

**ARBITRATION DECISION NO.:**

562A

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Administrative Services

Rehabilitation Services Commission

**DATE OF ARBITRATION:**

Telephone Conference

September 12, 1994

October 20, 1994

October 21, 1994

**DATE OF DECISION:**

December 2, 1994

**GRIEVANT:**

D. Gochenouer

**OCB GRIEVANCE NO.:**

29-04-(93-03-23)-0167-01-14

**ARBITRATOR:**

Rhonda R. Rivera

**FOR THE UNION:**

Anne Light Hoke, Esq.

**FOR THE EMPLOYER:**

Darla J. Burns

**KEY WORDS:**

Back Pay

Clarification of Arbitration

Award

Disability

Suspension

**ARTICLES:**

Article 35A - Disability Benefits

§ 35A.01 - Eligibility

**FACTS:**

The grievant was originally suspended for 20 days by the Rehabilitation Services Commission. In a prior arbitration the 20 day suspension was reduced to a 13 day suspension. Of the 7 day reduction in the suspension, 5 days were taken off for lack of evidence for some charges and 2 days were taken off the suspension for procedural errors committed by management.

Prior to this suspension the grievant had applied for disability leave. As originally scheduled the grievant's

suspension would have occurred during her "waiting period" for her disability and would have consequently "broken" that period. As a result, she would have lost the effect of the period in the determination of her eligibility for disability. Therefore, RSC changed the dates of the grievant's suspension to accommodate the "waiting period" for her disability leave. At the same time the grievant was notified of this change in her suspension, she received notification that 2 days of her disability pay were canceled due to the fact that an employee is prohibited from receiving disability pay during a period of suspension.

The Employer has refused to issue 7 days of back pay to the grievant. The Employer's argument for not issuing the back pay was that during a seven working day period for which the suspension was received, the grievant was in a no pay status while awaiting disability, and at the time the grievant was not entitled to the 7 days of back pay. As a result the Union and the State joined in an action to return the case to the arbitrator for a determination of whether the grievant was due back pay.

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

The Union argued that the grievant is entitled to two days of back pay because she was entitled to two days of disability pay during her suspension period.

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

The Employer has refused to issue 7 days of back pay to the grievant on the grounds that she was in a no pay status during the period when the suspension took place. Therefore, the Employer contended that the grievant suffered no loss of pay by her suspension.

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

The Arbitrator found that the grievant did not lose any disability pay because of the change in suspension dates. Furthermore, she had no leave balances during this suspension period. As a result, the length of the grievant's suspension period (20 days or 13 days) had no effect on the grievant losing any money. The arbitrator held, however, that if the entire reduction in suspension is nullified, management is not penalized for its procedural misconduct which prejudiced the grievant. Therefore, the grievant is entitled to two days back pay, not as a make whole remedy, but as a penalty to management.

#### **AWARD:**

The arbitrator ordered management to pay the grievant two days of back pay.

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

In the Matter of the  
Arbitration Between

OCSEA, Local 11  
AFSCME, AFL-CIO  
Union

and

State of Ohio  
Employer

**Grievance No.:**  
A-HR-BAM-4/3/93/  
29-04(3/23/93)16101-14  
**Grievant:**

D. Gochenouer

**Hearing Dates:**

9/12/94,10/20/94, 10/21/94

**Award Date:**

December 15,1994

**Request for Review of Remedy:**

November 1, 1995

**Award Date:**

December 2, 1995

**Arbitrator:**

Rhonda R. Rivera

**For the Employer:**

Darla J. Burns

**For the Union:**

Anne Light Hoke, Esq.

**Preliminary Matters**

The parties stipulated that the matter was properly before the Arbitrator. No hearing was held. A telephone conference was held, and the parties both submitted written argument.

