

**ARBITRATION DECISION NO.:**

559

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Mental Retardation  
and Developmental Disabilities  
Warrensville Developmental Center

**DATE OF ARBITRATION:**

September 28, 1994

**DATE OF DECISION:**

October 10, 1994

**GRIEVANT:**

Valerie Harris

**OCB GRIEVANCE NO.:**

24-14-(93-11-08)-0943-01-04

**ARBITRATOR:**

Harry Graham

**FOR THE UNION:**

Robert Robinson

**FOR THE EMPLOYER:**

Carolyn S. Collins

**KEY WORDS:**

Removal  
Just Cause  
Absent Without Leave  
Last Chance Agreement  
Discipline

**ARTICLES:**

Article 24 - Discipline  
    § 24.01 - Standard  
Article 29 - Sick Leave  
    § 29.03 - Notification

**FACTS:**

he grievant was employed as a Cook 1 and had been disciplined for absenteeism in the past. The grievant and her employer, the Warrensville Developmental Center, entered into a Last Chance Agreement. Under this agreement, if the grievant was in violation of any of the employer's attendance policies over a one-year period, discharge would result. Furthermore, the grievant's supervisor was authorized to make

exceptions to the agreement if there were mitigating circumstances. The arbitrator, therefore, did not have discretion to find any mitigating circumstances or to modify any discipline given.

The grievant was absent from work for three days and did not call in. Therefore, the grievant was considered Absent Without Leave (AWOL), in violation of the employer's policy on sick leave and in violation of the Last Chance Agreement. Subsequently, the grievant was discharged.

#### **EMPLOYER'S POSITION:**

The state argued that the grievant's discharge was for just cause based on her attendance record. The grievant had accumulated thirteen instances of discipline for attendance-related problems prior to her discharge. In addition, the grievant claimed that she had a back injury and that she received documentation from her physician that she would be absent from work from July 7 to July 26, 1993. The grievant called in sick on July 8 and July 9 but not on July 12 through July 14, which was in violation of the employer's policy on absenteeism and sick leave procedures. The grievant also violated the terms of the Last Chance Agreement and since no mitigating circumstances existed, the arbitrator had no authority to modify the discharge. Therefore, the discharge, according to the state, was not wrongful.

#### **UNION'S POSITION:**

The union argued that the discharge failed to meet the requirement of just cause. Under Contract Article 29.03, an employee on sick leave is required to notify the employer at the start and at the end of the sick leave period. Since the grievant provided her employer with documentation, she satisfied the notice requirement.

The grievant believed that she was not required to call in based on the language of the agreement. Additionally, since the grievant provided her employer with documentation stating that she would be absent due to her back injury, the employer was aware of the duration of her injury, and, as such, discharge was unfair.

#### **ARBITRATOR'S OPINION:**

Under the policy of the Warrensville Developmental Center, an employee may be terminated for being absent without leave, even in circumstances where the violation is the grievant's first offense. Based on the facts, the grievant was obligated to inform her employer of her absence and since she did not inform her employer until July 15 that she would be absent until July 26, she violated the employer's policy on sick leave and absenteeism. The grievant, in turn, violated the Last Chance Agreement, based on the policy violation.

Since the grievant and the employer agreed to the terms of the Last Chance Agreement, the employer had just cause to discharge the grievant.

#### **AWARD:**

The grievance is denied.

#### **TEXT OF THE OPINION:**

**In the Matter of Arbitration  
Between**

**OCSEA/AFSCME Local 11**

and

**The State of Ohio, Department  
of Mental Retardation and  
Developmental Disabilities**

**Case Number:**

24-14-(110893)-943-01-05

**Before:**

Harry Graham

**Appearances:****For OCSEA/AFSCME Local 11:**

Robert Robinson  
Staff Representative  
OCSEA/AFSCME Local 11  
1680 Watermark Dr.  
Columbus, OH. 43215

**For Department of MR/DD:**

Carolyn S. Collins  
Labor Relations Coordinator  
Department of MR/DD  
30 East Broad St., Suite 1210  
Columbus, OH. 43266-0415

**Introduction:** Pursuant to the procedures of the parties a hearing was held in this matter on September 28, 1994 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 give rise to this proceeding. The Grievant, Valerie Harris, has been employed for the past nine years as a Cook 1 at the Warrensville Developmental Center in Highland Hills, OH. During the course of her employment she accumulated numerous instances of discipline. These were largely related to problems associated with attendance. On May 14, 1993 Ms. Harris entered into a Last Chance Agreement with the Department. It established certain attendance standards to be met by Ms. Harris as the condition of her continued employment. On July 12, 13, and 14, 1993 Ms. Harris was absent from work. She did not call the Warrensville facility to report off. Consequently, she was considered to be Absent Without Leave (AWOL). This was regarded by the Employer to be a violation of the May, 1994 Last Chance Agreement. Ms. Harris was discharged. That discharge was protested in the grievance procedure of the parties. No resolution of the dispute was reached and the grievance is now properly before the Arbitrator for determination on its merits.

**Position of the Employer:** Preliminary to consideration of the events prompting the State to discharge Ms. Harris the Employer points to her disciplinary record. She had accumulated thirteen instances of discipline for attendance-related problems prior to discharge. Discipline for other infractions had been imposed as well. In May, 1993 Ms. Harris had entered into a Last Chance Agreement with the Department. It provided that for a 365 day period from May 14, 1993 that discharge would result if she violated any policies of the Warrensville Developmental Center. The Superintendent of the Center was given discretion to make exceptions to the Agreement based upon any mitigating circumstances. Any grievance protesting discipline arising under the Agreement was limited to the question of whether or not the Grievant violated a policy of the Warrensville Developmental Center. If a violation of a policy were found to have occurred the Arbitrator was explicitly prohibited from modifying any discipline that might have been imposed by the

Employer.

