ARBITRATION DECISION NO.:
359

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

EMPLOYER:
Department of Human Services

DATE OF ARBITRATION:
June 5, 1991

DATE OF DECISION:
July 8, 1991

GRIEVANT:
Ronald Augustus

OCB GRIEVANCE NO.:
16-00-(90-12-06)-0134-01-09

ARBITRATOR:
Rhonda R. Rivera

FOR THE UNION:
John P. Gersper
John Fisher

FOR THE EMPLOYER:
Dennis R. Van Sickle
Rodney Sampson

KEY WORDS:
Removal
Insubordination
Neglect of Duty
Absenteeism
Workers' Compensation

ARTICLES:
Article 24-Discipline
    §24.01-Standard
    §24.02-Progressive
Discipline
    §24.04-Pre-Discipline
Article 35-Benefits
    §35.03-Disability Leave

FACTS:
The grievant was hired on 4/27/87 by the Ohio Department of Human Services. His position was Mail

Clerk messenger. While employed in that capacity, he sustained a work related injury to his back on June 2, 1988. His doctor diagnosed the injury as "lumbar muscle strain." As a consequence, the grievant went on a disability leave and applied for and received Temporary Total Disability from the Bureau of Workers" Compensation. While recovering from this injury, the grievant returned to work and left work four times. The Bureau Chief testified that his repeated absences put a significant strain on the productivity and mission of the mail delivery function in ODHS.

On 4/18/90, the Bureau of Workers Compensation was evaluating the grievant's condition and concluded that the grievant was capable of working as a Mail Clerk. The Bureau Chief testified that on or about May 1, 1990, the grievant requested "light duty" and that she informed him that light duty was not available. The grievant maintained that his doctor restricted him to light duty and, therefore, he could not work. The grievant did not report to work on May 2, 1990 or subsequently. He did file continuous requests for leave, accompanied by forms from his doctor.

On October 22, 1990, the grievant was ordered to return to work on October 29, 1990. In response to the letter, the grievant replied he could not comply because he was still under a doctor's order not to return to work without restriction and he was taking various medication which made him very drowsy.

On October 31, 1990, the Office of Human Resources informed the grievant that disciplinary action of termination had been recommended for 1) insubordination and 2) neglect of duty (abandonment of position). Grievant was notified of a pre-disciplinary hearing and as a result of that hearing termination for just cause was recommended.

EMPLOYER'S POSITION:

The State maintains that three specialists have concluded that grievant is and was capable of performing his job. The grievant refused a direct order to return to work and was on notice as to the possible discipline. The grievant failed to provide satisfactory proof of either a new injury or any other proof to document a sufficient reason for his continued absence from work.

UNION'S POSITION:

The Union maintains that the state ordered grievant back to work without determining if he was still injured or if he was released to return to full duties.

Grievant has no prior discipline while employed at ODHS for any reason. He had not been counseled or disciplined for excessive absenteeism. He marked off on a legitimate workrelated injury and has now been removed from State service while on disability.

The Union contends that grievant did not abandon his job as he was not released to return to work by a competent physician and he was under a doctor's care at the time he was ordered to return to work.

He certainly cannot be deemed insubordinate under these circumstances.

ARBITRATOR'S OPINION:

The Arbitrator finds that an examination of grievant's doctor's statements indicates that nowhere does any doctor specifically state that the grievant could not do his job. Moreover, the "excuses" which refer to the bone scan are relying on the same report which categorically stated that the grievant could go back to work. The bone scan was only a suggestion and clearly did not limit the grievant's ability to return to work.

The claim of an inability to drive is unsupported by medical evidence. The mere fact that the drugs were prescribed does not prove that the doctor ordered that they be used to such an extent that the grievant could not drive.

No evidence was presented of any new injury. Competent medical evidence supports the position that the grievant could have done his job. The record shows that he refused a direct order to return to work and disingenuously provided insufficient evidence to justify his absence. The Employer had just cause to terminate the grievant.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO
Union

and

State of Ohio
Ohio Department of
Human Services
Employer.