**Exhibits**

**Employer Exhibits**

1. Copy of Calendars for the Years 1992 and 1993
2. Attendance and Payroll Records for November 1992 through December 1993 for the Grievant
3. Request for Leave Form dated March 11, 1993
4. Letter to the Grievant from Mrs. Erb dated March 11, 1993
5. Letter to the Grievant from the Ohio Department of Administrative Services dated March 15, 1993.
6. Letter to Grievant from Mr. Rabe dated March 19, 1993
7. Letter to the Grievant from Mr. Rabe dated April 2, 1993
8. Letter to the Grievant from the Ohio Department of Services dated April 2, 1993
9. Request for Leave dated May 7, 1993
10. Letter to the Grievant from the Ohio Department of Administrative Services dated May 14, 1993

**Union Exhibits**

1. Letter to the Grievant from the Ohio Department of Administrative Services dated March 15, 1993

2. Letter to the Grievant from the Ohio Department of Administrative Services dated April 2, 1993
3. Letter to the Grievant from Mr. Rabe dated April 2, 1993

### **Issue**

Must the State of Ohio Rehabilitation Services Commission pay the Grievant for the seven(7) days of back pay awarded her by the arbitration award of December 15, 1994 given the circumstances of her pay status during the time of her suspension?

### **Facts**

The Grievant was originally suspended for twenty (20) days by the Rehabilitation Services Commission. The Grievant grieved this suspension. On December 15, 1994, this Arbitrator denied the grievance in part and granted it in part. The Arbitrator reduced the twenty (20) day suspension to thirteen (13) days. Five (5) days of the reduction was because insufficient evidence was found for some of the charges. Two (2) days of the reduction were for procedural errors by the Commission that were prejudicial to the Grievant. The employer has refused to issue seven (7) days of back pay to the Grievant on the grounds that she was in a no pay status during the period when the suspension took place, and, therefore, the grievant suffered no loss of pay by her suspension. The Union's position is that the Grievant is entitled to two (2) days of back pay because she was entitled to two (2) days of disability pay during that suspension period. Neither contention is not without merit, as the pay situation of the Grievant was complicated a non-routine work record and the issues arising from disability pay and the disability waiting period. To make sense out of the two positions, one must look at the Grievant's work record for the relevant period.

#1. On Friday, March 5, 1993, the Grievant worked 6.5 hours and took 1.5 hours of sick leave. (See Employer's Exhibit 2)

#2. On Monday, March 8, 1993, the Grievant took 8 hours of vacation leave.(See Employer's Exhibit 2)

#3. On Tuesday, March 9, 1993, the Grievant took 8 hours of vacation leave. ( See Employer's Exhibit 2)

#4. On Wednesday, March 10, 1993, the Grievant took 4 hours of vacation leave and 4 hours of sick leave.(See Employer's Exhibit 2)

#5. On Thursday, March 11, 1993, the Grievant took 1.5 hours of sick leave and 6.5 hours of approved Leave Without Pay (LWOP). As of this point, the Grievant had exhausted her leave options for which she could be paid.

#5. On that same Thursday, March 11, 1993, the Grievant submitted a Request for Leave for the period March 12, 1993, a Friday, through April 30, 1993, also a Friday. She requested this leave pending the receipt of disability leave due to "extended illness." (See Employer's Exhibit 3) That leave was approved.

#6. On March 15, 1993, the Department of Administrative Services(DAS) notified the Grievant that she was entitled to Disability Benefits effective Saturday, April 3, 1993, through Tuesday, APRIL 6, 1993. The letter stated that the Grievant had served a "waiting period" for disability status from Saturday, March 6, 1993 through Friday, April 2, 1993. (See Employer's Exhibit 5)

#7. On March 19, 1993, the Grievant was suspended from Monday, March 29,1993 through Friday, April 23, 1993. ( See Employer's Exhibit 6)

#8. On April 2, 1993, the Grievant was notified that her suspension dates were amended so that her suspension would run from Monday April 5, 1993 through Friday, April 30, 1993. ( See Employer's Exhibit 7) Both parties agree that this amendment was the result of an agreement reached between the Employer and the Union. As originally scheduled, the Grievant's suspension would have occurred during her "waiting period" for her disability and would have consequently "broken" that period, and she would have lost the effect of the period in the determination of her eligibility for disability.

#9. On April 2, 1993, the same day as the letter from the Commission changing the dates of her suspension to accommodate the waiting period for her disability leave, the Grievant received a letter from DAS that amended the dates of her disability leave. This letter removed two (2) days of the previously awarded disability pay, namely April 5, 1993, a Monday, and April 6, 1993, a Tuesday. The stated reason for the amendment was that DAY had received information, presumably from the Commission, that the Grievant was to be suspended from Monday, April 5, 1993 through Friday, April 30, 1995. According to DAY, an employee is prohibited from receiving disability pay during a period of suspension.

