**ARBITRATION DECISION NO.:**
468

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

**EMPLOYER:**
Department of Commerce

**DATE OF ARBITRATION:**
June 4, 1992

**DATE OF DECISION:**
September 19, 1992

**GRIEVANT:**
Randy Burley

**OCB GRIEVANCE NO.:**
07-00-(91-07-17)-0127-01-07,
07-00-(91-05-22)-0120-01-07 and
07-00-(91-05-06)-0116-01-07

**ARBITRATOR:**
Harry Graham

**FOR THE UNION:**
Donald W. Conley

**FOR THE EMPLOYER:**
Tim Wagner,
Office of Collective Bargaining

**KEY WORDS:**
Physician's Verification
Requirements
Suspension
Denial of Leave
Without Pay
Management Bias in
Disciplinary Process

**ARTICLES:**
Article 29 - Sick Leave
§29.03-Notification
Article 31 - Leaves
of Absence
§31.03-Authorization
for Leave
Article 43 - Duration

§43.03-Work Rules

**FACTS:**

The grievant, an Investigator at the Ohio Department of Commerce, was suspended for being absent without leave. On April 24, 1991 the grievant reported to work 5 hours late; he maintained that he called in and spoke with his supervisor; however, his supervisor denied ever speaking to him. After arriving, the grievant left the premises, allegedly to file a document at DAS, but the document was never filed. When questioned, the grievant did not account for his absence. The supervisor then asked the grievant to complete a leave form. The grievant did not complete the form; he stated that he forgot to fill one out. The following day the grievant requested time off to visit a physician and to obtain an estimate for a car repair. Contrary to the grievant's position, the supervisor claims that leave approval was conditioned upon the grievant visiting the physician first and obtaining the estimate second.

On April 30 and May 1, the grievant was absent and late respectively; because the grievant did not first call in he was considered to be AWOL. Consequently, the grievant was placed on "sick leave verification" status. Also in dispute was the fact that the Employer revised the department's policy and procedure manual without soliciting comments from the grievant, a Union steward.

**EMPLOYER'S POSITION:**

The Union's procedural objections were without merit; the disciplinary investigation was fair and thorough and the procedures utilized fully complied with departmental requirements. The Hearing Officer was an attorney specializing in banking who had no interaction with the department in which the grievant worked. The Third Step Hearing Officer did not have to be neutral and/or detached; Arbitrator Rivera settled this issue in an earlier arbitration. (Arbitration Decision #430)

Article 29.03 required the grievant to call in to report his absence no later than one-half hour after the scheduled starting time on April 24; the grievant failed to do so. After the grievant finally arrived, he left the premises to do Union business on State time without permission. The grievant's supervisor approved time off on April 25 primarily so the grievant could visit a physician. This was the reason that the supervisor rescinded leave approval upon discovering that the grievant did not visit a physician at all. On April 30 and May 1 the grievant was absent without approved leave. Therefore, the Employer had a contractual right to discipline the grievant and to place the grievant on physician's verification status pursuant to Article 29.03.

The Employer contacted and spoke with the Chapter Presidents of two Union chapters in the Department of Commerce with respect to the changes in the work rules; the Contract required nothing more. Likewise, the Contract did not mandate the Employer to grant leave without pay. Both the Contract and Departmental policy left this issue to the supervisor's discretion, and under the circumstances the supervisor was correct in electing not to approve the grievant's request.

**UNION'S POSITION:**

On April 24 the grievant called in and notified his supervisor that he would be late, and the grievant believed that he was acting with his supervisor's approval when he left the premises to hand carry paperwork to DAS. Therefore, the discipline administered was excessive. On April 25, the grievant called his supervisor to inform him that he was unable to keep the doctor's appointment because the car estimate took longer than anticipated.

The Union contested the integrity of the entire investigatory process. Both Hearing Officers were biased. The Third Step Hearing officer testified that the grievant was a pattern sick leave abuser; however, she was unable to support her accusation with documentation. Furthermore, the Employer improperly "stacked" several minor charges against the grievant to support excessive discipline.

**ARBITRATOR'S OPINION:**

The Union's procedural objections were without merit. Nothing indicated that the Hearing Officer was biased or that the grievant was denied the opportunity to present his side of the events. Likewise, the contract did not require the Third Step Hearing Officer to be neutral or detached; this issue was previously

decided in a decision by Arbitrator Rivera. Furthermore, the Union failed to establish that the investigatory process was conducted in a careless or hasty manner. In light of the grievant's poor attendance record and the events leading to the instant grievance, the administration of some form of discipline was appropriate.