Grievance No.:
16-00-(12-06-90)-0134-01-09
Grievant:
(R. Augustus)
Hearing Date:
June 5, 1991
Award Date:
July 8, 1991

Arbitrator:
Rivera

For the Employer:
Dennis R. Van Sickle
Rodney Sampson

For the Union:
John P. Gersper
John Fisher

Present at the Hearing in addition to the Grievant and the Advocates were Haven Carskadon, Claims Administrator, DAS Worker's Comp. Section (witness), Terri Pinnicki, Labor Relations Officer, Department of Human Services, Toni Veno, Bureau Chief, Department of Human Services (witness), Eric Warren, Labor Relations Officer, Department of Human Services (witness), and John Lunn, Chief Steward (witness)

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 Exhibits

1. OCSEA/AFSCME Contract 1989-1991

2. Grievance Trail

a. Grievance 16-00(12-06-90)0134-01-09
b. Step 3 response dated and cover dated 2/13/91
c. Demand for arbitration dated 3/21/91

3. Grievant's position description

4. Discipline Trail

a. Order to report to work on 10/29/90 which is dated 10/22/90.
b. Employee's handwritten response (letter) to employer's order to report to work on 10/22/90 stamped received 10/29/90.
c. Pre-discipline Conference Notice dated 10/31/90.
d. Order of Termination dated 11/27/90.

Employer's Exhibits

1. Opening Statement

2. Grievant's Application for Disability Leave dated 6/20/88.

3. Evaluation of Grievant's Medical Condition by W. Jerry McCloud, M.D., Orthopedics Specialist Consultant dated 6/6/89 which reads as follows:

I did evaluate [Grievant] today in regard to the back injury sustained by him on 6/2/88. He relates to me that he has not worked in any capacity since 4/10/89. He relates that when he does work it basically is as a mail clerk. He is required to sort and bundle mail and does so in the standing position with twisting and bending. His treatment has been conservative. He does not have a compatible radicular history. His complaints are related to back pain and some limitation of motion. He relates that since he has been off work for almost 2 months now, he has improved. However, he relates that his attending physician has suggested that he could not return to those work activities until the first of August.

On physical evaluation Mr. Augustus is well developed and demonstrates no abnormalities of stance nor of gait. Neurological and radicular evaluation of both lower extremities is within normal limits. There is no motor nor sensory deficit. The pelvis is level. The lumbar lordosis is well maintained. I think that one may fairly estimate right and left bending and right and left rotation to be within normal limits, and the paraspinous muscles relax. The lumbar lordosis is well maintained and does demonstrate good flexibility. He will forward flex to get the extended fingertips to just about the junction of the middle and distal third of either tibia, and does so without radicular complaints.

In summary, Mr. Augustus has some very marginal loss of forward flexion, but in my impression an otherwise normal physical evaluation. I do not think the findings that were described today should significantly interfere with his quality of life activities, nor with his productive activities as a mailroom clerk as described.

It is my opinion that this individual is capable of resuming the work activities he enjoyed at the time of this injury on 6/2/88. He may do so without restriction. The changes are permanent and he has reached a level of maximum medical improvement. As now seen, I would estimate him to have a permanent partial

impairment of some 5% of the body as a whole, related to loss of forward flexion as described.

4. Evaluation of Grievant's Medical Condition by John S. Wolfe, M.D., Orthopedic Surgeon dated 2/5/90 which reads as follows:

[Grievant], a 43 year old male, was seen in the office January 31, 1990, for orthopaedic assessment of back problems. By history, this patient was well until June 2, 1988, when while working as a mail clerk messenger for the Ohio Department of Human Services, he developed low back pain abruptly. The patient had been doing that type of work since April of 1987. Following his onset of pain, he missed about two months of work and in the interim since injury, he has missed that two months as well as a time period from April through September of 1989; he further related not having worked since November of 1989.

