ARBITRATION DECISION NO.:
555

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

EMPLOYER:
Ohio Veterans Home

DATE OF ARBITRATION:

DATE OF DECISION:
August 10, 1994

GRIEVANT:
Linda Yanushewski

OCB GRIEVANCE NO.:
33-00-(93-12-14)-0510-01-04

ARBITRATOR:
Harry Graham

FOR THE UNION:
Lois Haynes

FOR THE EMPLOYER:
Robert Day

KEY WORDS:
Removal
Absenteeism
Sick Leave
Disparate Treatment

ARTICLES:
Article 29 - Sick Leave
§ 29.04 - Sick Leave Policy

FACTS:
The grievant, a hospital aide, was removed from her position due to excessive absenteeism. The grievant accumulated a poor attendance record over a period of two years due to severe health problems.

EMPLOYER'S POSITION:
The state claimed that the grievant was disciplined for excessive absenteeism and, since her attendance did not improve, her discharge was for just cause. Most of the grievant's absences were the result of call-offs. A call-off involves a call to work on the day of the scheduled work shift indicating that the employee will not be reporting to work. These call-offs frequently require management to utilize overtime to replace the employee. This frequently involves the use of other employees to work mandatory overtime. Additionally, a call-off disrupts the staffing pattern of the unit and the plans of co-workers.

Contract article 29.04 IID, outlines the disciplinary and corrective action for the inappropriate use of sick leave. Sick leave is defined as absence granted per the contract for medical reasons. Sick leave is misused when a pattern of absences results from excessive sick leave which may occur after holidays, paydays, or weekends. Abuse also results when an employee has a continued pattern of maintaining zero or near zero leave balances. Similarly, excessive absenteeism results when an employee uses more sick leave than is granted.

The state believed that although the grievant had bonafide illnesses due to a back injury, termination of her employment was justified. Therefore, the grievance should be denied.

UNION'S POSITION:

The union pointed out that the grievant was a satisfactory employee, as verified by the state's performance evaluation. The union also claimed that the grievant experienced disparate treatment due to the fact that employees with attendance records similar to hers were not disciplined.

A medical examination revealed that the grievant had a serious back problem that rendered her unable to work on a consistent basis. As a result, the grievant was considered temporarily, totally disabled and she qualified for unemployment compensation benefits.

Under contract article 29.04 IIIC, an employer must consider extenuating or mitigating circumstances in determining whether to discipline an employee and what the severity of the discipline should be. The union believed that extenuating and mitigating circumstances existed in the grievant's situation and, as such, her discharge was inappropriate.

ARBITRATOR'S POSITION:

The arbitrator held that in order for the union to establish the existence of disparate treatment, it is necessary that the employees be similarly situated. The arbitrator pointed out that the employees that the grievant referred to in the grievance were not in the same situation as the grievant. One of the employees cited by the union as receiving more favorable treatment than the grievant was a member of management. Although it may be regarded as unfair and inequitable that management employees receive different treatment than bargaining unit employees regarding sick leave usage, the arbitrator believed that the employer can allow this different treatment since a policy document does not have the binding authority of the Collective Bargaining Agreement.

The arbitrator also held that the grievant was correctly disciplined in the years prior to her discharge. In addition, the arbitrator found that Section 29.04 IIIC does not mandate that discipline be withheld due to mitigating or extenuating circumstances, but rather it indicates that such circumstances are to be kept in mind in making the disciplinary decision. Discipline may not be the appropriate response to absenteeism due to illness or injury because, by their nature, such absences are not controllable by the employee. Discipline does, however, provide notice to the employee that attendance must improve or more serious consequences will occur. The grievant's employment record showed that in six years of state service, the grievant missed 2,533.5 work hours, which represents more than one entire work year. The arbitrator held that at some point, an employer may terminate the services of an employee who has compiled a history of poor attendance.

As applied to the situation here, the arbitrator found that although the grievant had a history of injury and illness, a medical examination prior to her discharge does not indicate that her various ailments were work-related. Furthermore, the record of her absences compiled in 1992 and 1993 failed to show a relationship between work and the various reasons set forth for her absence.

In conclusion, the arbitrator held that the grievant showed a continued pattern of maintaining zero or near zero sick leave balances and excessive absenteeism, which is an abuse of sick leave as discussed in contract article 29.04 IID. Therefore, the grievance was denied.

AWARD:

Grievance denied.

TEXT OF THE OPINION:
In the Matter of Arbitration
Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Ohio Veterans Home

Case Number:
33-00-(931214)-0510-01-04

Before: Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:
Lois Haynes
Staff Representative
OCSEA/AFSCME Local 11
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Columbus, OH. 44870

For Ohio Veterans Home:
Robert Day
Ohio Veterans Home
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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was the Grievant's removal for just cause?
If not, what shall the remedy be?

Background: There is no dispute over the events that prompt this proceeding. The Grievant, Linda Yanushewski, has been employed as a Hospital Aide at the Ohio Veterans Home since February, 1985. Her most recent assignment was to work within the Alzheimer/Special Care Unit of the Home. During the course of her employment Ms. Yanushewski was absent from work a great deal. Her record will be set forth below. In due course, on December 2, 1993 the Grievant was discharged. It was the view the State that she had been in violation of Article 29.04 II D of the Agreement which prohibits abuse of sick leave.

