

**ARBITRATION DECISION NO.:**

318

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Administrative  
Services, Division of  
State Personnel,  
Payroll Processing Unit

**DATE OF ARBITRATION:**

December 11, 1990

**DATE OF DECISION:**

January 22, 1991

**GRIEVANT:**

Gerald Peters

**OCB GRIEVANCE NO.:**

22-02-(90-05-23)-0134-01-05

**ARBITRATOR:**

Rhonda Rivera

**FOR THE UNION:**

Brenda Goheen

**FOR THE EMPLOYER:**

Shirley Turrell

**KEY WORDS:**

Removal  
Employee Altering His  
Own Pay Records  
Alteration of Records  
for Personal Gain  
Unexcused Absence

**ARTICLES:**

Article 23 - Personnel  
Records  
Article 24 - Discipline  
Article 25 - Grievance  
Procedure  
Article 29 - Sick Leave  
Article 43 - Duration

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**FACTS:**

The grievant worked for the Department of Administrative Services (DAS) for almost nine years, attaining the position of Payroll Processing Specialist in the Division of the State Personnel Payroll Processing Unit. He received three prior disciplines: a five day suspension for absenteeism in 1986, a three day suspension for altering his own records and a five day suspension for unauthorized absenteeism in 1988. In 1988 the IRS instituted a tax levy against the grievant's salary. The copy of this levy which DAS should have received, was missing from the grievant's record. The employer believed that the grievant had removed this IRS tax levy from his file. The grievant admitted to altering his records and explained that he needed to supplement his disability payments. The grievant stated that he thought the levy was a voluntary agreement with the IRS. Although he admitted changing his records he explained that he thought he was not being dishonest and did nothing wrong.

The grievant was diagnosed with a life threatening long term illness in 1985 and this caused problems with his attendance. He also stated that his immediate supervisor knew of his illness. His leave requests were always approved and he was never counseled about his attendance record. The employer removed the grievant for altering his payroll records and for his attendance that was becoming progressively worse.

**EMPLOYER'S POSITION:**

Employees who know how to alter payroll records are in an extremely sensitive position of trust. The grievant admitted to altering his record. The grievant abused his position for personal gain even after being suspended for the same offense in 1988. The grievant clearly had notice that unauthorized changes in his records was a work rule violation. By removing the monthly deduction for the IRS the grievant did alter his records to receive money. This is a violation of the department's policy and a serious breach of the employer's trust. It can not be credibly argued that the grievant thought the IRS levy was a voluntary, optional agreement. The State should not be forced to continue to employ a dishonest worker, especially in a work place where the potential for abuse is tremendous.

The grievant in addition to the allegation of dishonesty is developing a pattern of absenteeism. In 1989 the grievant used over 370 hours of unapproved leave; his sick leave was exhausted and he was absent for almost a week without a physician's statement. There is just cause for removal.

**UNION'S POSITION:**

The grievant did not know that his actions were dishonest or wrong. He freely admitted that he had altered his payroll records. The State dealt with his first alteration of records with a three day suspension and even if the State proves a violation, the discipline should be commensurate with the offense. The grievant, an eleven year employee facing extreme emotional trauma due to his illness, should not be removed.

The employer added the absenteeism charge to bolster their decision to remove the grievant. This motivation is evidenced by the employer's not charging the grievant until almost two months later with unauthorized absences. The charge has no merit and should not be considered in this arbitration. First, the document which purports to demonstrate the grievant's absences should not be introduced at the arbitration since it was not shown to the Union until the arbitration. Secondly, the grievant's immediate supervisor knew that the grievant had been diagnosed with a life threatening illness. The grievant's requests were always allowed. The last major problem with the absenteeism charge is that the grievant was never notified that his excused absences were a problem. The grievant's removal is not progressive or commensurate.

**ARBITRATOR'S OPINION:**

The Arbitrator found that the grievant was clearly notified that altering payroll records without authorization was a work rule violation. This violation without other mitigating factors would require a severe suspension of 10-30 days but not removal. The employer's charge of unauthorized absenteeism is without merit. The grievant took sick leave and his sick leave requests were never denied. There was no question that he was truly sick since the charge of unauthorized absenteeism can not be added to the violation of alteration of records, the removal is neither commensurate or progressive.

**AWARD:**

The removal will be modified to a thirty day suspension and grievant will be made whole.