He presently related a history of taking Percodan and Valium for pain. He mentioned having a bone scan requested to assess his back difficulties. He related having had radiographs taken of his back recently by a Doctor Woodard in Xenia, Ohio and according to the patient's report, the films were within normal limits.

The patient's pain is in the thoracolumbar area, causes difficulty sleeping at night, tends to radiate cephalad, but not distally. Valsalva maneuver can cause pain in the area of an inguinal hernia, but not enhanced back pain. The patient described no lower extremity radiation to his symptoms.

Physical examination noted [Grievant] to be a 188 pound, 68-1/4 inches tall, bearded male. He was able to walk upon request with a symmetrical and normal gait. He was able to heel walk repetitively. Skim of his thoracolumbar spine was within normal limits. He was able to flex to having fingertips at proximal third calf level. He had 10 degrees of extension and 15 degrees of right and left bending ability. In his lower extremities, straight leg raising was negative. He had neither measurable or obvious thigh or calf atrophy; his deep tendon reflexes were two plus at knee and ankle bilaterally; pulses were intact.

Diagnostic impression on [Groevamt] would be of thoracolumbar back sprain. I was unable, based on my examination, to demonstrate any findings which would preclude work activities as a mail clerk messenger. I say this having read the job description of mail clerk messenger which you forwarded to me.

I feel that Mr. Augustus has probably made maximal medical improvement based on the chronicity and duration of his symptoms. I did not demonstrate findings to attach a percentage of permanent partial disability to this claimant.

5. Specialist's Report for the Industrial Commission of Ohio by Daniel E. Braunlin, M.D. dated 4/18/90 which reads as follows:

This 43 year old male indicates his height is 5 feet 8 inches and his weight is 185 pounds. He is working currently and returned to his regular employment as a mail clerk on 2/5/90. He is not having any difficulties in his employment currently although he continues to have daily and constant low back pain even on days that he is not working. He was injured in June of 1988 when he was lifting a mailbag. He felt the acute onset of pain. He was off work until early September of that year when he returned to work. He has been off work from April 1989 until early September 1989. He then returned to work in September of 1989 through the Thanksgiving time. He was off work in December and January and returned to work on 2/5/90. He describes no significant improvement in his symptoms since their onset. He had physical therapy at Greene Memorial Hospital initially which was not significantly helpful. He was given exercises at that time which were not helpful and he no longer does the exercises. He does not use heat nor cold at home as he has not found these to be helpful in the past. He is not describing radicular pain into the lower extremities but does describe low back cramping especially when he tries to go to bed at night. Sometimes he will have the sensation of heat across his low back. The only testing that has been performed as been routine x-rays as a bone scan has been denied.

EXAMINATION:

Physical examination shows that he ambulates normally. He appears his stated age of 43, his stated height of 5 feet 3 inches and his stated weight of 185 pounds. After disrobing he has the complaint of pain

from L-1 through L-3 bilaterally. The lumbar paraspinals are soft in their entirety. His lumbar range of motion shows 80 degrees of forward flexion, 20 degrees of lateral side bending to the right, 15 degrees of lateral side bending to the left and 20 degrees of hyperextension. He heel and toe walks normally and car arise from 50% of a deep kneebend. The reflexes are 1/4 and symmetric at the knees and ankles and Babinski's are downgoing bilaterally. There is not focal motor weakness in the lower extremities. The sitting straight leg raising maneuver is normal. In the supine position there is hamstring tightness and low back pain at 80 degrees of straight leg raising bilaterally with a negative Lasegue's maneuver and negative Patrick's maneuver. His pain is not decreased when the knees and hips are additionally flexed from that position.