On April 24, the grievant had a bona-fide belief that his supervisor knew of and approved his departure. The Arbitrator found it unlikely that the Employer would have approved a leave request primarily to obtain an estimate for car repair. Likewise, the Arbitrator decided the disputes regarding physician verification status, discretionary approval of leave without pay and changes in work rules in the State's favor.

The Arbitrator decided that a seven-day suspension was excessive as compared with the grievant's offense, especially since the grievant's record indicated that his most recent discipline was a one-day suspension. Therefore, the disparity between the one and seven day suspensions was unjustified.

**AWARD:**

The suspension was reduced from seven to two days, but other related grievances were denied.

**TEXT OF THE OPINION:**

In the Matter of
Arbitration Between

**OCSEA/AFSCME Local 11**

and

**The State of Ohio,
Department of Commerce**

**Case Numbers:**
07-00-(91-07-17)-0127-01-07
07-00-(91-05-22)-0120-01-07
07-00-(91-05-06)-0116-01-07

**Before:**
Harry Graham

**Appearances:**

**For OCSEA/AFSCME Local 11:**
Donald W. Conley
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

**For Department of Commerce:**
Tim Wagner
Office of Collective Bargaining
106 North High St.,
6th & 7th Floors
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on June 4, 1992 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. Exchange of the briefs was completed on

August 16, 1992.

Issues: At the hearing the parties presented the following issues for determination:

1. Was the Grievant, Randy Burley, suspended for seven days for just cause? If not, what shall the remedy be?
2. Was the Grievant properly put on physician's verification per Article 29.03 of the Contract?
3. Was the policy and procedure manual for the Department of Commerce (1990) properly promulgated per article 43.03 of the Contract?
4. Were his (Randy Burley's) requests for leaves improperly denied per the contract or the Department of Commerce Policy and Procedure Manual?

In addition, there are several procedural issues raised by the Union. The State agrees that the issues are properly before the Arbitrator. As is to be expected, the positions of the parties on these issues are diametrically opposed. The procedural issues raised by the Union are:

1. That the pre-disciplinary hearing officer was not neutral or detached.
2. That the Step 3 grievance hearing officer was not neutral or detached.
3. That the investigation in this situation was unfair and inadequate.

Background: The facts that give rise to this dispute are not a matter of complete agreement between the parties. The major controversy between them centers on the action taken by the State as the result of certain events involving the Grievant, Randy Burley. Mr. Burley is an Investigator with the Ohio Department of Commerce. He is also a Union steward, a fact that is relevant to this dispute.

On April 24, 1991 Mr. Burley was involved in a number of actions which prompted the State to administer discipline. On that date Mr. Burley did not report to work until after 1:00 p.m. His scheduled work day was due to commence at 8:00 a.m. He had called in and spoken to someone. (Precisely whom he spoke with is a matter of dispute. The Grievant asserts he informed his supervisor that he would be late. This is denied by the supervisor). No contact was had between the Grievant and the Department from the time of his initial call-in to the time he reported. Shortly after reporting to work, at about 1:45 p.m. he left the premises. He was to go to the offices of the Department of Administrative Services to deliver paperwork on behalf of a co-employee who was seeking disability benefits. He was absent from work for about one hour. Later in the day on April 24, 1991 Mr. Burley's supervisor, Jim Simchia, asked that he explain his absences and complete a request for leave form. Mr. Burley did not do so. In fact, the form requested by Mr. Simchia was never filed by the Grievant.

At some time prior to these events Mr. Burley had been involved in an accident resulting in damage to his car. On April 25, 1991 he sought approval to have time off in order to visit his doctor and to secure an estimate for repair of the damage to the car. This request was approved by Mr. Simchia with the proviso, according to Mr. Simchia, that Mr. Burley first go to the doctor. The secondary purpose of the time off was for him to secure the estimate to repair his car. The doctor visit proviso is dispute by Mr. Burley. In fact, no visit to the doctor was made by Mr. Burley on April 25, 1991. The final element prompting the State to suspend Mr. Burley for seven days was its view that on April 30, 1991 he was absent. On May 1, 1991 he missed two hours of work. In the opinion of the State, these absences constituted absence without leave. (AWOL).

On October 22, 1991 Mr. Burley was placed on what the parties term "sick leave verification." This was done orally. Subsequently, on November 7 and again in December, 1991 this was done in writing. Mr. Burley regarded this to be improper and grieved to protest.

As part of its routine of conducting its affairs the Department of Commerce from time to time issues what may be termed a policy and procedures manual. In 1990 the Department revised the manual that had been in effect since 1986. In revising the manual the Department did not solicit comments or reaction from Mr. Burley. In order to protest that failure, Mr. Burley filed a grievance.