**TEXT OF THE OPINION:**

In the Matter of the  
Arbitration Between

**OCSEA, Local 11  
AFSCME, AFL-CIO**  
Union

and

**Department of Administrative  
Services, State of Ohio**  
Employer

**Grievance No.:**  
22-002-(05-23-90)-0134-01-05

**Grievant:**  
(Peters, G.)

**Hearing Date:**  
December 11, 1990

**Award Date:**  
January 22, 1991

**Arbitrator:**  
Rivera, R.

**For the Union:**  
Brenda Goheen

**For the Employer:**  
Shirley Turrell

The following persons were in attendance at the Arbitration hearing in addition to the Advocates named above and the Grievant: Sybil Griffin, Assistant Deputy DAS (witness), David Breckinridge, Attachments Manager DAS (witness), Robert Cruse, Payroll Manager DAS (witness), Jeff Hodges, OCSEA Steward

**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.

## **Joint Stipulations of Fact**

1. Grievant was properly classified as a Payroll Processing Specialist.
2. Grievant worked in the Division of State Personnel, Payroll Processing Unit.
3. Grievant's date of hire was March 23, 1981.
4. Grievant's working hours were 7:00 a.m. - 4:00 p.m.; Monday-Friday in payroll weeks; Tuesday-Saturday - non payroll weeks.

## **Joint Stipulation of Issue**

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

## **Joint Exhibits**

1. 1989 Collective Bargaining Agreement (see below for relevant articles).
2. Notice of Removal and Disciplinary Notice.

Removal Letter dated May 16, 1990 stated the following reasons for removal:

“You are to be removed for the following infraction(s):

Excessive absenteeism; neglect of duty; unauthorized alteration of a payroll file for personal gain. Between January 17, 1990 and March 22, 1990, you have been absent without authorization for approximately 55 hours.

On or about August 17, 1989, you deleted, from your own payroll computer file, the deduction code for back taxes owed to the IRS. The alteration was discovered on March 15, 1990 when the agency received an IRS Levy for money owed. You were suspended in 1988 for altering your own file and were put on notice that you were not to access or alter your file.

As a payroll processor you are responsible to accurately and confidentially maintain computerized payroll files on behalf of all state agencies; and are entrusted to perform your duties in such fashion that the integrity of those records is unimpeachable. Having twice altered your own payroll files for personal gain, you can no longer be relied upon to perform your duties without serious compromise to the integrity of the Payroll Processing Unit.”

### 3. Grievance Trail

The original grievance dated 5/23/90 cited violation of the following articles and sections in particular: § 24-01, § 24.02, § 24.05, § 29.04, and § 43.02.

Step 3 response dated August 3, 1990 states that the Union contended violation of the following articles: § 24.01, § 24.02, § 24.05, §29.04, and §43.02.

### 4. Position Description - PCN 25416.0.

### 5. Classification Specifications for Payroll Processing Specialist 2.

### 6. Previous Discipline Record. Discipline included the following:

- a) A five (5) day suspension awarded 5/7/86 for various absenteeism violations (failure to call-in, lack of physician's excuse, late call-in) between 10/1/85 and 11/22/85.
- b) A three (3) day suspension awarded 1/20/88. Grievant was suspended for the following reason:

Failure of good behavior.

On or about October 31, 1987 you used your ability to access the payroll computer system to alter your personal payroll and state time records. Records indicate that you altered the balance of your vacation record from .7 hours to 43.5 hours. Records reveal further that you then supplemented your own Disability Journal records, using the altered vacation hours, resulting in a higher disability benefits payment for the pay period ending October 24, 1987. You have abused the authority of your position for personal gain and have compromised the integrity of the payroll system in so doing.

c) A five (5) day suspension awarded 10/4/88 for "exhausting all leave balances" and thus being "absent without authorization" for 26 days between February 4, 1988 and June 15, 1988.

## 7. Time Sheets

Covering the following payroll periods:

January 14, 1990 - January 27, 1990  
 January 28, 1990 - February 10, 1990  
 February 11, 1990 - February 24, 1990  
 February 25, 1990 - March 10, 1990

During that time period, the Grievant was listed for the following leave

Sick Leave -- 10.5 hours  
 Vacation Leave -- 21 hours  
 Other -- 56.5 hours

## 8. Leave requests

These leave requests cover the same time period as the time sheets.

### **Employer Exhibits**

#1 Proposal to Remove (To Director from Sybil R. Griffin) dated 4/13/90.

Infraction was stated as follows:

"Alteration of employee's own computerized file (payroll) which resulted in the deletion of the code for the voluntary wage plan which employee agreed to with IRS. The deletion of the code resulted in no monies being forwarded to IRS."

#2 Position Description Data System Cord 1 -- PCN 25310.

#3 Affidavit of Patricia A. McCoy which stated in pertinent part as follows:

On September 16, 1988 there was a Internal Revenue Service Levy received in the Attachment section levying upon the wages of Gerald A. Peters, SS# 273-40-0406, in the amount of \$2,737.04, which was posted on the attachment records on the same date.