OPINION:

His current history and physical examination is found above. I do feel that a bone scan would be appropriate to rule out bony pathology and I would suggest that this be approved. I do not find evidence of focal neurologic abnormalities in the lower extremities but he does have some persistent low back pain as well as decreased lumbar range of motion. I note that Dr. Harris indicates that some degenerative arthritis of the dorsal spine was discovered on some x-rays but I do not find an x-ray report which documents those changes. I note that lumbosacral spine x-rays dated 5/1/89 show levoscoliosis and transitional vertebral body at L-1. I have reviewed a 6/1/89 opinion of Dr. McCloud who felt that the claimant could return to his previous employment, that he had reached maximal improvement and that he had a 5% impairment. I note that x-rays dated 6/7/88 of the dorsal spine and lumbosacral spine show mild levoscoliosis but no fracture or other abnormalities were defined on those films.

It is my opinion that maximal improvement has occurred and he has an 8% permanent partial impairment of the body as a whole. He has returned to his previous employment and although he continues to have some pain on a daily basis he is able to perform his current employment on a regular basis. In his employment that he was performing as a mail clerk at the time of his injury he would be sorting mail and delivering mail and continually bending, twisting and lifting sacks of mail which might weigh up to 75 pounds. He has returned to that employment at this time. In the Rehabilitation Division instruction in proper lifting and bending would be helpful as might some additional back strengthening exercises. He does not need vocational evaluation or job retraining as he has returned to his previous employment. I do believe that a bone scan would be helpful whether he is involved in the Rehabilitation Division or not and I would suggest that this be approved. I feel that he has likely reached maximal improvement.

6. Physician's Report Supplemental (Ohio Bureau of Workers' Compensation Form C-84) by Curtis Harmon, M.D. dated 6/26/90.

7. C-84 by Curtis Harmon, M.D. dated 9/5/90.

8. Hearing Officer's Report Workers' Compensation dated 9/28/90 which reads in part as follows:

It is the finding of the District Hearing Officer that the claim has previously been allowed for: "strained middle and lower back."

The Hearing Officer further finds that the claimant's condition has reached maximum medical recovery in that Claimant's condition, in all reasonable medical probability, will continue for an indefinite period of time without any present indication of recovery therefrom. Therefore, Temporary Total Disability Compensation is to be terminated as of 09/17/90. No further compensation is to be paid without formal hearing.

This order is based on the medical report(s) of Dr. Braunlin, Dr. Harris, and Dr. Wolfe.

The contents of Exhibits E-6, E-7, and E-8 are essentially the same with except to the dates.

3. Present Complaints and Condition(s). "Pain in lumbar sacral area -- due to lumbar muscle strain."

4. Has normal recovery been delayed?

Yes _X_ No ___ If yes, give reason(s).
"Reason is unclear. Orthopedic surgeon has suggested bone scan to rule out skeletal disorder as an etiology."

9. C-84 by Curtis Harmon, M.D. dated 11/1/90.

10. IOC from Veno, Chief of Bureau of Office Services to Grievant dated 5/1/90.
11. IOC from Veno, Chief of bureau of Office Services to Dee Edwards, Director of Human Resources dated 5/30/90.

12. Prescription form from Greene Memorial Hospital signed by Curtis Harris dated 5/7/90 which states in full as follows:

"[Grievant] has been under my care since 5/1/90 for lumbar muscle strain. He tentatively may return to work on 6/30/90."

13. IOC from Veno, Chief, Bureau of Office Services to Sara Larson, Acting Chief, Division of General Support Services dated 7/9/90.

14. IOC from Veno, Chief, Bureau of Office Services to DeJarnette Edwards, Director of Human Resources dated September 11, 1990.

15. Request for Leave (RFL) by Grievant dated 9/6/90 for period 9/10/90 to 9/28/90.

16. RFL by Grievant dated 9/28/90 for period 10/1/90 to 11/2/90.

17. Notes by ELW of conversation with Dr. Harris on 6/13/90.

18. Prescription Form from Greene Memorial Hospital dated 11/1/90 signed by Curtis Harris which states in full.

"[Grievant] is presently under my care for lumbar muscle strain. He may be able to return to work after his bone scan is ok'd by orthopedic surgeon approx. 12/3/90."

