In the Matter of the Arbitration between THE STATE OF OHIO and STATE COUNCIL OF PROFESSIONAL EDUCATORS/OEA/NEA	GRIEVANT: Theodore J. Nesbitt DEPARTMENT: The State Library of Ohio No. 20-00(89-11-20) 05-06-10

BEFORE: Joyce Goldstein, Arbitrator

APPEARANCES:

For the Employer: Dennnis R. Van Sickle, Labor Relations Officer; Rodney Sampson, Assistant Chief, Arbitration Services, Office of Collective Bargaining; Michael S. Lucas

For the Union: Henry L. Stevens, Uniserv Consultant; Carrie Smolik; Theodore Nesbitt

PLACE OF HEARING: 65 S. Front Street, Columbus, Ohio

DATE OF HEARING: January 24, 1990

AWARD: The grievance is denied. There was just cause to impose a three day suspension upon the grievant.

DATE OF AWARD: February 21, 1990

Joyce Goldstein

In the Matter of the Arbitration between THE STATE OF OHIO and STATE COUNCIL OF PROFESSIONAL EDUCATORS/OEA/NEA	GRIEVANT: Theodore J. Nesbitt DEPARTMENT: The State Library of Ohio No. 20-00(89-11-20) 05-06-10

I. INTRODUCTION.

Theodore J. Nesbitt, the Grievant, is employed by the State Library of Ohio ("Employer" or "Library") as a State Government Specialist. As such, he is a member of a bargaining unit whose exclusive representative is the State Council of Professional Educators/OEA/NEA ("Union").

The Grievant was suspended for three days for unexcused absences on September 27 and 28, 1989 resulting from a failure to report for work or to follow the proper reporting procedures identified in State Library Work Rule #106.[1]

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[1] State Library Work Rule #106 provides in relevant part:

> When unable to report to work, staff...must call in no later than 8:30 a.m. or within one-half hour of their starting time. Messages are to be left with one of the supervisors or lead workers as indicated on the attached list. If none of the supervisors/lead workers for 65 South Front Street staff can be reached, the message can be left with the receptionist for the administrative offices (462-7061)....
>
> If unforseen [sic] circumstances beyond the employee's control prevents [sic] the employee from complying with this rule, the supervisor will make exception and not subject the employee to disciplinary action.

The parties stipulated that the issue to be decided by the Arbitrator is

> Was the three day suspension issued to the grievant for just cause; if not what should the remedy be?[2]

The parties further stipulated that

> The grievance is both procedurally and substantively arbitrable. The time limits in the grievance procedure have either been met or waived. The arbitrator has been properly chosen and has jurisdiction to hear the case.

In addition, although the parties failed to stipulate to many of the facts relevant to the disposition of this case, most of the facts, as set forth below, are also undisputed.

II. STATEMENT OF FACTS

A. The Employer.

The Ohio State Library is a reference library established to provide research and information services to state agencies. The Library's mission is to develop, maintain, provide and disseminate information, materials, ideas and services for Ohio's state government and to its citizens through the development of libraries.

> The employee will notify the supervisor as soon as possible thereafter.
>
> Evidence of the emergency preventing the employee from calling in on time may be required.

[2] Article 13.01 of the collective bargaining agreement provides, "Employees shall only be disciplined or discharged for just cause."

B. The Grievant

Theodore J. Nesbitt has been employed by the Library since January 14, 1980. Currently, he is classified as a Library Consultant whose working title is State Government Specialist. He is the primary liaison between the Library and other state agencies. He provides consultant services to develop, evaluate and coordinate library resources in state agencies. He is responsible for representing the Library to state agencies and to organizations outside of state government.

On a more personal level, the Grievant has a history of suffering from anxiety related disorders which may be work-related.

Additionally, the Grievant has a history of non-compliance with Work Rule #106. On two prior occasions, the Grievant was disciplined with verbal and written reprimands for his failure to telephone his supervisor when the Grievant intended to be absent from work.[3] Either the Grievant failed to call at all, he called late, he called and left a message with someone outside of his chain of command, or he called and said he was running late and then never appeared at all. On September 25, 1987, he received a verbal reprimand for failing to comply with Work Rule

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[3] Although there was some discussion at the hearing of these prior offenses, there was no evidence introduced to dispute that the prior discipline was warranted.