The proper exemption forms were mailed to the employee. There was a release of levy obtained and entered, together with a Form 2159 Internal Revenue Service agreement whereby the employee would have a regular KTX deduction on his personal record, deducting the amount of \$42.50 per bi-weekly pay, which I posted on his record on September 26, 1988. These KTX deductions are not monitored by myself nor

viewed unless I receive a telephone call from an IRS agent, regarding the same.

On March 15, 1990, another Internal Revenue Levy was received by the attachment section for this same employee, and was entered by myself after browsing the employee's personal record and finding that the KTX deduction in the amount of \$42.50 had been deleted by someone other than myself.

Upon receiving the exemption forms, together with a copy of the new Levy, the employee came to my cubicle and inquired what could be done about the Levy. I asked him, "What did you do, did you delete the KTX?" He replied, "Yes". I further said, "You know the IRS will send another Levy when they receive no money."

The Union objected to three sentences found in the Affidavit contending that Grievant maintained those sentences were untrue.

The objection is overruled. The Affidavit represents the best evidence of what Ms. McCoy would have testified. Ms. McCoy was subpoenaed and appeared; the Grievant was an hour late; Ms. McCoy had to leave to attend to a personal emergency. The Grievant had an opportunity to testify and refute the affidavit.

#4 Time Sheet for August 13, 1989 to August 26, 1989.

#5 Computer Data run.

#6 Memorandum from Sybil R. Griffin to Pamela J. Gordon, Deputy Director dated 4/13/90 which read in pertinent part as follows:

I reviewed the documentation which included: 1. the voluntary agreement signed by Grievant with the IRS, 2. the computer record of activity on the PF update file on Grievant's terminal which indicated activity on his own file on 8/17/89, 3. attendance records which showed that the Grievant was at work on 8/17/89 and 4. witness statement of Pat McCoy dated 4/10/90 in which Ms. McCoy stated that the Grievant admitted to her that he had deleted his KTX code.

I asked Grievant if he deleted the KTX code which resulted in the cancellation of monies forwarded to IRS. Grievant stated that he deleted the code and that he did not feel it was improper because the agreement he had with IRS was voluntary. He also stated that he took this action because he was experiencing financial difficulty.

I stated that no payroll processing specialist could add or delete any records on the computerized files without proper documentation or authorization. He did not indicate that he had received permission to take such action.

#7 Supoena to Patricia McCoy to appear at the Arbitration hearing. (N.B. Ms. McCoy did appear but was released because of a family tragedy. See her affidavit Employer Exhibit #3.)

#8 Four documents

- a) Levy on Grievant from IRS dated 9/15/88.
- b) IRS Payroll Deduction Agreement with Grievant dated 9/22/88.
- c) Notice of IRS levy on Grievant dated 3/15/90 (received 3/15/90 by DAS).
- d) Release of levy on Grievant dated 3/15/90 (received by DAS on 3/16/90).

#9 Computer Payroll sheets of Grievant

- a) July 29, 1989: shows KTX
- b) August 13, 1989: KTX gone.

#10 Letter dated January 11, 1990 from Aurelia Dixon, Payroll Processing Supervisor, to Grievant which read in pertinent part as follows:

“Over the last year you have utilized over 370 hours of unapproved leave in addition to personal leave and vacation leave which has been approved when sick leave was exhausted. You have been absent from work on January 3, 4, 5, 6, and 8, 1990 on unapproved leave of absence and returned to work on January 9, 1990 for two hours.

Please be advised that it will be necessary for you to present an adequate physician's statement to explain your January absences within one week of receipt of this letter. Failure to present an adequate medical statement for the unapproved absences of January 3 thru 9 may be the basis for disciplinary action.

In the future, you may be asked to present an adequate physician's statement dependent upon the frequency and length of your absences.”

N.B. The Union objected to the introduction of this letter which was not part of the joint record and which was not part of the Grievant's personnel record but found in the files of Robert Cruse. Objection based on § 23.01, § 23.02, and § 23.03 (see relevant contract sections below).

The objection is sustained. The Employer has an obligation under Article 25.08 to provide relevant documents to prevent unfair surprise. Moreover under Article 23.01-23.03 the proper place for such a letter is in the employee's personnel file not in a manager's file.

#11 Application for Disability Retirement dated 7/26/90.

Objected to as to Relevancy.

Objection sustained.

### **Contract Sections**

I. Cited specifically by Union in Grievance (Emphasis added by Arbitrator).

#### **§ 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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

#### **§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. One or more verbal reprimand(s) (with appropriate notation in employee's file);
- B. One or more written reprimand(s);
- C. One or more suspension(s);
- 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 employer 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. The OCSEA Chapter President shall designate the Union representative who shall receive such notice who is assigned to selected work areas under the jurisdiction of the Chapter. 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.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment.

### **§ 29.04 - Sick Leave Policy**

It is the policy of the State of Ohio to grant sick leave to employees when requested. It is also the policy of the State to take corrective action for unauthorized use of sick leave and/or abuse of sick leave. It is further the policy of the State that when corrective and/or disciplinary action is taken, it will be applied progressively and consistently.

