

ARBITRATION DECISION NO.:

644

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Transportation
Region 8

DATE OF ARBITRATION:

June 17, 1997, July 1, 1997

DATE OF DECISION:

August 9, 1997

GRIEVANT:

Connie Wiley

OCB GRIEVANCE NO.:

31 08 (96 06 29) 0012 01 09

ARBITRATOR:

Anna DuVal Smith

KEY WORDS:

Abandonment
Just Cause
Pre Disciplinary Hearing
Removal
Sick Leave

FOR THE UNION:

Michael Muenchen

FOR THE EMPLOYER:

Carl C. Best, Labor Relations Officer
Lou Kitchen, Labor Relations Specialist

KEY WORDS:

Job Abandonment
Just Cause
Pre Disciplinary Hearing
Removal
Sick Leave

ARTICLES:

Article 24 - Discipline
§24.01 - Standard

FACTS:

The grievant was employed as an Engineering Clerk in the construction unit of Ohio Department of Transportation's Region 8. Work in the construction department is seasonal, so the grievant was temporarily reassigned to the Highway Worker II classification in Hamilton County in the Winter of 1995. It was in this classification that the grievant suffered from two injuries which led to her sick leave. The grievant submitted Bureau of Workers' Compensation C 84 forms for October 1995 through March 1, 1996. After March 1, the grievant did not return to work. The Employer attempted to contact the grievant several times to inform her that she needed to either return to work or submit a C 84 for the rest of the time she had missed. The grievant stated that her doctor was responsible for submitting the forms, and that she was in between doctors at that time. On April 9, the Employer sent correspondence to the grievant stating that she had until April 18 to submit proper documentation covering her absence from March 1 to April 12. The grievant submitted a new C 84, which covered March 1 to April 12, and stated that the grievant needed time to find a new doctor.

At this time, the Employer issued a pre disciplinary notice, alleging three or more unauthorized absences from February 19 through April 24. At the pre disciplinary hearing, the grievant submitted another C 84 that covered September 25 through April 30, and the C 84 had an estimated return to work date of August 1, 1996. Also, the grievant's new doctor signed this C 84. The pre disciplinary officer nevertheless found that there was just cause to discipline the grievant, and on June 14, Management discharged the grievant for job abandonment.

EMPLOYER'S POSITION:

The Employer argued that the grievant was removed for just cause. The issue in this case is the grievant's unauthorized absence, not her disability. The grievant took two relatively minor injuries and used them as a reason for not coming to work for nine months. The grievant did not timely submit the required forms; she was difficult to reach, and she rejected help from others. The grievant is now able to return to work, but has yet to do so. The Employer resists the proposed solution of placing the grievant in separation/retirement. That would enable the grievant to return to her job if released for work. This would be an unjust result since the grievant abandoned her job,

UNION'S POSITION:

The Union argued that the Employer was unable to show there was just cause to remove the grievant on either of the two grounds offered. The two grounds were (1) that she failed to report off and (2) that she failed to provide proper medical documentation.

With respect to the charge of failure to report off, the Union argued that the grievant had sufficient communication with the Employer. The Employer was familiar with the grievant's situation. Further, documents notifying the grievant that she needed to contact the Employer were mailed to the wrong address.

With respect to the issue of proper medical documentation, the Union argued that the grievant did submit the documentation. The Union argued that the Employer simply did not believe the grievant's documentation was credible. The Union pointed out that the Employer is entitled to yet another doctor's opinion if requested. Also, the Union pointed out that the grievant had the right to change doctors, notwithstanding the Employer's objection to the change.

ARBITRATOR'S OPINION:

The Arbitrator stated that although the grievant did not handle the situation perfectly, she did not abandon

her job; therefore, there was not just cause to discharge her. The Arbitrator reached this conclusion for several reasons.

First, the Arbitrator stated that the evidence indicated that the grievant's absence was not from job abandonment, but from her stalled recovery and her search for different treatment. Not only was the grievant seeing doctors, she had entered a rehabilitation program.