#10. The Grievant had approved LWOP until April 30th. She was also suspended until April 30th. Therefore, she would have been expected to return to work on the first working day after April 30th, namely Monday, May 3rd, 1993. If she was unable to return to work then, she was required to ask for leave. She did not do so and, consequently, she was considered Absence Without Leave on May 3, 1993, May 4, 1993, and May 5, 1993. The Grievant requested leave as of May 6th, 1993 and was granted leave until June 1, 1993, pending receipt of requested disability leave. The Grievant was not granted disability leave and, therefore, was required to return to work on June 1, 1993. Thus, the Grievant's disability leave, during this time period, consisted of 2 or 4 days, depending on one's interpretation of these events.

## Discussion

Originally, without the agreement between the Employer and the Union, the suspension would have interrupted the Grievant's waiting period for disability and, apparently, destroyed her ability to receive disability for a certain period. As conceived, the agreement between the parties would have allowed the waiting period to be completed, instituted the suspension, with the expectation that after the suspension she would either be approved for disability leave or return to work. From the telephone conference with the parties, the Arbitrator understood that neither party moved the suspension date with the expectation of disability beginning before the first day of May, 1993. Both parties worked on the change in date of the suspension with the purpose of protecting the grievant's disability waiting period. The Union has not claimed that the original date of suspension was discriminatory or incorrectly chosen. The Union has not challenged the statement by DAS that a person on suspension can not receive disability pay. Apparently, the change in suspension dates was made in good faith but with incomplete information. Apparently, the waiting period expired Friday April 2nd, 1993. So a suspension beginning March 29th, 1993 would have interfered with that period. The first day that she could have been suspended would have been Saturday, April 3, 1993, a day that was not a working day. The first working day for the suspension was Monday April 5, 1993. Apparently, disability days are counted using weekends, and working days are not; this discrepancy has caused the problem. However, if the suspension had taken effect on March 29, 1993 (*and, arguendo*, not affected the disability situation), she would have been on suspension on April 5th, the first working day that the disability pay became available and could not be legally paid. As the scenario played out, she was on disability on April 5th and the suspension started on April 5th, so she could not be paid. In addition, she never became eligible for disability pay during the suspension as originally calculated nor the suspension as finally imposed. So again she did not lose any disability pay because of the change in suspension dates. She also had no leave balances during this period. So whether her suspension was 20 days or 13 days, she lost no money because of the suspension. So from the point of making the grievant whole, no payment is required.

When she first discussed this issue during the telephone conference, the Arbitrator concluded that no pay was necessary because the Grievant lost no pay. That conclusion is borne out by the analysis carried out

above. **However, the Arbitrator failed to take into account the nature of the Award made on the 15th of December, 1994.** The Grievant's suspension was reduced from 20 days to 13 days for two (2) reasons. The first is an ordinary reason, namely, the Arbitrator concluded that the Grievant was not guilty of some of the infractions that were charged. This reason resulted in a reduction of five (5) days of the suspension. HOWEVER, secondly, two (2) of the days of suspension reduction were imposed because the Arbitrator concluded that the Employer had engaged in procedural misconduct prejudicial to the Grievant. The purpose of the two (2) days reduction was NOT to make the Grievant whole but to encourage the Employer to follow fair procedures. If the Employer does not have to pay those two (2) days because of the unrelated situation of the Grievant and her leave status, the purpose of that two (2) day suspension is obviated.

### **AWARD**

Therefore, the Arbitrator awards two (2) days of full pay to the Grievant. These two (2) days of pay are to be calculated at the rate of pay that the Grievant was earning on March 5, 1993. The Arbitrator does NOT reduce the award to two (2) days of pay at the disability rate because Grievant's personal pay status is irrelevant. The Arbitrator is aware that the money is, in effect, a windfall for the Grievant. However, the primary purpose of the two(2) day reduction is achieved.

Date: December 2, 1995

RHONDA R. RIVERA, Arbitrator