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REVIEWED BY
DEC 19 2002
CC. 12-19-02
GRIEVANCE COORDINATOR

VOLUNTARY LABOR ARBITRATION TRIBUNAL

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In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 34-13-020206-0010-01-09 ~~0010-01-09~~
and	*	
	*	
OHIO BUREAU OF WORKERS'	*	Misty D. Colliton, Grievant
COMPENSATION	*	Discharge
	*	

* *

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

Lori R. Collins, Staff Representative
Victor Dandridge, Staff Representative
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Bureau of Workers' Compensation:

Roger A. Coe, Labor Relations Officer
Ohio Bureau of Workers' Compensation

Shirley Turrell, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:35 a.m. on October 29, 2002, at the offices of the Ohio Civil Service Employees Association in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is 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 or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Bureau of Workers' Compensation (the "Bureau") were Diana Dalton, Claims Supervisor; Jeff Sheets, Service Office Manager; Bruce Horn, Steward (by subpoena); and Shirley Turrell, Labor Relations Specialist. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") was the Grievant, Misty Colliton. A number of documents were entered into evidence: Joint Exhibits 1-2, State Exhibits 1 and Union Exhibits 1-2. The oral hearing was concluded at 2:00 p.m. following closing arguments whereupon the record was closed. This Opinion and Award are based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Grievant was employed by the Ohio Bureau of Workers' Compensation for approximately sixteen years. At the time her employment was terminated she was a Workers' Compensation Claims Specialist 4 at the Logan Service Office. Since July 13, 2000, she was under a physician's verification requirement for absences due to illness or injury because her sick

leave balance had fallen below twenty hours. Physician's verification is provided for in the Collective Bargaining Agreement at Article 29, Sick Leave:

A. Physician's verification

> At the Agency Head or designee's discretion, in consultation with the Labor Relations Officer, the employee may be required to provide a statement, from a physician, who has examined the employee or the member of the employee's immediate family, for all future illness. The physician's statement shall be signed by the physician or his/her designee. This requirement shall be in effect until such time as the employee has accrued a reasonable sick leave balance. However, if the Agency Head or designee finds mitigating or extenuating circumstances surrounding the employee's use of sick leave, then the physician's verification need not be required.
>
> Should the Agency Head or designee find it necessary to require the employee to provide the physician's verification for future illnesses, the order will be made in writing using the "Physician's Verification" form with a copy to the employee's personnel file.
>
> Those employees who have been required to provide a physician's verification will be considered for approval only if the physician's verification is provided within three (3) days after returning to work. (Joint Ex.1)

The directive placing the Grievant on physician's verification includes the following:

> In accordance with the State Sick Leave policy and the Collective Bargaining Agreement, the verification should be in its original form and personally written and signed by the attending physician. Rubber-stamped Return to Work Certificates or copies of Return to Work Certificates are not sufficient....
>
> Failure to follow this directive will be an act of insubordination and you will be disciplined.
>
> This physician verification is to continue until further notice. (Joint Ex. 5)

At the time of the incident leading to her removal the Grievant had accrued approximately 29 hours of sick leave and had accumulated the following disciplinary record:

January 21, 2000	Written reprimand	Dishonesty (f) Falsification of an Official Document

January 26, 2000	1 day suspension	Attendance (b) Unexcused absence Dishonesty (f) Falsification of an Official Document
June 7, 2000	5 day suspension	Dishonest (a) (c), and (f) Failure of good behavior (g) General
June 16, 2000	Verbal reprimand	Attendance (a) Tardiness

She had also been on a last chance agreement since August 2000 wherein the Bureau reduced a contemplated removal to a 30-day suspension for dishonesty (willful falsification of an official document); insubordination (interfering with, failing to cooperate with or providing false information in conjunction with an official investigation or inquiry); and attendance (unexcused absence). This agreement further provided that "if BWC determines the Employee has violated this Last Chance Agreement, or if BWC determines there is any violation of BWC Work Rules, the appropriate discipline shall be REMOVAL. The Union and the Employee agree to waive their rights to appeal this removal through the grievance procedure and arbitration or through any other administrative or legal action" (Joint Ex. 2). Union Steward Bruce Horn, who negotiated this agreement, testified the Grievant read it and that he believed she was aware of its terms. The document itself states that "All parties understand the gravity and significance of the Agreement and all parties enter into it voluntarily" (Joint Ex. 2).

On January 2, 2002, while the Last Chance Agreement was still in effect, the Grievant called off work sick. The Bureau's call-off record indicates that Service Office Manager Jeff Sheets advised her she would need a physician's verification ("PV") and that she said she would obtain one (Joint Ex. 2). When she returned to work on January 3, her supervisor, Diane Dalton, reminded her she needed a PV. The Grievant testified she was unable to obtain the requested

slip on January 3 because her doctor's office was closed that afternoon. She stated other attempts she made that week were also unsuccessful. On Tuesday, January 8, Ms. Dalton reminded her again by email, "I need that physician verification from your physician when you were ill last week" (Joint Ex. 9). The Grievant's reply recounted her attempts to obtain it and closed, "I will get it OK" (Joint Ex. 9). When the requested document was not forthcoming by January 10, Ms. Dalton recommended denial of the requested sick leave to cover January 2, 2002, on the basis that no PV was received. In addition, investigation and disciplinary proceedings were instituted. In her investigatory interview, the Grievant stated the reason she had not submitted a PV was that her doctor had been out. She also admitted being aware that, pursuant to her Last Chance Agreement, failure to follow the PV directive would be an act of insubordination for which she would be disciplined.