Second, the Employer disregarded the C 84's which covered essentially all of the grievant's absences. In particular, the Arbitrator objected to the Employer's disregard of the C 84 submitted at the pre disciplinary hearing as "too little, too late." The Arbitrator found that this would discourage the introduction of any new evidence at a pre disciplinary hearing and render the procedure a hollow formality.

Third, although the grievant erred in not keeping the Employer abreast of her whereabouts, the Employer disregarded some clear signals that the grievant had not abandon her job. While the Employer may suspect the motives of the grievant and question the legitimacy of her injury, these are not appropriate bases for removal under a just cause standard.

AWARD:

The Arbitrator sustained the grievance in its entirety. The grievant was made whole, put back in the rehabilitation program, and allowed to transition back to work.

TEXT OF THE OPINION:

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VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration
Between

OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL-CIO

and

OHIO DEPARTMENT OF
TRANSPORTATION

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No. 31 08 960629 0012 01 09

Connie Wiley, Grievant
Discharge

Appearances

For the Ohio Department of Transportation:
Carl C. Best
Labor Relations Officer
Ohio Department of Transportation

Lou Kitchen
Labor Relations Specialist
Ohio Office of Collective Bargaining

For the Ohio Civil Service Employees Association:

Michael Muenchen
Ohio Civil Service Employees Association

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I. HEARING

A hearing on this matter was held at 9:00 a.m. on June 17, 1997 and continued on July 1, at the District 8 offices of the Ohio Department of Transportation (ODOT) in Lebanon, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties from their permanent panel, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter was properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross examine witnesses, who were sworn and excluded, and to argue their respective positions. Testifying for the Employer were James Fife (Acting Human Resources Manager), David Yacchari (Superintendent), Diana Martin (Business and Human Services Administrator) and Carl Best (over the objection of the Union). Also present was Ed Flynn, Labor Relations Administrator, who examined Mr. Best. Testifying for the Union were Dianne Padich (Rehabilitation Specialist, Bureau of Workers' Compensation), Hugh Williams (District 6 President and TWP Committeeman, testifying by speaker phone) and Connie Wiley, the Grievant. Also present was Doug Jansen, Steward. A number of documents were admitted into evidence (Joint Ex. 1 8, Employer Ex. 1 3, and Union Ex. 1 4. The hearing concluded at 4:00 p.m. on July 1, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. BACKGROUND

Prior to her removal for an unauthorized absence of three or more consecutive days, the Grievant, Connie Wiley, was employed as an Engineering Clerk in the construction unit

2

of ODOT's Region 8. Before her successful bid for this position in 1989, she had spent approximately three years as a Highway Worker II. Her performance evaluations were satisfactory until 1994 when she received one "below expectations" rating for poor quality work attributed to excessive personal phone calls. This rating was upheld on appeal. No prior disciplinary actions were placed

on the record. James Fife, formerly Safety Supervisor, testified Ms. Wiley had a number of lost time injuries over the years for which she filed workers' compensation claims. Rehabilitation Specialist Dianne Paddich testified there were eleven since 1990. Two of these injuries were the events that ultimately led to her removal and the instant grievance.

Work in the construction department is seasonal. During the winter, the Grievant, like other employees in the department, is temporarily reassigned under the 1000 hour program agreement with the Union. For Ms. Wiley, this was to the Highway Worker II classification in Hamilton County, a position for which she bid. On January 13, 1995, she sustained an injury to her elbow while using a hand held pound post, but did not lose time for this until May. On September 25, 1995, she injured her shoulder while removing a screw and nut from a post, going on sick leave approved by the Bureau of Workers' Compensation (BWC) on September 29. While she was being treated by John M. Roberts V, M.D., for the shoulder injury, she reported pain from the previous elbow injury. For this she received the diagnosis of 726.32 lateral epicondylitis and underwent surgery. Bureau of Workers' Compensation C 84 requests for temporary total disability compensation were submitted beginning on October, covering her absences to an estimated return to work date of February, 30, 1996 (later determined to be March 1, 1996). **3**