Union Exhibits

1. Opening Statement.

2. OBES form C-62E -- Employer Follow Up Questionnaire dated 6/14/90.

3. Ohio Administrative Code Section 123:1-33-04 which reads in whole as follows:

"An appointing authority with the approval of the director may require that an employee submit to a medical examination in order to determine the employee's capability to perform the substantial and material duties of the employee's position; or to perform the duties of a position for which the employee is reasonably suited to perform based on the employee's education, training, or experience. Such examination shall be conducted by a physician designated by the director. The appointing authority must supply the examining physician with facts relating to the perceived disabling illness, injury, or condition. Additional information may include: physical and mental requirements of the employee's position; duty statements; job classification specifications; and position descriptions. The cost of the medical examination shall be paid by the appointing

authority."

4. Prescription Form of Greene Memorial Hospital dated 9/27/90 and signed by Curtis Harris which states in full:

"[Grievant] is presently under my care for lumbar muscle strain. He may be able to return to work after his bone scan if ok'd by orthopedic surgeon approx. 11/5/90."

5. Twenty-two pages of forms relating to the Grievant's medical leave.

Jointly Stipulated Facts

1. Neither party raised any procedural defects either in the processing of this Grievance to Arbitration or the discipline process.

2. A pre-discipline conference was held and attended by the Grievant and his union representatives.

3. The Grievant was hired April 27, 1987 by the Ohio Department of Human Services and was employed there at time of discharge.

4. The Grievant was employed as a Mail Clerk Messenger, Classification #12731.

5. The Grievant has no prior discipline on record.

Joint Issue

Was the Grievant discharged for just cause?
If not, what should the remedy be?

Relevant Contract Sections

§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.

§24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

§35.03 - Disability Leave

Eligibility

Eligibility shall be pursuant to current Ohio law and the Administrative rules of the Department of Administrative Services in effect as of the effective date of this Agreement.

Facts

The Grievant was hired on 4/27/87 by the Ohio Department of Human Services. His position was Mail Clerk Messenger (PCN 25127.0). While employed in that capacity, he sustained a work related injury to his back on June 2, 1988. His family doctor, Curtis Harris, M.D., diagnosed the injury as "lumbar muscle strain." As a consequence, the Grievant went on a disability leave and applied for and received Temporary Total Disability from the Bureau of Workers' Compensation. While recovering from this injury, the Grievant returned to work and left work four times; June 18, 1988 to August 1, 1988, April 10, 1989 to July 31, 1989, and November 27, 1989 to February 4, 1990. After February 4, 1990, he apparently again returned to work and left again on May 1, 1990. Bureau Chief Veno testified that the Grievant did his job when he was present but that his repeated absences put a significant strain on the productivity and mission of the mail delivery function.

Mr. Carskadon, Claims Administrator for Department of Administrative Services, testified that consistent with Departmental Rules and policies he had the Grievant examined by an Orthopaedic Specialist. (See Union Exhibit 3) That examination by Dr. McCloud dated 6/6/89 concluded that the Grievant could return to work. (Employer's Exhibit 3)

When the Grievant again left work, a second specialist examination was done. (See Employer's Exhibit 4) Dr. Wolfe, an Orthopedic Surgeon, determined on 2/5/90 that the Grievant was capable of working. Simultaneously, the Bureau of Workers' Compensation was evaluating the Grievant's condition and on 4/18/90, Dr. Braunlin, for the BWC, concluded that the Grievant was capable of working as a Mail Clerk. (See Employer’s Exhibit 5) Mr. Carskadon pointed out that all during this period only one injury was under consideration, i.e., lumbar muscle strain of 6/2/88 and that no new injury was reported to DAS. Mr. Carskadon said no further medical evaluations were requested in May, 1990 because the law did not require the employer to do more and because by that date three separate orthopaedic specialists had determined that the Grievant had made the maximum recovery from his injury, had suffered either 0%, 5%, or 8% of total disability, and could do the job of a mail messenger.