Given the language of Section 5.08(D) of the collective bargaining agreement, such evidence could have been admissible and the Arbitrator so indicated that to the parties at the hearing. Section 5.08(D) provides, "If a verbal or written reprimand becomes a factor in a disciplinary grievance that goes to arbitration, the arbitrator may consider evidence regarding the merits of the verbal and written reprimand."

#106 on September 15, 1987 and September 17, 1987. In July of 1989, he received a written reprimand for failing to comply with Work Rule #106 on June 27, 28 and 29, 1989.

C. SEPTEMBER 27 AND 28, 1989

On September 27, 1989, at 8:02 a.m., the Grievant attempted to call his supervisor, Michael Lucas, to say that he was running late for work and that he would report directly to one of his client state agencies. At the time of the call, Mr. Lucas was not at his desk and his calls were forwarded to a secretary. The Grievant apparently did not ask to speak with anyone else in the chain of command. Rather, he left his message with the secretary who answered the phone. However, this secretary is not the "receptionist for the administrative offices" to whom employees are instructed to report absences pursuant to Work Rule #106 in the event their supervisors are unavailable.

At approximately 9:45 a.m., the Grievant telephoned again. This time he spoke with another secretary, but still not the administrative receptionist. Although there is some dispute about what the Grievant said during this telephone call, it is undisputed that he again said he was running late but would still report to work.

At no time in either of these two phone calls did the Grievant speak with any supervisory personnel, state that he was ill, or state that he would not be reporting for work. However, he did not report for work on September 27, 1989, nor did he report for work (or call at all) on September 28, 1989.

Between 3:30 p.m. and 4:45 p.m. on September 27, 1989, Mr. Lucas made several efforts to telephone the Grievant's home. Each time the line was busy.

The Grievant reported for work on September 29, 1989, and subsequently requested leave for the previous two days. Mr. Lucas recommended to the Library's administrator that the requests for leave be denied because the Grievant did not follow the reporting off procedures. Mr. Lucas' recommendation was accepted.

The Grievant testified that starting on September 26, 1989 and continuing until September 29, 1989, he suffered from an anxiety attack for which he took several medications. As a result of the attack and the medications, the Grievant testified that he was unable to work and unable to comply with the reporting requirements of Work Rule #106. He also stated that he had no recollection of what transpired from the time of the second phone call (at 9:45 a.m.) on September 27th until he reported for work on September 29th.

III. EMPLOYER'S POSITION

The Employer's position is that the Grievant failed to report for work and failed to follow the reporting off procedures of Work Rule #106. The Employer contends that the Grievant never spoke to the right person when he called and never said he was not coming in to work. To the contrary, the two messages he left on the first day of his absence stated that he was running late

but would eventually report to work. He failed to call at all on the second day.

The Employer rejects the Union's position that the Grievant was too ill to follow the proper procedures because he was capable of calling on at least two occasions. It would not have been very difficult to ask to speak to a supervisor, say that he was ill, or say that he was too sick to work.

Finally, the Employer maintains that this is not the first occurrence of this type. The Grievant was already disciplined for violating these very same procedures on five other days. The three-day suspension is warranted, the Employer argues, because the less severe discipline already imposed obviously failed to get the point across to the Grievant. At the hearing, the Grievant was unable even to remember the circumstances of the prior discipline.

Finally, the Employer argues that Work Rule #106 is a valid rule, that it is reasonable, that is was properly promulgated, that both the Union and the Grievant had notice of the rule, and a three-day suspension for a third violation of the rule is appropriate under the "Standard Guidelines for Disciplinary Action".

IV. THE UNION'S POSITION.

The Union's position is that there was no just cause to discipline the Grievant.

Specifically, the Union contends that Work Rule #106 excuses strict compliance with the reporting off procedures "if unforseen [sic] circumstances beyond the employee's control prevents [sic] the employee from complying with this rule." The Union maintains that the Grievant's anxiety attack was an unforeseen circumstance that justified his failure to strictly comply with the reporting off procedures. Given the Grievant's physical condition on September 27, 1989, the Union argued that the Grievant should have been commended, not disciplined, for making the two phone calls he did.

While the Union apparently concedes that the Grievant never said during those phone calls that he would not be reporting for work,[4] the Union maintains that Work Rule #106 does not require that any particular words be said when an employee calls to report an intended absence. Further, the Employer had notice of the Grievant's health problems because the Grievant had supplied a note to that effect from his doctor dated July 29, 1989.