It is the desire of the State of Ohio that when discipline is applied it will serve the purpose of correcting the performance of the employee.

### **Sick Leave Policy**

#### **I. Purpose**

The purpose of this policy is to establish a consistent method of authorizing employee sick leave, defining inappropriate use of sick leave, and outlining the discipline and corrective action for such inappropriate use. The policy provides for the equitable treatment of employees without being arbitrary and capricious, while allowing management the ability to exercise its administrative discretion fairly and consistently.

#### **II. Definition**

##### **A. Sick Leave**

Absence granted per negotiated contract for medical reasons.

##### **B. Unauthorized use of sick leave**

1. Failure to notify supervisor of medical absence;
2. Failure to complete standard sick leave form;

3. Failure to provide physician's verification when required;
4. Fraudulent physician verification

C. Misuse of sick leave

Use of sick leave for that which it was not intend or provided.

D. Pattern abuse

Consistent periods of sick leave usage, for example:

1. Before and/or after holidays;
2. Before and/or after weekends or regular days off;
3. After pay days;
4. Any one specific day;
5. Absence following overtime worked;
6. Half days;
7. Continued pattern of maintaining zero or near zero leave balances; or
8. Excessive absenteeism - use of more sick leave than granted.

### III. Procedure

A. Notification of leave balance

Sick leave usage will be measured from December 1 through November 30 of each year. When an employee's sick leave balance reaches or falls below 16 hours of new sick leave according to the payroll journal, the Personnel Department will notify the employee using "Notification of New Sick Leave Balance" form of his/her sick leave balance. Copies will go to the Agent Head or designee, immediate supervisor and Labor Relations Officer. The Agency Head or designee or the Labor Relations Officer will make himself/herself available if the employee wishes to discuss extenuating or mitigating circumstances.

If and/or when the new sick leave balance is exhausted, the Personnel Office will again notify the employee in writing of a zero balance in new sick leave with copies to the Agency Head or designee, the immediate supervisor, and the Labor Relations Officer. The Agent Head or designee and the Labor Relations Officer shall jointly meet with the employee to discuss his/her use of sick leave. The purpose of this meeting shall be to allow the employee the opportunity to discuss any extenuating circumstances concerning the use of sick leave of which the supervisor should be aware. This meeting is not for the purpose of requiring the employee to explain his/her prior use of sick leave, nor is it to be considered as disciplinary in nature.

B. Physician's verification

At the Agency Head or designee's discretion, in consultation with the Labor Relations officer, the employee may be required to provide a statement personally written and signed by a physician who has examined the employee or the member of the employee's immediate family, for all future illness. This requirement shall be in effect until such time as the employee has accrued a reasonable sick leave balance. However, if the Agency Head or designee finds mitigating or extenuating circumstances surrounding the employee's use of sick leave, then the physician's verification need not be required.

Should the Agency Head or designee find it necessary to require the employee to provide the physician's verification for future illnesses, the order will be made in writing using the "Physician's Verification" form with a copy to the employee's personnel file.

Those employees who have been required to provide a physician's verification will be considered for approval only if the physician's verification is provided within three (3) days after returning to work.

**C. Unauthorized use or abuse of sick leave**

When unauthorized use or abuse of sick leave is substantiated, the Agency Head or designee will effect corrective and progressive discipline, keeping in mind any extenuating or mitigating circumstances.

When progressive discipline reaches the first suspension, under this policy, a corrective counseling session will be conducted with the employee. The Agency Head or designee and Labor Relations Officer will jointly explain the serious consequences of continued unauthorized use or abuse of sick leave. The Agency Head or designee shall be available and receptive to a request for an Employee Assistance Program in accordance with Article 9 (EAP). If the above does not produce the desired positive change in performance, the Agency Head or designee will proceed with progressive discipline up to and including termination.

**D. Pattern abuse****§ 43.02 - Preservation of Benefits**

To the extent that State statutes, regulations or rules promulgated pursuant to Ohio Revised Code Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives.

**Sections Cited by the Union For Objection to Employer's Exhibit 10****§ 23.01 - Personnel Files**

An employee's official personnel file will contain all matters required by the Ohio Revised Code and will be maintained within the Division of Personnel of the Department of Administrative Services in Columbus. All other matters pertaining to an employee will be retained within the Agency for which the employee works. In the case of employees working for the Department of Administrative Services, all other matters pertaining to an employee will be retained within the Division of Personnel of the Department of Administrative Services.

Only materials maintained in an employee's official personnel file shall be available to the public.