Mr. Burley also grieved over the fact that the Department did not approve his requested leave without pay. The various grievances were not resolved in the procedure of the parties and they agree that they are now properly before the Arbitrator for determination on their merits.

Position of the Employer: Dealing initially with various procedural objections raised by the Union the State insists they are without merit. The Department of Commerce utilizes an internal procedure, specific to it, when discipline is being considered. That procedure contemplates that the pre-discipline hearing officer be neutral and detached from the events under review. The Department meets that standard in this situation according to the State. The hearing officer was Clair Long. Ms. Long is an attorney whose field of expertise is banking. She does not deal with the section of the Department in which Mr. Burley is located. Nor is she a supervisory official in the sense that she has any responsibility for directing Mr. Burley. She had no connection with these events whatsoever. As that is the case, she meets the departmental requirement according to the Employer.

In a prior proceeding involving Mr. Burley Arbitrator Rhonda Rivera was of the view that there is no contractual obligation for the State to provide a neutral or detached Step 3 hearing officer. That view should control in this situation according to the State. The Step 3 hearing officer is a management official. He or she is not required to be neutral or detached by any proviso of the Agreement. As that is the case, the Step 3 hearing officer utilized by the State in this dispute, Vicki Treciak, was appropriate.

Noting exists to indicate that the investigation leading to the discipline of Mr. Burley was anything other than fair and thorough. In this situation, the facts are straightforward. They are a matter of record. A dispute exists over whether or not the action taken by the State is appropriate. That issue will be determined on its merits as viewed by the Arbitrator. Mr. Burley's supervisor did not act improperly in this instance according to the State.

The State points out that the Grievant has compiled an unenviable record of attendance. He has been disciplined for poor attendance prior to this proceeding. In the Spring of 1992 Arbitrator Rhonda Rivera had before her a five-day suspension. She reduced it to a one-day suspension. That any discipline whatsoever was sustained is indicative of the poor attendance manifested by the Grievant.

As the Employer views this the incident of April 24, 1991 there is no question but that the Grievant did not properly call-in to report that he would be late. The Agreement at Section 29.03 provides that an employee who is sick and unable to report to work is to notify the Employer no later than one-half (1/2) hour after the scheduled starting time. On April 24, 1991 no such call was made by Mr. Burley within the prescribed time period. In fact, Mr. Burley did call-in, albeit somewhat late. Notwithstanding that to be the case, he did not report for work until about 1:00 p.m. Shortly thereafter he left. He did not request permission to leave. In fact, he was going to the offices of the Department of Administrative Services on behalf of a co-worker. In essence, he was performing Union business on State time without permission. This sort of behavior cannot be tolerated if the State is to run its affairs efficiently it insists. Mr. Burley did not seek permission to leave. No permission was granted. The grievant merely left his post to attend to tasks he regarded as being of greater significance to him than his activities on behalf of the State. Nothing in the Agreement permits employees to do this whether or not they are Union stewards. After he was requested by his supervisor to complete the appropriate leave request form for the hour he was absent, Mr. Burley did not do so. He indicated he forgot about it. This is ridiculous according to the State. The Grievant is a veteran of State service. He is a Union steward. It is simply unacceptable for a person with his background and experience to expect a defense of "I forgot" to be acceptable.

On the 25th of April, 1991 time off was approved for two tasks. One was a doctor's visit. The other was to secure an estimate of the cost of car repair. The State acknowledges that there is a difference in the accounts provided during the grievance procedure and to the Arbitrator by the Grievant and his supervisor, Mr. Simchia. Burley indicates his time off was without restriction. Simchia claims that he approved time off for the doctor visit with the car repair estimate secondary. The State urges that Simchia be believed as after learning that the Grievant did not go to the doctor he rescinded his approval of leave. He would not have done so had he approved leave for a car repair estimate according to the State.

On April 30 Mr. Burley was absent. No leave for that absence was approved. A similar situation

occurred on May 1, 1991. This represents an AWOL situation. When viewing the totality of the events at the end of April and beginning of May, 1991 the State asserts that it had ample grounds to administer the discipline under review in this proceeding.

With respect to the question of whether or not the Grievant was properly placed on physician's verification the State points to Article 29.03 of the Agreement. Language found at that Section of the Article permits the Employer to request a statement, personally written and signed by a physician. The Employer asked for the statement it had a contractual right to ask for. Mr. Burley did not provide it. He has not been disciplined for that action. There is no impropriety in the State seeking a statement that the Agreement permits it to obtain. Hence, no contractual violation occurred in this instance the State insists.