As the estimated return to work date approached, Fife testified he began trying to reach the Grievant to remind her a new C 84 was needed if she was not yet fit for work. He said he was aware of her pager and had used it, but was not always successful in reaching her. The Personnel Department did not have her phone number, so he called her grandmother's phone (which he had gotten from a co worker) a number of times and left word. On March 5, Fife and the Union signed off on the Grievant's participation in the Transition to Work Program, and Fife's office faxed the forms to Dr. Roberts. However, according to Fife, Roberts would not agree that Wiley could perform the duties of a highway maintenance worker since he was no longer her physician, and the Grievant was unable, unwilling and/or uninterested in the program. Hugh Williams, TWP Committeeman, testified about the voluntary Transition to Work Program, saying that it has had success in returning employees to permanent employment and that he thought ODOT would have many places for an engineering clerk to transition back to after rehabilitation.

On March 18, the Grievant was examined for BWC by Bernard B. Bacevich, M.D., an independent medical examiner who found that the Grievant had reached maximum medical improvement and was unable to return to her former position (as route marker) because of limitations on repetitive lifting, pulling, gripping and squeezing with her right arm. His report was received by BWC on March 25, but it is not clear when ODOT became aware of his findings.

Fife finally talked to the Grievant on or about March 20, saying it was critical to get a new C 84 to cover her absence since the end of February, but, according to Fife, the Grievant berated him, used profanity, threatened to consult an attorney, and said she would **4**

get the C 84 when she was ready. For her part, the Grievant testified that she was upset Fife had disturbed her grandmother and not respected her request that she be contacted by pager. She pointed out that she has no control over when a doctor's office will supply needed documents. In addition, she said Fife made a reference to "you people," which she took as a racial slur, something Fife denies. Wiley reported the incident as harassment Diana Martin, Business and Human Resources Manager, who spoke to Fife about it. Fife told

her the verbal abuse was all Wiley's and that he had been trying to assist her in preventing an unauthorized absence, as he does with other employees. Martin got back to Wiley, telling her it was the Grievant's responsibility to get the paperwork in. During this conversation, the Grievant told Martin she was changing doctors, but, according to Martin, did not try to report off to her, which would have been improper anyway, nor did she request leave. Ms. Martin said the Grievant was agitated and used profanity, but did not threaten or rebuke her.

It was also on March 20, that Martin learned Wiley had been on unapproved leave since February 29 (later determined to be March 1), so she signed April 9 correspondence prepared for her by Carl Best, Labor Relations Officer, giving the Grievant three days from April 15 to return to work or provide proper medical documentation for the period February 29 through April 12. This letter was sent to a number of addresses by registered return receipt and regular mail.

Another C 84 was received by the Department on April 18 (stamp indicates "95 [sic] Apr 18"), providing an actual return to work date of April 8, 1996 and stating "this C 84 is being extended to afford the patient time to acquire a new physician of record. She is

5

dismissed from my care." Copies submitted in arbitration cut off the physician's signature and date part of the form and Fife testified there was no signature, but Dr. Roberts' name and address stamp are clear. The document states the last examination or treatment occurred on February 13, 1996.

Despite this C 84, a pre disciplinary notice alleging violation of Directive WR 101, Item 17, unauthorized absence for three or more consecutive days from February 29 through April 24 was issued April 24 and mailed to multiple addresses by the same means as the April 9 notice.

The Grievant telephoned the Department on May 1, the day of her scheduled predisciplinary hearing to say that she had transportation problems, so the hearing was rescheduled for May 3. At this meeting, the Grievant alleged that she had informed Supt. David Yacchari on April 4 of her absence, but he testified in arbitration that although he had spoken to her in early April, it was in the course of her calling the garage to speak to a friend, and not a call off. She also brought with her another C 84, signed on April 30 by her new doctor, Bruce F. Siegel, D.O. This covered disability dates from September 25, 1995 to April 30, 1996 and provided an estimated return to work date of August 1, 1996. The pre disciplinary hearing officer nevertheless found, on May 3, that there was just cause for discipline.