In order to protest her removal Ms. Yanushewski filed a grievance. It was not resolved in the procedure of the parties and they agree that it is properly before the Arbitrator for determination on its merits.

Position of the Employer: During her tenure with the State Ms. Yanushewski experienced increasingly

severe discipline related to what the State perceived to be her failure to attend to work. The record is as follows:

Date	Discipline Violation
7/30/91	Verbal Warning-Excessive Absenteeism
11/13/91	Written Warning-Excessive Absenteeism
2/11/92	3 day Suspension-Excessive Absenteeism
2/11/92	Counseling-Attendance
11/12/92	5 day Suspension-Excessive Absenteeism
7/19/93	10 day Suspension-Excessive Absenteeism

That record indicates that the State has followed the principles of progressive discipline in this instance it insists. For several years prior to her discharge Ms. Yanushewski experienced discipline related to attendance. Her attendance did not improve. The State was left with no alternative but to discharge her in its view.

In the course of her employment with the State the Grievant had 104 instances of leave. Ninety-nine (99) of these were call-offs. A call-off involves a call to work on the day of the scheduled work shift. By nature of the short notice of absence provided to the Employer a call-off may prompt overtime. This overtime may frequently be involuntary on behalf of those held-over. A call-off disrupts the staffing pattern of the unit and the plans of co-workers. In Ms. Yanushewski's case, the number of call-offs had become intolerable.

The record complied by the Grievant shows that from her date of hire to her date of discharge she missed 2,533.5 hours of work. This is excessive in the opinion of the State.

At Section 29.04 II D the Agreement is concerned with the concept of patterned abuse of sick leave. Sections 7 and 8 bear directly upon the Grievant's situation according to the State. Included among the concepts of pattern abuse is a continued pattern of maintaining a zero or near zero sick leave balance or excessive absenteeism. This encompasses the notion of use of more sick leave than is granted. Both concepts are applicable to Ms. Yanushewski. Her sick leave account constantly hovered around zero balance. On occasion it was completely depleted. She utilized other sorts of leave in lieu of sick leave.

The State does not dispute that the medical history of the Grievant is filled with instances of bona-fide illness and injury. As the State views this dispute, that is irrelevant. At some time an employee must report to work on a consistent basis. Ms. Yanushewski did not do so. Hence, the termination of her employment at issue in this proceeding was justified according to the Employer. The State urges the grievance be denied in its entirety.

Position of the Union: The Union points out that the Grievant has been a satisfactory employee for the State. Her performance evaluation shows that she meets or exceeds expectations for the various sorts of activity itemized on the form. By its own records the State has graded Ms. Yanushewski be a good employee. Hence, her discharge is inappropriate according to the Union.

The Grievant has experienced disparate treatment at the hands of the Employer according to the Union. It points to the attendance records of Phillip Freeman and William Mayo. Both are employees of the Home and both in 1993 experienced a zero balance in their sick leave account. No discipline was administered. In contrast, Ms. Yanushewski was discharged. This is the sort of disparate treatment that should prompt the State's action to be overturned in the Union's view.

When the Grievant was discharged she applied for Unemployment Compensation benefits. Without reciting the outcome of the claim and various appeals, in the final analysis Unemployment Compensation benefits were granted to Ms. Yanushewski. In the course of that appeal the Hearing Officer determined that Ms. Yanushewski had experienced a back injury several years ago. She was sent by the Home for medical examination. The examining physician determined that she had a back problem that was under treated and found that was unable to work consistently without developing problems. He considered her to be temporarily, totally disabled. The contents of that report were not shared with the Grievant and she

continued to work. In determining the Grievant to be eligible for unemployment compensation benefits the Hearing Officer found the conduct of the State to be "unconscionable." In essence, the State contributed to Ms. Yanushewski's health problems. To discharge her under these circumstances should not be permitted to occur according to the Union.

Section 29.04 III C of the Agreement directs the Employer to consider "extenuating or mitigating circumstances" in determining whether to discipline and the severity of discipline. Extenuating and mitigating circumstances are present in abundance in this situation according to the Union. Not only has Ms. Yanushewski experienced health problems, some were caused by the State. Under such circumstances discharge is inappropriate in the Union's view.

Discussion: The concept of disparate treatment is an elusive one. In order for the Union to establish the existence of disparate treatment it is necessary that the employees be similarly situated. That is not the case in this instance. At least one of the people cited by the Union as receiving more favorable treatment than Ms. Yanushewski, Phillip Freeman, is not a member of the bargaining unit. It may be regarded as unfair and inequitable that management employees receive different treatment than bargaining unit employees with respect to sick leave usage. If the employer desires that to occur it may do so, no matter what statements have been made on a policy document. A policy does not carry with it the binding authority of the Collective Bargaining Agreement. The sort of disparate treatment as the concept is used in labor relations did not occur in this instance.