Similarly, the Agreement at Section 43.03 mandates that after the effective date of the Agreement agency and institutional work rules shall not violate the Agreement. They shall also be reasonable. In addition, the Union is to be provided an opportunity to be notified prior to the issuance of work rules. In fact, the Chapter Presidents of two Union chapters in the Department of Commerce were notified of the revised work rules. Discussion with them occurred. Mr. Burley was not a chapter president. He was a Steward. He had no claim to notice or discussion or work rule revisions under the Agreement the State insists.

Turning to the final issue in this proceeding, the State points out that there is no contractual requirement that it grant Leave Without Pay. Nowhere is it mandated that leave of that nature be granted. Furthermore, Departmental policy clearly provides that leave of that nature is discretionary. Under the circumstances of this dispute Mr. Simchia chose to deny the requested leave. Granting that Mr. Burley was unhappy with that development, there is nothing either in the Agreement or the departmental policy that would require a different result.

Based upon these arguments the State urges that the grievances be denied in their entirety.

Position of the Union: The Union points out that when Mr. Burley departed the office to go to the Department of Administrative Services it was not on his own initiative. Rather, he was directed to hand carry paperwork to that Department regarding the disability benefits for a coworker. As he was acting as instructed by supervision he may not be disciplined for being out of the office according to the Union.

On the same day, April 24, 1991 Mr. Burley called-in sick. His call was placed 45 minutes after the start of his shift. The Union acknowledges that the call-in was late. However, to disapprove the requested leave and determine that the Grievant was AWOL is excessive under these circumstances in the Union's view. Mr. Burley could have been determined to have been late, not AWOL. There is an element of disparate treatment about this event. About one month later, on May 22, 1991 a co-worker, George Anderson, called in late. He was experiencing arthritis. No discipline was administered to Mr. Anderson. In fact, his application for leave was approved on a retroactive basis by the supervisor, Mr. Simchia.

When Mr. Burley applied for leave to secure an estimate on the damage to his car and to visit his doctor his leave application was approved. In fact, the appraisal process at the car dealer took longer than anticipated. Mr. Burley telephoned the office and informed the Employer that he would not be able to keep the appointment with the doctor as his office would be closed. Subsequently, the approved leave was disapproved by Mr. Simchia. This represents the only instance when Mr. Simchia has disapproved leave that had previously approved.

At the arbitration hearing Vicki Treciak testified that in 1990 she had informed Mr. Burley that he had been identified as a patterned abuser of sick leave. When pressed to supply documentation she was unable to do so. Her assertion that he had been notified of the fact that the Employer regarded him as an abuser of sick leave does not bear scrutiny according to the Union. Documentation is to be retained of such notices. No such documentation is available. Any assertion that the Grievant was regarded as an abuser of sick leave is insupportable according to the Union.

In this situation there has occurred the proverbial stacking" of charges against the Grievant. A number of minor events have been combined by the Employer to justify imposition of serious discipline. Given the justified nature of Mr. Burley's absences that cannot be permitted to stand according to the Union.

Discussion: The procedural issues raised by the Union at the hearing are not well taken. While the

Department of Commerce requires that the pre-disciplinary hearing officer be neutral and detached the evidence does not support the claim of the Union that she was not. The pre-disciplinary hearing officer in this case, Clair Long, has no daily contact with Mr. Burley. She does not function in a supervisory capacity with respect to Mr. Burley. Nothing is on the record before this Arbitrator to indicate anything other than that Ms. Long provided a complete opportunity to the Grievant to present his side of events. She listened to the testimony and evidence before her and made her recommendation. No procedural impropriety exists in that sequence of developments.

Joint Exhibit 7 is a decision by Arbitrator Rivera involving these parties. Arbitrator Rivera is of the view that there is no contractual requirement that the step three hearing officer be neutral and detached. Arbitrator Rivera's conclusion is forthright and unambiguous. It is correct. No contractual language exists that requires the Employer to provide a third step hearing officer who is anything other than a representative of management. Had the parties mutually desired to provide for an evidentiary hearing characterized by the full panoply of due process doubtless they would have done so. They did not. The third step hearing officer is not required to be neutral under any term of the Agreement. Hence, the contention of the Union that there is a fatal defect in the processing of the grievances under review in this proceeding is misplaced.

Such investigation as occurred in this situation may be characterized as bureaucratic in nature. That is, Mr. Simchia examined records maintained in the course of business. He satisfied himself that Mr. Burley had made a late call-in. He spoke with employees who would be expected to have knowledge of Burley's various other calls to the office. As the State points out, the assistance of Sherlock Holmes was not required in this instance. It may be that the actions of the State are to be regarded as excessive or disproportionate to whatever offense might have been committed by the Grievant. That is for the grievance procedure to determine. The Union has not shown to the satisfaction of this Arbitrator that the investigation conducted by the State was perfunctory or that it lead to a rush to judgment.