Ms. Veno testified that on or about May 1, 1990, the Grievant requested "light duty" and that she informed him that no such position existed. The Grievant maintained that his doctor (Dr. Harris) restricted him to light duty, and, therefore, he could not work. The Grievant did not report to work on May 2, 1990 or subsequently. He did file continuous requests for leave accompanied by forms from Dr. Harris. (See Union Exhibit 3) Ms. Veno said that in their conversation of May 1, 1990, the Grievant did not. inform her of any new injury. On September 28, 1990, the hearing officer for the Bureau of Workers' Compensation determined that the Grievant was able to work and discontinued the Temporary Total Benefits as of 9/17/90. (See Employer's Exhibit 8)

On October 22, 1990, the Grievant was ordered to return to work on October 29, 1990. That letter read as follows:

"The Ohio Department of Human Services has received a copy of the findings from your recent hearing with The Industrial Commission of Ohio. The disposition of the hearing was that you were terminated from Temporary Total Disability as of 9/17/90. Please be advised that you are hereby ordered to return to work on Monday, October 29, 1990 at 8:00 a.m.

If you fail to comply with this directive you will be considered AWOL and will be disciplined for insubordination and neglect of duty. This disciplinary action could consist of termination of your employment. (See Joint Exhibit 4(a))"

Mr. Carskadon testified that although DAS officials believed that the Grievant was able to work before October 29, 1990, the Department decided to await the BWC determination before taking action.

In response to the letter of 10/22/90, the Grievant replied

"I cannot comply with this because I am still under doctors order; and I am taking various medication which made me very drowsy and I would be considered under the influence of drugs.

You have in your possession my latest doctors statement of a return to work date of 11/5/90.

Just because I was terminated from Temporary Total Disability does not mean that my injury disappeared. My injury still exists and I am waiting to have a bone scan done to find out what the problem is. It also states in the hearing officer's report that my injury will continue for an indefinite period of time." (Joint Exhibit 4b)

On October 31, 1990, the Office of Human Resources informed the Grievant that disciplinary action of termination had been recommended for 1) insubordination and 2) neglect of duty (abandonment of position). He was notified of a Predisciplinary Hearing on 11/8/90 at 10:00 a.m. (Joint Exhibit 4(c)). That hearing was held and termination for just cause was recommended. The Grievant was terminated as of 11/27/90 for insubordination and abandonment of position (Joint Exhibit 4(d)). On 1/15/91, a third step was held on the Grievance (filed 12/6/90) and the termination was upheld. (See Joint Exhibit 2(b))

The Grievant testified at the Arbitration hearing. He said that on 5/1/90 his last day of work that his back was hurting because the injury was still there and he asked for "light duty." He said this pain came from the injury of 6/2/88. After leaving on 5/1/90, he said he called his doctor (Dr. Harris) and received an appointment for May 7, 1990. He said he regarded his disability at that time to date from 5/1/90 (See Employer's Exhibit E-12). The Grievant testified that he did not return to work on 10/29/90 but that he did receive the 10/22/90 letter. He said he called personnel and also sent a certified letter. He said he could not come to work because he was taking Diazepam and Talwin as prescribed by Dr. Harris. He said he could not return to work until released by Dr. Harris after a bone scan. He said he was not insubordinate nor did he abandon his job because when he failed to come back to work he was under his doctor's care. Moreover, he said he did not abandon his job because he filed Requests for Leave. He said he never applied for Rehabilitation Services because he never knew about it.

Employer's Position

Three specialists have concluded that the Grievant is and was capable of performing his job. The Grievant refused a direct order to return to work and was on notice as to the possible disciplinary outcome. The Grievant failed to provide satisfactory proof of either a new injury or any other proof to document a sufficient reason for his continued absence from work.

The Grievant was terminated for just cause.

Union's Position (From Union's Opening Statement)

Grievant's original injury occurred on June 2, 1988. He marked off three times before the current disability period, starting May 1, 1990.