The Union also argued (but presented no evidence) that there has been laxity in enforcing Work Rule #106, and that no one else has ever been disciplined for violating the rule.

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[4] The Union did object to the Employer's introduction of a notarized statement from, and the original phone message taken by, the secretary who answered the phone and took the message. The Union argued that the Employer should have called the secretary as a witness instead. As a general rule, the Union's position is correct. However, the parties agreed to follow the "Expedited Arbitration Procedure" contained in Section 6.08 of their collective bargaining agreement. Section 6.08 expressly provides for, and encourages the use of, notarized statements in lieu of live witness testimony. Other than objecting to the <u>form</u> of the Employer's evidence on this issue, the Union offered no substantive evidence to dispute the <u>content</u> of the Employer's evidence.

Finally, the Union called its Grievance Chairperson, Carrie Smolik, as a witness, to testify that the Union's Grievance Committee investigated this case and determined that the grievance was meritorious. Ms. Smolik otherwise had no personal knowledge of the circumstances of this case. The Union argued that the Arbitrator give weight to the Grievance Committee's determination.

V. DISCUSSION.

This Arbitrator agrees with the Employer that there was just cause to suspend the Grievant for three days for his failure to report for work or to comply with the reporting off procedures of Work Rule #106. The Grievant's actions and attitude do not support his version of the facts.

Regarding the Grievant's actions, his convenient memory loss for the entire time in question and his purported inability to call to say he was too ill to work is simply not credible. No one disputes that the Grievant suffers from an anxiety disorder. However, there was no credible evidence that his disorder was so disabling that it prevented him from complying with the reporting off procedures. He was sufficiently capable of telephoning his Employer twice on September 27, 1989 to say that he was running late. Perhaps if other evidence was introduced to corroborate the Grievant's alleged complete incapacitation and memory loss, it might have been more believable. Does he always become totally incapacitated during anxiety attacks? Did anyone observe him in

this condition? Does he always have amnesia during these periods?

Additionally, no explanation was ever offered for why Mr. Lucas received a busy signal when he attempted to call the Grievant's home for over an hour during the afternoon of September 27, 1989. Was the Grievant on the phone? Was someone else on the phone at the Grievant's home? Was the phone left off the hook?

Regarding the Grievant's attitude, he was warned about and disciplined for this behavior on several occasions and yet acted with complete disregard of the rules. During his testimony, the Grievant stated on cross-examination that he believed that it was better to leave a message with his supervisor's secretary rather than the other individuals identified in Work Rule #106. He also stated that he did not want to wait on the telephone to speak with any of these other individuals.

These statements suggest that the Grievant was perfectly well aware of the rule and the proper procedures, but that he simply chose to ignore them. Although the Grievant may be a conscientious employee (as he testified), he cannot avoid discipline by choosing to ignore rules with which he does not agree. While it is true that the Grievant's supervisor testified that he received the Grievant's phone messages soon after they were taken, and that no harm or disruption actually occurred as a result of the Grievant's violations, it remains the Employer's prerogative to enforce legitimate workrules.

This Arbitrator rejects the Union's argument that because Work Rule #106 does not mandate the use of particular words when an employee telephones to report an intended absence, that the Grievant did not violate the rule when he said he was running late rather than that he would be absent. The obvious purpose of the rule is to notify the Employer of an absence. It is inconceivable that an employee could believe that he is reporting an intended absence when he instead says that he is tardy but intending to eventually report for work.

Finally, this Arbitrator gives no weight to the Union's assertion of disparate treatment because no evidence was introduced in support of this claim. Further, this Arbitrator gives no weight to the testimony of the Union's Grievance Chairperson. She had no personal knowledge of any of the facts involved in this matter. Hopefully, the Union would not have proceeded to arbitration had it believed the grievance lacked merit. Similarly, the Employer presumably also would not have proceeded to arbitration had <u>it</u> believed it lacked cause to discipline the Grievant. However, the good faith beliefs of the parties in the merits of their respective cases are not at issue in this case.

VI. **AWARD.**

The grievance is denied. There was just cause to suspend the Grievant for three days.

Joyce Goldstein

Cleveland, Ohio
February 21, 1990