**§23.02 - Review of Personnel Files**

Employees and/or their authorized union representatives shall have the reasonable right to review the contents of their personnel files. Employees shall have access to all materials in their files except those prohibited by Ohio Revised Code Section 1347.08(C). Such review may be made during normal working hours. Employees who are not normally scheduled to work when the Personnel office is open may request to review their files through their supervisor. The supervisor will make the file available in a reasonable amount of time. Reasonable requests to copy documents in the files shall be honored at no charge.

No persons except those authorized by the employee and those whose job entails access to personnel files shall be permitted to review employee's personnel files, except as required by the Ohio Revised Code.

**§23.03 - Employee Notification**

A copy of any material to be placed in an employee's personnel file that might lead to disciplinary action or negatively affect an employee's job security or advancement shall be provided to the employee. If material is placed in an employee's personnel file without following this procedure, the material will be removed from the file and returned to the employee at his/her request. Such material cannot be used in a disciplinary proceeding. An employee can place documents relevant to his/her work performance in his/her personnel file.

**Relevant Contract Sections (Arbitrator)****§ 25.08 - Relevant Witnesses and Information**

The Union may request specific documents, books, papers or witnesses reasonably available from the Employer and relevant to the grievance under consideration. Such request shall not be unreasonably denied.

#### **§ 24.06 - Prior Disciplinary Actions**

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months. Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months. This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement

#### **§ 24.08 - Employee Assistance Program**

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action.

#### **§ 29.01 - Definitions: Sick Leave for State Employees**

1. Active pay status means the conditions under which an employee is eligible to receive pay, and includes, but is not limited to, vacation leave, sick leave, and personal leave.
2. No pay status means the conditions under which an employee is ineligible to receive pay and includes but is not limited to, leave without pay, leave of absence and disability leave.
3. Full-time employee means an employee whose regular hours of duty total eighty in a pay period in a state agency, and whose appointment is not for a limited period of time.

#### **§29.02 - Sick Leave Accrual**

Beginning with the pay period which includes December 1, 1989, all employees shall accrue sick leave at the rate of 3.1 hours for each eighty (80) hours in active pay status, excluding overtime hours, not to exceed eighty (80) hours in one year.

Less than full-time employees shall receive 3.1 hours of sick leave for each eighty (80) hours of completed service, not to exceed eighty (80) hours in one year.

Employees that are on approved leave of absence or receiving Workers' Compensation benefits shall be credited with those sick leave hours which they normally would have accrued upon their approved return to work.

Sick leave shall be granted to employees who are unable to work because of illness or injury of the employee or a member of his/her immediate family or because of medical appointments or other ongoing treatment. The definition of "immediate family" for purposes of this Article shall be: spouse, significant other ("significant other" as used in this Agreement, is defined to mean one who stands in place of a spouse, and who resides with the employee), child, step-child, grandchild, parents, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparents, brother, sister, brother-in-law, sister-in-law or legal guardian or other person who stands in place of a parent.

A period of up to ten (10) working days of sick leave will be allowed for parenting during the postnatal period or following an adoption. the amount of sick leave charged against an employee's accrual shall be the amount used, rounded to the nearest one half (1/2) hour. Employees shall be paid for sick leave used at

their regular rate. After employees have used all of the accrued sick leave, they may choose to use accrued vacation, compensatory time or personal days or may be granted leave without pay.

### **§29.03 - Notification**

When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification. The Employer may request a statement, personally written and signed by a physician who has examined the employee or the member of the employee's immediate family, be submitted within a reasonable period of time. In institutional agencies or in agencies where staffing requires advance notice, the call must be made at least ninety (90) minutes prior to the start of the shift or in accordance with current practice, whichever period is less.

If sick leave continues past the first day, the employee will notify his/her supervisor or designee every day unless prior notification was given of the number of days off. When institutionalization, hospitalization, or convalescence at home is required the employee is responsible for notifying the supervisor at the start and end of such period.

### **Facts**

The Grievant was hired by DAS on March 23, 1981. At the time of the events leading to his grievance, he was a Payroll Processing Specialist in the Division of State Personnel Payroll Processing Unit. (Joint Exhibits 4 and 5) Grievant was highly proficient at his job and the quality of his work was extremely good. (Testimony of Robert Cruse.) Prior to the events at issue, the following discipline existed in Grievant's file (Article § 24.06):

1. 5/7/86 a five (5) day suspension for absenteeism.
2. 1/20/88 a three (3) day suspension for altering his own personnel records.
3. 10/4/88 excessive absenteeism. (Joint Exhibit 6)