In July, 1993 Ms. Harris was absent from work. Her absence commenced on July 7, 1993. Various reasons were provided by the Grievant for her absence. In one account, she was attacked by a Warrensville resident. In another account, she wrenched her back lifting kitchen utensils. On July 7, 1993 Ms. Harris was seen at the Kaiser facility and received from them documentation for her absence on that date. She subsequently saw her personal physician and received from him documentation that she would be absent from work to July 26, 1993 for back problems. Ms. Harris called off work on July 8, and 9, 1993. No call was received by the facility on July 12, 13, and 14, 1993. Ms. Harris' failure to call off on those dates represented a violation of the policy of Warrensville Developmental Center. Policy No. 10-86 IV A provides that employees who cannot report to work are to notify their supervisor. Ms. Harris did not do so on the days in question. She violated the explicit terms of her May 14, 1993 Last Chance Agreement. As she violated the Policy of the institution and the Superintendent found no mitigating circumstances the Arbitrator has no authority to modify the discharge under review in this proceeding according to the State. Hence, it insists that its action must stand.

**Position of the Union:** According to the Union the discharge under review in this proceeding fails to meet the contractually established test of "just cause." At Section 29.03 the Agreement provides that an employee on sick leave is to notify the Employer "at the start and end of such period." Ms. Harris met the contractual standard of notice.

When the Grievant was treated for back problem's on July 7, 1993, she received medication for her pain. The medication was motrin, 800 mg. and morflex, 100 mg. These had an adverse effect upon Ms. Harris. They made her sleepy and incapable of calling-in. Furthermore, she had a bona-fide belief that she did not have to call-in due to the language of the Agreement.

On July 15, 1993 Ms. Harris came to the Warrensville facility and provided documentation that she would be absent to July 26, 1993. The Employer knew the duration of her expected absence. To discharge her under these circumstances is impermissible in the Union's opinion.

The Union points to Ms. Harris' history of discipline. During the course of her employment at Warrensville she worked in the Dietary Department. While in Dietary she was the recipient of continual discipline. For ten months she worked in the Housekeeping Department. During that period, no discipline was incurred. There existed an environment of hostility to Ms. Harris in the Dietary Department. In essence, the Union urges this discipline be viewed as an attempt to "get" Ms. Harris. As such, it should be set aside and the Grievant restored to employment with all pay and benefits provided to her.

**Discussion:** The terms of the May 14, 1993 Last Chance Agreement are very specific. They provide that:

- 1) All parties agree that should the employee, within 365 days of effective date of this agreement, violate any W.D.C. policies will (sic) result in termination with the exception of mitigating circumstances which will be at the discretion of the Superintendent.
- 2) Any Grievance arising out of this disciplinary action shall have the scope of arbitration of this grievance limited to the question of whether or not the grievant did indeed violate said policy. The arbitrator shall have no authority to modify any disciplinary action received unless the arbitrator finds that no violation of WDC policies regarding absenteeism, tardiness, or attendance occurred.

That Agreement was entered into by all concerned in this proceeding. It bears the signatures of the Grievant and the President of the Local Union Chapter. It also is signed by the Superintendent of the Warrensville facility and the Labor Relations Officer at Warrensville. It represents the commitment of the parties to modify the "just cause" standard for discipline found in the Agreement. The Superintendent of Warrensville is explicitly given the sole discretion to determine if any mitigating circumstance existed in this situation. He found none.

The Last Chance Agreement provides that any violation of polices of Warrensville Developmental Center

"will" result in termination. Employer Exhibit in this proceeding is a compilation of the operating policies of the Warrensville facility. Under AWOL it provides for removal for the first offense. Employer Exhibit 4 defines AWOL as "no contact was made by the employee regarding absence from duty, and the employee did not report to work as scheduled." The record in this situation establishes that the Grievant did not call in on July 12, 13, and 14, 1993. Whatever might be the contractual standard established by the Agreement, the parties agreed to modify it by the explicit terms of the Last Chance Agreement. That Agreement was signed by the Grievant. She knew what she was required to do. It was her obligation to call the Center in instances of absence. Ms. Harris did not inform the Employer until July 15, 1993 that she would be absent to July 26, 1993. This represents a violation of the absence Policy, Employer Exhibit 4. It is also a violation of the Call-In (Call-Off) Policy, Employer Exhibit 5 in this proceeding. That policy provides for members of the OCSEA/AFSCME represented bargaining units that employees must notify their supervisor when they will be unable to report to work. Ms. Harris did not do so. She had nine years of service at the facility and should have been aware of the procedure to be used in instances of absence. Employer Exhibit 6 shows that on March 8, 1993 she received instruction on the call-off procedure. She did not comply with it in this instance. By the explicit terms of the Last Chance Agreement as Ms. Harris violated policies of the Warrensville Developmental Center there can be no outcome of this dispute other than confirmation of the action of the Employer.

When the parties came to negotiate the Last Chance Agreement of May 14, 1993 the Grievant was on notice that the Agreement was what it purported to be: the terms under which she was provided her last chance at continued employment. The Agreement gives to the Arbitrator no discretion to find any mitigating circumstances. Only the Superintendent has that authority. Once a policy violation has been found to have occurred the Arbitrator has "no authority" to modify discipline. The terms of the Last Chance Agreement represent the understanding of the parties with respect to the manner in which discipline might be imposed on the Grievant for one year subsequent to May 14, 1993. Those terms have been met.

**Award:** The grievance is DENIED.

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

Harry Graham  
Arbitrator