Each time he marked off, prior to May 1, Grievant was ordered examined by a state physician and returned to work when released by the physician. That was not done this time. Under the Ohio Administrative Code, Section 123:1-33-04, the State of Ohio has the right to require a medical examination in order to determine the employee's capability to perform the substantial and material duties of the employee's position.

The state exercised that right three times in the Grievant's case, but failed to do so after he marked off on May 1, 1990. He has not been ordered to be examined by a state physician since that time.

Instead, the State ordered him back to work without determining if he was still injured or if he was released to return to full duties.

Grievant has no prior discipline in ODHS for any reason. He has not been counseled or disciplined for excessive absenteeism. He marked off on a legitimate work-related injury and has now been removed from State service while on disability.

The Union contends that Grievant did not abandon his job as he was not released to return to work by a competent physician and he was under a doctor's care at the time he was ordered to return to work.

He certainly cannot be deemed insubordinate under these circumstances.

The Union seeks as remedy that Grievant be reinstated, effective the date of his removal with back-pay to February 4, 1991, when he was released to full duties by his physician and that he be made whole in all respects, including benefits' accruals, seniority, etc.

Discussion

The Grievant sustained a lumbar muscle strain a work related injury -- on June 2, 1988. Three separate specialists - two obtained by the Employer -- and one obtained by the Bureau of Workers' Compensation all agreed that the Grievant had reached the maximum possible recovery from that injury and in that condition the Grievant was capable of performing his job. Even after these three reports, the Employer waited until after the BWC Hearing before ordering the Grievant back to work. The Grievant refused. The Grievant's basis of refusal was that 1) he was under a doctor's care admittedly for the same injury and that doctor had not yet ordered him back to work and 2) the drugs he was taking affected his ability to drive. The Union advocated, in addition, that the Employer should have obtained another doctor's examination for the period after 5/1/90 which the Union claimed to be a "new" disability period.

The Grievant's contention that he was "under doctor's care" must be examined. From the inception of this injury, the Grievant was "under Dr. Harris' care," however, during that care, three specialists examined the Grievant and found that the same injury did not preclude the Grievant from working. An examination of Dr. Harris' statements indicates that nowhere does he specifically state that the Grievant could not do his job. Moreover, the "excuses" which refer to the bone scan are relying on the same report which categorically stated that the Grievant could go back to work. (Dr. Braunlin, see Employer's Exhibit 5) The bone scan was only a suggestion and clearly did not limit the Grievant's ability to return to work. In the same report, Dr. Braunlin recommended the use of Rehabilitation Services to train the Grievant in proper lifting techniques and to strengthen muscles. Dr. Harris did not request those services, and the Grievant claims he never knew of them or used them. However, in his letter of 10/29/90, the Grievant refers to other parts of the same

report which he apparently read.

The claim of an inability to drive is unsupported by medical evidence. The mere fact that the drugs were prescribed does not prove that the doctor ordered them used to such an extent that the Grievant could not drive. Moreover, nowhere in Dr. Harris' statements are the drugs or their effects mentioned.

After three specialist's reports, the Employer was entitled to doubt the sufficiency of Dr. Harris' cursory statements. The Arbitrator finds that the statements which Dr. Harris made are more relevant as to what they did not say rather than what they did say. The Employer was not obligated under the statute to provide another doctor's examination when no new injury existed. The law does not ever require a futile act. Moreover, the Arbitrator notes that not only did the Grievant not use Rehabilitation Services to train or to strengthen his muscles, but he stopped doing the exercises prescribed and failed to use the heat/cold treatments recommended.

No evidence was presented of any new injury. Competent medical evidence supports the position that the Grievant could have done his job. The record shows that he refused a direct order to return to work and disingenously provided insufficient evidence to justify his absence. The Employer had just cause to terminate the Grievant.

Award

Grievance denied.

Date: July 8, 1991
RHONDA R. RIVERA, Arbitrator