As the parties to this dispute are well aware the main issue in contention is the seven-day suspension administered to Mr. Burley. The work history compiled by the Grievant is clear. He has indeed compiled a rather poor attendance record. The Union acknowledges this to be the case in its opening statement provided to the Arbitrator at the hearing. Similarly, the events that prompted the State to administer discipline did indeed occur. Mr. Burley called-in late. Standing alone, this is not a significant violation of the Agreement. In light of Mr. Burley's work history it takes on more weight than would otherwise be the case. That he reported for work on April 24, 1991 well after his call-in must also be considered in assessing any discipline due to the Grievant.

The circumstances surrounding Mr. Burley's departure from the office in order to go to the Department of Administrative Services are ambiguous. Mr. Burley claims that he spoke to Mr. Simchia's secretary and understood that she had given him approval to depart. It is the case that a secretary lacks authority to authorize such behavior. On the other hand, nothing is on the record before the Arbitrator to indicate that Mr. Burley had anything other than a bona-fide belief that the Employer was aware of his departure and had approved it. In the bright light of hindsight his departure from the office on April 24, 1991 was erroneous on his part. In the more ambiguous circumstances that existed on that date it cannot be said that the Employer has acted with due proportion. The penalty does not fit the offense. This view is tempered by the fact that when asked to complete a request for leave form for his absence he did not do so. A claim of faulty memory rings hollow.

These events must prompt the observation that the Grievant and supervisory officials have a testy relationship. The Grievant is a forceful advocate of the rights of co-workers. This may have lead him to push the system. As every action prompts a reaction, the system is pushing back.

The next day when the incidents involving the damage estimate to Mr. Burley's car and his failure to visit the doctor occurred is also veiled in ambiguity. The Grievant claims that he was unaware of any requirement that he visit the doctor on April 25, 1991. Mr. Simchia understood to the contrary. It appears more likely to the Arbitrator that the auto damage estimate was incidental to the doctor visit than the contrary. Certainly this would be expected managerial viewpoint. Given the leave balance situation in Mr. Burley's accounts as they existed in April, 1991, low, it is appears unlikely to the Arbitrator that leave was granted to secure a damage estimate and only secondarily for a doctor visit.

No lengthy discussion is required over the action of the Employer placing the Grievant on physician's verification. Section 29.03 of the Agreement prescribes that:

“The Employer may request a statement, personally written and signed by a physician who has examined the employee...be submitted within a reasonable period of time.”

This language is not ambiguous. The Employer may act as it did in this instance.

Similarly, under the Agreement the Department of Commerce may promulgate work rules. Section 43.03 provides as much. It was not contradicted by the Union that the rules were provided to the presidents of its chapters in the Department of Commerce. Nor was it shown that this action was perfunctory. Those people were provided an opportunity to react to the proposed rules. The terms of the Agreement were fully complied with by the State in this situation.

Under the Agreement approval of leave is not automatic in all circumstances. That this is so is indicated in Section 31.03 of the Contract which provides that "authorization for or denial of a leave of absence..." is to be promptly communicated to the applicant. In this situation the Employer retains authority under the Agreement to grant or not grant leave. No violation of the Agreement occurred when the Employer declined to grant the leave requested by the Grievant.

The most significant issue in this proceeding when all the underbrush is stripped away is the seven-day suspension administered to the Grievant. This is a very serious penalty. In order to justify it there must have occurred a very serious offense. The events of April 24, 25 and May 1, 1991 do not rise to that level. Furthermore, reference must be made to the decision of Arbitrator Rivera on the record in this proceeding as Joint Exhibit 7. In the dispute before her Arbitrator Rivera reduced a five-day suspension of this Grievant to one-day. It is the one-day suspension that is on the record of Mr. Burley. To move from that one-day suspension to the seven-day suspension under review in this proceeding is excessive. Were there no previous discipline on the Grievant's record at all it is questionable whether or not any time off would be justified. However, there is the fact of the one-day suspension. Under these circumstances, that must prompt the conclusion that a short suspension is warranted.

Award: The grievances are denied in part and sustained in part. The seven-day suspension administered to the Grievant, Randy Burley, is to be reduced to a two-day suspension. The other grievances that accompanied that grievance to arbitration are denied.

Signed and dated this 19th day of September, 1992 at South Russell, OH.

Harry Graham
Arbitrator