On September 15, 1988, DAS received from IRS a tax levy on Grievant's salary (Employer Exhibit 8A). Pursuant to policy, the Grievant was sent exemption forms. The Grievant executed a Payroll Deduction Agreement with the IRS (Employer Exhibit 8B) and the levy was released. A IIKTXII was placed on Grievant's salary to carry out the Agreement (Employer's Exhibit 9). On March 15, 1990, a second IRS levy was received by DAS. Patricia McCoy investigated and discovered that the 1988 KTX had been removed. Ms. McCoy said that she did not remove the KTX. She asked the Grievant, and he admitted to her that he had removed the KTX (Employer's Exhibit 3). Ms. McCoy notified her supervisor, David A. Breckenridge. An investigation was instituted. Computer runs indicated that the KTX had been removed on or about August 12, 1989 (Employer's Exhibit 9). Sybil Griffin, Administrator, investigated and sent a memo to Pamela Gordon with her findings on 4/13/90 (Employer's Exhibit 6). A predisciplinary hearing was held on May 2, 1990 (Joint Exhibit 2). The notice for the predisciplinary hearing alleged excessive absenteeism (to wit, 55 hours of unapproved leave between January 17, 1990 and March 22, 1990) as well as a charge of altering a payroll file. On May 18, 1990, the Grievant was removed (Joint Exhibit 2). On June 7 and June 12, 1990, a Step 3 was held; the Grievance was denied on 8/3/90. A notice for arbitration was filed by OCSEA on September 4, 1990.

Sybil A. Griffin, Administrator, testified at the hearing as to her investigation of the removal of the KTX. She said that removal was warranted in the Grievant's case because of DAS's strong policy which requires the proper documentation and authorization for any payroll change. She said she did consider that the Grievant had a lot of absenteeism at that time, in the past, and that his absenteeism was getting progressively worse. Moreover, he previously had improperly altered his own payroll. She said she personally was unaware that the Grievant had a medical problem until the Step 3 hearing. Under cross-examination, Ms. Griffin said that to her knowledge no supervisors had been instructed as to the sick leave notification procedures found in Article 29.04. Nor, she said, had that policy been implemented at DAS "yet", and consequently, the Grievant had received none of the notifications referred to in §29.04.

David Breckenridge, Manager of Payroll Deductions, testified. He said the only proper way a KTX can be terminated is upon notice from the IRS; moreover, the only proper employee to handle such a payroll transaction was (and is) Patricia McCoy. Robert Cruse, Manager of Payroll Division, testified that the integrity and security of the payroll is a prime directive of his department. He said persons who knew how to alter the payroll were in positions of trust. Mr. Cruse testified that Grievant had received at least two (2) awards/citations. He was unaware of the contract provisions requiring notification of sick leave balances. He said he had conducted no meetings between the Grievant and himself since the Grievant's prior absenteeism discipline in October of 1988. Since that time, he did meet with the Grievant once to discuss physician's verifications. Cruse also said he was unaware of the nature of Grievant's medical problems until Step 3. He said that being aware of an employee's medical problems is the duty of the immediate supervisor and not his (Cruse's) function. Cruse said that Grievant has highly proficient and trained other payroll employees; his last training presentation was in the fall of 1989.

The Grievant testified about his previous discipline for altering payroll records. He said he did it "because I wanted to supplement my disability." Since that discipline, the Grievant said he had received several letters of commendation from other payroll offices, a commendation from Office of Budget Management, and an award from the Governor. He said that he did not believe that deleting the KTX was improper because the agreement with the IRS was voluntary. He admitted that the removal was not done with his "best judgment." He said he had no personal gain because, in the long run, the amount he owed the IRS was substantially increased. Under cross-examination, the Grievant conceded that he had a short run financial gain in that his take home pay was increased for nearly 6 months. He maintained that he was not dishonest, did nothing wrong, and that he felt he was "entitled" to the sum covered by the KTX.

With regard to his absenteeism, the Grievant testified that he was diagnosed with AIDS in 1985<sup>[1]</sup> and that the diagnosis affected his work record at first because he was emotionally devastated. Starting in 1988 to present, he said he had gotten sicker with periods of wellness. He said his immediate supervisor was aware of his illness. He said he had been required to bring in physician's verifications for his January absences but that he never had been notified officially that he was required to medically document subsequent absences. He said that he had always filed proper requests for leave. (See Joint Exhibit 8) He said he had never been counseled about absenteeism since the 1988 discipline. He said he did not know his absenteeism was a problem until he received his predisciplinary notice on April 25, 1990.

### **Employer's Position**

This Grievant abused his position for personal gain, not just once but again, blatantly, even after receiving a suspension for the first offense. He was chronically absent for years and failed to correct his attendance even after the application of several levels of progressive discipline.

This Grievant was terminated, not because he did not know his job, but because he knew his work very well well enough to enter his own computerized payroll records, therein changing data so as to increase his own take home pay, and therein, removing a monthly deduction required by the Internal Revenue Service to satisfy back-taxes which he owed to the Federal Government.

The Grievant has admitted altering his own records and offers only the excuse that he needed money.