Meanwhile, the Grievant had been referred to BWC's Rehabilitation Services. On February 22, 1996, Dianne Paddich wrote her a letter inviting her to participate, and copied ODOT on it. Paddich called the Department on April 9 to determine Wiley's employment status and learned the Department was requesting that she return to work. Paddich

6

interviewed the Grievant on April 16. Her recommendation was to a program of pain management reconditioning and work hardening. After Dr. Siegel saw the Grievant on April 30, he provided the necessary prescriptions for this program, and the referral was made May 9, 1996. The Grievant was evaluated on June 13 and entered the program on June 24, but on June 28, Paddich was informed by the pain management

clinic that the Grievant had been discharged. Ms. Paddich testified the delay in getting the Grievant into the program was attributable to her own caseload, the change in doctors, and in getting the prescriptions. She could not say the Grievant was uncooperative, but would also not say that the Grievant was doing everything she could in her own best interests. However, she found the Grievant to be untruthful about why she was unable to drive.

On June 14, the day after she was evaluated, the Grievant's employment was terminated. Ms. Martin testified once she knew Bacevich's determination, she did not consider disability separation for two reasons. One was that she did not learn of Bacevich's findings until late in the process and they did not negate the fact that the Grievant failed to document her absence. The other was that Bacevich's determination related to the Grievant's temporary assignment as highway worker, not to her regular job as clerk. She was aware that Fife and the Union had agreed to transition the Grievant back to work, but understood the Grievant to be uncooperative. She testified Fife talked to her about rehabilitation before the pre discipline, but also that she was unaware of the Grievant's involvement in the program until she was released from it.

As for the Grievant, she testified she still is not able to work and now has psychiatric problems. She claims these began before she was discharged but Carl Best, Labor Relations **7**

Officer, testified he knew nothing about this until the parties exchanged documents just prior to the first day of the arbitration's oral hearing. The Grievant testified she wants to return to work but was not given a chance to do so.

A grievance protesting the removal was filed on June 28 by Steward Douglas Jansen, alleging, violation of Articles 24.01 of the Collective Bargaining Agreement and requesting reinstatement, return to work when able, and a make whole, back pay remedy as applicable, Being unresolved at lower steps of the grievance procedure, the case was appealed to arbitration where it presently resides for final and binding decision, free of procedural defect.

III. STIPULATED ISSUE

Was the Grievant terminated for just cause? If not, what shall the remedy be?

IV. PERTTNET CONTRACT PROVISIONS

ARTICLE 24 DISCIPLINE

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....

V. ARGUMENTS OF THEPARTIES

Argument of the Employer

The Employer argues the issue here is not the Grievant's disability, but her unauthorized absence. It

nevertheless points out that she parlayed two relatively minor injuries into nine months of not coming to work. When her doctor did not agree with her own assessment of her condition, she switched doctors. She took her time about getting C84's in, resisted efforts to rehabilitate her, was difficult to reach because of address and
8

phone number changes, and when Fife tried to help her, he was rebuked and threatened instead of thanked. She is dishonest, expected the Employer to track her down, and blames others for her predicament even though it is agreed it is the employee's responsibility to get the paperwork in (not the employer's), and her history of eleven claims in ten years shows she knows proper procedure. Her attempts to provide medical documentation should be viewed with suspicion because of the seriousness of her condition and timeliness with which it was submitted. The Employer claims it went beyond the call of duty, whereas the Grievant's actions show she did her best not to return.

The Grievant is not now able to return to work and never has been, The Union has suggested disability separation/retirement as a just outcome. She, herself, could file for disability retirement with PERS. The Employer resists disability separation because it would give her recall rights if released for work, which the Employer contends is unjust in view of the fact that she broke a rule that is applied consistently throughout the state. She abandoned her job and to reinstate her would be unjust.

Argument of the Union

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The Union says the Employer attempted and failed to establish just cause for terminating the Grievant on two grounds, that she failed to report off and that she failed to provide proper medical documentation.

