred between January, 1989 and May, 1989. Ms. Kady testified that the Grievant had had problems at home for 6 or 7 years but that these "problems" had never affected the Grievant's job until early 1989.

On October 31, 1989, the Grievant called in between 8:00 and 8:30 and asked permission to take her son to the doctor. Ms. Kady testified that she received the call and told the Grievant that she was "needed" at noon and should either come in or call in by noon. The Grievant replied she would do "the best she could." The Grievant neither came in at noon nor called. On Wednesday, November 1, 1989, Joe Jones, the Grievant's husband called in and said that the Grievant was "in no condition to come to work." When Ms. Kady asked to speak to the Grievant, her husband said "she can't come to the phone." On November 2, 1989 and November 3, 1989 (Thursday and Friday), the Grievant did not come to work nor did she call in.

On Monday, November 6, 1989, the Grievant came to work and went to Ms. Kady and asked to speak to her to explain her absences. Ms. Kady said she did not think that talking to the Grievant alone was "appropriate", so she set up an appointment for herself, the Grievant, and Ms. Ritenhour at 10:00 a.m.

At 10:00 a.m., the Grievant told her story to Ms. Kady and Ms. Ritenhour. Ms. Kady testified that the description of events given on November 6, 1989 was consistent with the Grievant's subsequent recitation of the events at later hearings. After hearing the story, Ms. Kady said she and Ms. Ritenhour agreed "that something had to be done", and since she (Ms. Kady) could only issue written and verbal reprimand, the actual decision was not hers.

On cross-examination, Ms. Kady said that from the first recitation she did "not believe" the Grievant. Although on cross-examination she did concede that "something had happened in her (the Grievant's) life", something "unusual." Ms. Kady said she considered the Grievant AWOL for the afternoon of October 31, 1989 because the Grievant never called in. She stated that if the Grievant had called in, she would have approved the afternoon as leave. Ms. Kady said that she considered the Grievant AWOL on November 1, 1989 because she did not consider the husband's phone call sufficient. She said that in another case she had considered a wife's phone call sufficient when the wife allegedly called from the ICU Unit when her husband (the employee) had a heart attack. Ms. Kady said the situations were "entirely different." Ms. Kady said the Grievant had never previously abused sick leave. Ms. Kady said she regarded the Grievant's story as a "continuing saga", and although she did not believe the Grievant, she asked her for no verification. She said she herself did not attempt to verify any of the facts because "it wasn't her role." She said that a couple of police reports were submitted, but they did not contain the Grievant's name. She said she knew of no investigation conducted by the Employer. Ms. Kady was the Employer's sole witness.

The Grievant testified that on October 31, 1989 she called in and said she had to take her youngest son to the doctor's. Ms Kady gave permission but demanded that she (the Grievant) be in by noon or call. The Grievant said "she'd do her best." The Grievant testified that she had no car and relied on public transportation. By mid-morning, the youngest child was feeling better, and the Grievant resolved to take him to the babysitter's and then go into work. A man who had come to her home to see her husband, an apparent friend, offered to drive her to the babysitter's and return her to the house to go to work. After delivering the child, the man did not return the Grievant to her home as promised and unusual events followed. Apparently, the Grievant's husband was a small time drug dealer who owed some money to his source. In essence, the "collector" held the Grievant as collateral for the money owed until Saturday p.m. when her husband finally paid up. At one point in the three day saga, the Grievant temporarily escaped and made contact with two policemen. However, the policemen never got her name. The Union introduced these police reports, and the Employer stipulated that the two officers would identify the Grievant as the woman they saw. After being released, the Grievant took her children and herself by bus to her mother's in Cincinnati, returning Sunday night to be at work on Monday. On Monday, after a four day ordeal, a 2 day bus trip, she attempted to explain what happened to her immediate supervisor, Ms. Kady.

The Employer found that the Grievant was AWOL 3-1/2 days (1/2 on October 31, 1989, 1 = 11/1/89, 2 = 11/2/89, 3 = 11/3/89). Under the grid (12(b)), AWOL for 3 days or more consecutive, the penalty listed is removal. The Grievant was terminated.

Discussion

Both sides agreed that Grievant was not at work for 4 days in a row. The Employer calculated the absence at 3-1/2 days by denying leave for October 31 p.m. and denying the validity of the husband's call in. Apparently, the Employer concluded from the moment the Grievant returned that she was a liar. No credence was given to her story, and no investigation undertaken. The Employer maintained that investigation was solely the Union's burden. This latter supposition flies in the face of labor management law. One test of just cause is that a full and fair investigation took place prior to discipline. The Grievant never had a fair chance because her supervisor stated that from the very first time she heard the story she did not believe the Grievant. Yet, the Grievant was a 10 year employee, with an excellent work record, with no prior AWOL, who the Supervisor knew was having "family problems", and whom the Supervisor claimed as a "friend." The Arbitrator finds this behavior not only incredible, but highly prejudicial.

Ms. Kady was the Employer witness, and she testified that no one in management sought to verify the police reports. Investigation is not the sole responsibility of the Union. The Employer has more resources to accomplish a thorough investigation, and to find just cause, the Employer cannot rely on the mere subjective feeling of supervisors. Thus, the Grievant did not receive a full and fair investigation. The Grievant was not AWOL on October 31, 1989. She properly called in. Mitigating circumstances prevented a noon call. The Grievant was not AWOL on November 1, 1989, her husband called in and truthfully said "She cannot come to the phone." Technically, the Grievant neither called nor worked on November 2, 1989 nor November 3, 1989. If the Grievant's story was essentially true, the absences on November 2, 1989 or November 3, 1989 were beyond her control. The Arbitrator found the Grievant to be a credible witness and that her description of events was truthful. Thus, the Arbitrator finds that the Grievant was not AWOL on October 31, 1989 or November 1, 1989 and that the technical AWOLs of November 2, 1989 and November 3, 1989 were overcome by mitigating circumstances beyond the control of the Grievant.

Settlement

At the close of the hearing, the Arbitrator informed both parties that she was not going to find just cause for the dismissal and that the Grievant was to go back to work. However, the Arbitrator suggested a negotiated settlement would be preferable and respond to the needs of both the Employer and the Grievant. However, the Employer was unable to find any way to place the Grievant in a comparable position, and after 10 days, no settlement resulted.

Award

The Grievance is upheld in its entirety. Upon first thought, the Arbitrator was going to hold the Grievant technically AWOL for two days, but upon reflection, that charge is overcome by the mitigating circumstances and by the failure of the Employer to conduct a full and fair investigation.

Therefore, the Grievant is to be reinstated in her position with full back pay and no discipline on her record. The Arbitrator would prefer that the Grievant be offered a comparable position elsewhere in the Agency under a different supervisor. Since the Agency maintains that no such position does exist nor can be found, the Arbitrator retains jurisdiction over this award for two (2) years and directs that the Grievant be treated without prejudice or harassment. Any evidence of unfair treatment can be brought by the Union, with notice to the Employer, directly to the Arbitrator. If a comparable position can be found, the Arbitrator will release jurisdiction when the Grievant is so placed.

The Arbitrator urges the Grievant to return immediately to counseling to handle the effects of the trauma and that insurance benefits be immediately restored.

Date: April 30, 1990

Rhonda R. Rivera
Arbitrator