The State exercised just cause in the termination of this Grievant and that termination was the only option for an employee who repeatedly chose to make up his own rules for conduct, ignoring both state policy and Federal law.

The Grievant's Classification of Payroll Processing Specialist is unique. The Payroll Processors have full computer access to, and can change payroll information, on all state employee payroll files. For that reason, they must be trusted to enter or change only payroll information which has been appropriately documented and authorized.

The Grievant knowingly violated departmental policy. The Grievant deliberately and without authorization deleted his own deduction for back taxes as levied by the IRS. The Grievant demonstrated chronic absenteeism during critical payroll periods, failing to benefit from the corrective discipline applied patiently

since 1986. His frequent absences created hardships for supervisors and co-workers obligated to meet State payroll, deadlines..

The Grievant was on notice of the requirements and limitations of his position; those requirements were entirely reasonable; progressive discipline was applied. The Grievant deliberately chose to engage in repetitive violations which seriously compromised his employer's compliance with Federal law.

In view of the severity of the infractions and previous unsuccessful attempts to apply corrective discipline, further progressive discipline would not be feasible in this Grievant's case.

### **Union's Position**

The Arbitrator should decide that the Grievant was not in an unauthorized absence status. The contract, Article 29.04 established that U.A. is

1. Failure to notify supervisor of medical absence
2. Failure to complete standard sick leave form
3. Failure to provide physician's verification when required
4. Fraudulent physician verification
5. Misuse of sick leave.

The State has failed to establish the Grievant was in an unauthorized status. A zero balance of sick leave is not enough to sustain this charge. Article 29.02 allows that

"After employees have used all of their, accrued sick leave they may choose to use accrued vacation, compensatory time or personal days or may be granted leave w/o pay."

Article 31.01 states

". . . the employer shall grant unpaid leaves of absence to employees upon request for the following reasons:

C. For an extended illness up to one year, if an employee has exhausted all other paid leave."

The State has failed to carry its burden on this charge for several reasons:

1. The charge of unauthorized use of sick leave has not been sustained.
  - a. The supervisor was notified of medical absence
  - b. Sick leave form was completed
  - c. Physicians verification was provided after request
  - d. No fraudulent physician's form was presented
2. The contract states sick leave usage will be measured from December 1 through November 30 of each year. The State failed to do this.
3. The contract calls for notification of 16 hours and 0 balance; then meetings will be held to discuss mitigating circumstances. The State failed to give the notices or to hold these meetings.
4. The contract states specifically what will happen under 29.04.III B when the employer requires an employee to submit a physician's verification. A notice must be sent to the employee. The State failed to send this notice.
5. The contract 29.02 allows for an employee who has exhausted sick leave to avail himself of other leave including leave w/o pay. The State is saying that an employee who uses in excess of earned leave is automatically in an abusive status. Clearly the contract has Articles that provide for a consideration of the circumstances surrounding the leaves. The Grievant having been diagnosed as having AIDS and a drug problem. The State has received verification of this problem from the Grievant's doctor. (Joint Exhibit 2) Clearly, the circumstances surrounding the use of sick leave deserves mitigation.

The Union raises the issue of timeliness. The leave in question was from January to March. Article 24.02, states "Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article."

The Union submits that the State added absenteeism to the charge of unauthorized alteration of payroll records to bolster their case for removal. They were clearly aware of these absenteeism problems in March and no need existed to delay action on these incidents until May. The State failed to follow specific Articles of the Contract; inadequate notice was given to the employees and untimely discipline was imposed.

On the charge of unauthorized alteration of a payroll file, for personal-gain, the Union maintains that this deduction was voluntarily entered into by the Grievant and the IRS. The Grievant understood from the form he signed that he could withdraw this deduction at any time. The Grievant unhesitatingly told management that he is the one that deleted this deduction. The employee experienced no personal gain.

The Union agrees that Grievant was on notice for falsely altering a payroll record. The Union submits this notice was not sufficient to alert him that an alteration that he felt he had the authority to make would result in discipline.

The Union submits this is a 11 year employee who is facing extreme emotional turmoil due to his illness.

The State dealt with his previous charge of altering payroll records with a three day suspension. Article 24.05 states that the discipline shall be corrective and not punitive and that discipline shall be commensurate with the offense.

## **Discussion**

This grievance must be separated into three components:

1. the charge of unauthorized payroll deduction,
2. the charge of excessive absenteeism, and
3. the discipline.

### 1. Unauthorized Payroll Alteration

In 1988, the Grievant altered without authorization his own payroll for personal benefit. He was given a three (3) day suspension. In that discipline, the following statement was made, "You have abused the authority of your position for personal gain and have compromised the integrity of the payroll system in doing so." The Grievant was clearly on notice -- very specific notice -- that using his skills to work on his own payroll records was improper and would subject him to discipline. Any employee with skills to manipulate state payroll is in a position of trust; the integrity of payroll depends on his or her integrity. Grievant's statements that he thought he could properly alter his own records were simply disingenuous. His statement that he did not personally gain a benefit is sophistry.