With respect to reporting off, the Union argues the Grievant had good communication and met the Employer's expectations. They knew her situation. Fife testified he tries to give the benefit of the doubt to the employee with the goal of bringing injured employees back to work. He is supposed to be lenient. Instead, he was prejudiced,
9

could not recall if he mentioned to Martin that the Grievant was in rehabilitation, and as much as admitted he was tired of doing his job. Documents putting the Grievant on notice were mailed to the wrong address and no one looked into the independent medical examiner's determination that she had reached maximum medical improvement and could not return to work. In the Union's opinion, the Grievant should be disability separated. The three day rule is arbitrary and .was not applied to take into account the good communication the parties had on this case.

As for the documentation provided, the Union says the Employer tried to make it into an issue of credibility, although it has the right to get a third opinion if it doubts the employee's claim of incapacity. In fact, the Grievant has the right to change doctors and she was enrolled in a rehabilitation program. The Union argues it is a direct violation to terminate an employee under these circumstances. It asks that the Grievant be made whole, put back in the rehabilitation program, and allowed to transition back to work.

VI. OPINION OF THE ARBITRATOR

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In a case like this, it is all too easy to become sidetracked by the ills of the Grievant her physical, emotional, behavioral and legal problems and the difficulties these have caused her employer. But as the Employer points out, this case is not about the Grievant's disability. It is about whether she abandoned her job. And the answer to this must be, "no." The fact of the matter is that as her March 1 C 84 was expiring, the Grievant had already had her last appointment with Dr. Roberts and was in the process of finding a new doctor. The record does not disclose when she saw the doctor to whom Roberts referred her (Kiefhaber), but it is evident she was no longer under the care of Roberts at the time **10**

she needed to supply a new C 84 because Roberts would not sign the documents faxed to him on March 5 on the basis that the Grievant was dismissed from his care. Dr. Bacevich also makes reference to the transfer in his March 19 report. As of March 20, when the Grievant spoke to Fife and Roberts, she was still between doctor who could supply the necessary paperwork and she so informed them. However, given that she was delinquent in covering her absence by over a month and had proved difficult to reach by phone, it was entirely reasonable for the Employer to try to get clarification of the Grievant's intentions regarding her job through the April 9 letter that put her on notice of job abandonment if she did not appear for work or supply medical documentation within three days of April 15.

By the time this deadline expired, the Department had, in fact, received Dr. Roberts' final C 94 covering the Grievant through April 8 and providing additional corroboration of her transition to a different doctor. It is clear to me that the Employer completely and arbitrarily disregarded this C 84. Although it does not cover the full period requested by the April 9 notice and no signature is evident on the Arbitrator's copies (because that portion is cut off), it is plain it came from Dr. Roberts' office, for the stamp and handwriting are identical or very similar to those on previous C 84s (expiring 12/6/95, 4/12/96, 4/30/96). The Employer nevertheless issued a pre disciplinary notice for her absence from February 29 through April 24, including the period covered by this C 84 and extending the period stated on the April 9 notice by nearly two weeks.

Unbeknownst to the Employer, the Grievant had also already seen her new doctor (on April 4), but a C 84 from him was not signed until her second appointment on April 30. She brought this and a note from Siegel with her to her pre disciplinary hearing (Joint **11**)

Ex. 6 and 7), but the pre disciplinary report makes absolutely no reference to them, nor did Martin refer to them in her testimony. This creates the inference that the appointing authority was not in full possession of the facts when the removal notice was issued. At Step 3, the Employer said bringing this C 84 to the pre disciplinary hearing was, "too little, too late." This makes the pre disciplinary hearing into a hollow formality, for it implies that no documentation offered for the first time at this hearing would have been acceptable. If the Employer had questions concerning the authenticity of the documents or the matters certified to therein, it had recourse. But to disregard entirely or dismiss as "too little" the April 8 C 84 because it fell short by four days (despite the change in doctors) and "too late" the April 30 C 84 because it came in at the pre disciplinary hearing (despite the fact that it had been in process since before the April 4 notice was sent) is to unfairly discharge an employee on a technicality.

There is plenty of evidence indicating the Grievant's delinquency was not from job abandonment but from