A predisciplinary hearing was held January 28 on the charges of insubordination and attendance. At this hearing the Union submitted a note from D. Waregh, R.N., which states "Misty Colliton called into Dr. Carr's office morning of 1-3-2002 c/o of sinus, sore throat headache,. Presc was called in, office closed on 1-4-2002 she did call on 1-5-2002 11:30 informed strep test could be done but Dr Carr would not be in on that afternoon [sic]" (Joint Ex. 10). The hearing officer nevertheless found the Grievant in violation of Bureau work rules and her last chance agreement. Her termination for insubordination (failure to follow a written policy or practice of the employer) and attendance (unexcused absence) was effective February 5, 2002.

This action was grieved on February 6, 2002. Said grievance was fully processed to arbitration where the sole issue before the Arbitrator as stipulated by the parties is *Did the Grievant violate the terms of the Last Chance Agreement? If not, what should the remedy be?*

The Bureau submits that this issue limits the Arbitrator's authority and argues that the Last Chance Agreement should be strictly construed because it is a derogation of the Collective Bargaining Agreement. It says termination is justified because the Grievant has not learned from corrective discipline. She has a history of discipline for sick leave abuse and dishonesty. The Bureau has been patient, and is at a loss for what else it can do. The Grievant knew she was obliged to provide a PV and that failure to do so constitutes insubordination. The Bureau was justified by her record in keeping her on the PV requirement and the Grievant had ample opportunity to protest if she thought this was not reasonable. The Bureau contends that the Grievant was rather cavalier about complying with the PV requirement considering that her job was at stake. She might have seen another doctor or gone to an urgent care facility, but she limited her attempts to her own doctor because she did not want to pay for the visit. Even if one grants the Grievant leeway in providing the PV, the one she eventually provided is not legitimate on its face because she did not see the doctor and the slip does not cover the date of her absence. For these reasons, the grievance should be denied.

The Union argues that the Grievant is not guilty of insubordination because she should not have been on physician's verification. The Collective Bargaining Agreement permits the requirement "until such a time as the employee has accrued a reasonable sick leave balance." The Bureau's own policy says that less than 20 hours is unreasonable, therefore more than 20 is a reasonable balance. The record shows that the Grievant had a sick leave balance of more than 20

for at least three pay periods, therefore she should have been released from the requirement. Even so, the Grievant did provide a PV from her attending physician. There is no requirement for the employee to be seen by the doctor. It is the doctor, not the employee, who has the right to decide what is necessary, whether an in-person visit or visit by telephone. The note she provided also indicates she made attempts to see the doctor. It is not her fault these attempts were futile. She should not be held hostage to a third party. Never before now has the Bureau refused to accept similar notes. The only reason the Grievant's absence was unexcused is because she did not get the PV the Bureau wanted. Since it was not her fault, her absence should be excused. In the Union's view, the Bureau took extreme, imperialistic actions. The Grievant had nearly completed the terms of the Last Chance Agreement and was not in violation of the rules she was charged with. The Union therefore asks that the grievance be granted, the Grievant be restored to her job and awarded all back pay and benefits for time lost.

III. OPINION OF THE ARBITRATOR

The Union attacks the charge of insubordination on the grounds that the Grievant's PV requirement was not a legitimate order on January 2 because it was in violation of the Collective Bargaining Agreement and Bureau policy. Even if this were true (and the Arbitrator makes no finding one way or the other), employees are not free to engage in the self-help of disobedience except in limited circumstances principally arising from the lack of any effective remedy. In the circumstances of this case, the Grievant had an effective remedy specified by the Collective Bargaining Agreement which the Arbitrator is bound to apply, namely the grievance procedure. In any event, the Grievant's failure to provide a PV within the 3-day limit had nothing to do with her belief about the legitimacy of the requirement. There is no record she protested on January 2

when she was reminded of it upon calling off. On January 3 she began her attempts to get the PV and on January 8 she even emailed her supervisor that she would get it. Moreover, in her investigatory interview, she accepted the legitimacy of the PV directive when she acknowledged understanding that failure to follow the PV requirement would be an act of insubordination. She thus had no excuse for not following the "obey now, grieve later" principle.

The only question, then, is whether the Grievant was sufficiently in compliance. She was not. The note she eventually supplied makes no mention of the date she called off sick. Even if the note had been timely provided, it gives no evidence of a legitimate use of sick leave, which is the entire purpose of physician's verification. It only shows that she called her doctor's office the day following her absence complaining of certain symptoms and that a prescription was called in. The Arbitrator is at a loss to explain why the Grievant, knowing she was on a last chance and having met the PV requirements for nearly 18 months would not have taken measures up to and including paying for an urgent care visit herself to cover the call-off since her job was at stake. She testified notes similar to the one she did provide had been accepted before, but there is no evidence in the record that the Bureau has accepted a similar note that fails to cover the date of the absence. In short, if the Grievant was, indeed ill on January 2, she did not show due diligence in establishing that fact to her employer.

IV. AWARD

The Grievant violated the terms of the Last Chance Agreement. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
December 19, 2002

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