The Grievant committed a severe infraction, worthy of discipline. DAS has no grid to help guide either managers or warn employees. The contract requires that the discipline be 1) progressive and 2) commensurate but 3) not punitive. Without other infractions, a severe suspension of 10-30 days would be logical -- progressive and commensurate -- given that the first offense merited a 3 day suspension.

However, the next issue is what weight should be given to the charge of absenteeism?

### 2. Absenteeism

The Grievant entered this situation with two relevant prior absenteeism disciplines. In 1986, four years prior to these events, the Grievant had received a five day suspension for a mixture of absenteeism problems, including failure to call off, late call offs, and lack of proper physician verification. Those problems do not exist in this grievance.

Grievant was also disciplined in 1988 for exhausting all leave balances without proper authorization.

Between the 1988 discipline and this grievance, a new contract was negotiated with a revised comprehensive sick leave policy. That contract went into effect July 1, 1989, well before these events.

That contract specifically and clearly provided for specific notification of 16 hour and 0 hour sick leave balances followed by meetings with the employee to learn of extenuating circumstances, and to suggest EAP

where appropriate.

No evidence was provided that the employer followed any of the procedures of S 29.04 in the case of this Grievant. The advocate for the Employer said that the policy would be implemented after 11/30/90 based on the first sentence of §29.04 III entitled Procedure: "Sick leave usage will be measured from December 1 through November 30 of each year." This argument has many flaws:

1. The Employer could have calculated sick leave from December 1, 1988 through November 30, 1989.
2. This delay in implementation was unilateral without notice to the Union.
3. Nothing in the words of the contract make 16 hour balance nor zero (0) hour balance notices contingent on measuring sick leave from 12/1 through 11/30. Logically, if measuring controlled the rendering of balance notices, then no discipline could result until after 11/30/90. The Employer cannot have it both ways.

The sick leave policy spelled out in §29.04 states the following essentials:

1. The policy of the state of Ohio is to grant sick leave when requested.
2. Corrective action is to be taken for unauthorized use of sick leave and/or abuse of sick leave.
3. Corrective action is to be applied
  - a) progressively
  - b) consistently.
4. The purpose is to "correct" the performance of the employee.
5. Policy requires "equitable treatment . . . not arbitrary or capricious."

"Unauthorized sick leave" is specifically defined in the contract.

1. Failure to notify supervisor of medical absence.

No evidence was adduced to show that Grievant ever failed to notify his supervisor.

2. Failure to complete standard sick leave form.

Joint exhibits indicated that proper requests for leave were completed.

3. Failure to provide physician's verification when required.-

III(B) of 29.04 states that when a physician's verification is required the employee must receive an official "order" of such a requirement. No evidence was shown of such an order.

4. Fraudulent physician verification.

Such a charge was never made.

Under 29.04 Misuse of sick leave is also specifically defined: "Use of sick leave for that which it was not intended or provided." No charge was made or proof shown that the Grievant was anything but sick.

III Procedure at C requires corrective counseling. Mr. Cruse said he never counseled Grievant since before the 1988 discipline. The Grievant testified that he did not know his sick leave was a problem until he received the predisciplinary notice in April.

The Arbitrator finds that the Employer violated the letter and the spirit of the sick leave policy. No just cause existed to discipline the Grievant for excessive absenteeism.

### 3. Level of Discipline

The action (alteration) taken by the Grievant was a serious breach of trust and must be disciplined. The first offense was a 3 day suspension. Removal is neither commensurate nor progressive. The Grievant is a 9 year employee who, by the testimony of his own superiors and the Employer's witnesses, does quality work and is highly skilled. He has trained others and received various citations for his work.

### Award

Grievance is denied in part and granted in part.

Removal is changed to a thirty (30) day suspension after which the Grievant is to be fully reinstated and

made whole.

Date: January 22, 1991

Rhonda R. Rivera

Arbitrator

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[1] The Employer objected to introduction of any evidence of the nature of the Grievant's illness, i.e., AIDS, on the grounds that the Arbitrator is biased (presumably) in favor of all persons afflicted with AIDS. This objection was denied. The Arbitrator does teach AIDS law, does practice pro bono for persons afflicted with AIDS, and has authored a text book chapter and a law review article on AIDS. All these facts are well known to both OCB and OCSEA. The Arbitrator rejects the notion that knowledge and experience constitute bias or prejudice. The Arbitrator states for the record that she has never had any prior contact with the Grievant of any type nor been consulted previously by anyone about the facts of the case. Nor does the Arbitrator equate compassion nor understanding with bias.