The employer followed the principles of progressive discipline in this situation. The record of discipline, cited above, indicates the State moved from a verbal warning through increasingly severe applications of discipline. The final application of discipline prior to Ms. Yanushewski's discharge was a ten day suspension. The State acted correctly in its application of discipline in the years preceding discharge. Section 29.04 III C does not mandate that discipline be withheld due to mitigating or extenuating circumstances. It merely indicates that such circumstances are to be kept in mind. The record of discipline in this situation extends back to 1991. From 1988 through 1990 Ms. Yanushewski missed 1335 hours of work. (Employer Ex. 2). Expressed differently, she was absent slightly more than 20% of available work time. That poor attendance record provided more than sufficient justification for the Employer to commence the course of discipline followed in this situation. Discipline may not be the appropriate response to absenteeism due to illness or injury. By their nature, such absences are uncontrollable by the employee. Discipline does however, provide notice to the employee that attendance must improve or more serious consequences to continued employment will occur.

Following initiation of discipline in 1991 to her discharge in 1993 the Grievant missed 1198.5 hours of work or 19.2% of available work time. There was no significant improvement in the second period over the first. It must be acknowledged that in 1993 Ms. Yanushewski had the lowest level of absenteeism of any year of her career in State service. It was 155 hours or almost four weeks. The 155 hour figure remains substantial. In six years of State service the Grievant missed 2,533.5 work hours. This represents more than one entire work year. (2080 hours being the accepted figure for a straight time work year). Plainly put, Ms. Yanushewski's attendance record is dreadful.

At some time an employer may terminate the services of an employee who has compiled a history of poor attendance. This is the case even though absence is bona-fide. In a somewhat analogous situation Arbitrator Stanley Aiges upheld the discharge of an employee who was unable to meet performance standards after an automobile accident. Public Service Electric and Gas Co. 65 LA 380 Aiges, 1975. Arbitrator Aiges made the point that if, after a reasonable period of time, an employee is unable to meet minimum performance standards the Employer may terminate that employee. In this situation the high absenteeism rate compiled by the Grievant rendered her incapable of meeting the fundamental obligation of an employee to the employer, attendance at work.

Joint Exhibits 2 and 3 in this proceeding are the attendance records of the Grievant for 1992 and 1993. Joint Exhibit 2 indicates time off work for upper respiratory infection, family emergency and recovery from surgery for a hysterectomy. No reference is found to treatment for a back injury. Joint Exhibit 3 covering 1993 details absences but does not provide a reason for them. As set forth above, the attendance record for

1992 and 1993 is poor. Those observations are pertinent to the findings of the Unemployment Compensation Hearing Officer regarding Ms. Yanushewski's claim for benefits. In November 1991 the Grievant was examined by Vernon D. Patterson, D.O. at the behest of the Veterans Home. (Joint Exhibit 4) Dr. Patterson (Union Ex. 5) evaluated Ms. Yanushewski for a "number of different problems ranging from spinal disorders to stress reactions, bronchitis, headaches, sciatic nerve pain, low back pain, pneumonia and menopause...." In his account Dr. Patterson related that Ms. Yanushewski did "not recall any specific injury." Dr. Patterson concluded that in his opinion Ms. Yanushewski "is unable to work consistently without developing significant symptom complex and as the result I would consider her to be temporarily totally disabled...." The Employer made no response to this finding. It did not inform the Grievant of the results of Dr. Patterson's examination. It continued her in work status with no reference to any disability such as found by Dr. Patterson. When confronted by this history the Unemployment Compensation Hearing Officer found it to be "unconscionable." He determined the Employer, did not have just cause to discharge the Grievant and sustained her claim for benefits. The Arbitrator fully agrees with the finding of the Hearing Officer that withholding the result of the 1991 physical exam from Ms. Yanushewski was "unconscionable." The issue posed for the Hearing Officer was whether or not Ms. Yanushewski was "discharged for just cause in connection with work?" He found that she was not. The standards employed by Unemployment Compensation officials and arbitrators are somewhat different. As Arbitrator Aiges pointed out in Public Service an employer has a legitimate expectation that employees will be able to meet a minimum standard of performance. In the situation before him no question existed but that an employee had been injured and as a result could not perform to expectations. In this situation the Arbitrator accepts as fact that Ms. Yanushewski has a history of injury and illness. Dr. Patterson's examination, some three years prior to the Grievant's discharge, does not indicate her various ailments to be work related. The record of absence compiled in 1992 and 1993 fails to show a relationship between work and the various reasons for absence. In the final analysis the Grievant was absent from work approximately 20% of the time during her tenure with the Veterans Home. In spite of the bona-fide reasons for her absence the record indicates that Ms. Yanushewski has shown a "continued pattern of maintaining zero or near -zero leave balances" and "excessive absenteeism-use of more sick leave than granted" which are the contractual tests specified in Section 29.04, II D. As that is the case there can be but one result to this dispute.

Award: The Grievance is denied.

Signed and dated this 10th day of August, 1994 at South Russell, OH.

Harry Graham
Arbitrator