#444

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION, SOUTHEASTERN CORRECTIONAL INSTITUTION

-and-

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

ARBITRATOR'S OPINION

Grievant: Edward Jenkins, Jr.

27-24-890719-0034-01-03

5/18/90

FOR THE STATE: LOUIS KITCHEN
Labor Relations Specialist
Ohio Department of
Administrative Services
Office of Collective Bargaining
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FOR THE UNION: JOHN FISHER
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Ohio Civil Service Employees
Association, Local 11, AFSCME,
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DATE OF THE HEARING: May 18, ~~1989~~ 1990

PLACE OF THE HEARING: Ohio Department of
Administrative Services
Columbus, Ohio

ARBITRATOR: HYMAN COHEN, Esq.
Impartial Arbitrator
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The hearing was held on May 18, 1990 at Ohio Department of Administrative Services, Office of Collective Bargaining, Columbus, Ohio, before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:35 a.m. and was concluded at 2:30 p.m.

* * * * *

On or about July 17, 1989 **EDWARD JENKINS JR.** filed a grievance with the **OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, SOUTHEASTERN CORRECTIONAL INSTITUTION**, located in Lancaster, Ohio, the "**State**" in which he protested his removal from employment. After the grievance was denied, it was eventually carried to arbitration under the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local 11, AFSCME, AFL-CIO**, the "**Union**".

FACTUAL DISCUSSION

The Southeastern Correctional Institution was described as a "medium security facility" which houses 1,600 inmates most of whom are "youthful offenders". The youth who are incarcerated at the facility have committed a variety of crimes, but none have committed capital offenses. The youthful offenders' average education is at a sixth grade level.

The Grievant is a Correction Officer II. Among the duties of a Correction Officer are to supervise inmates in their daily activities, preparing reports, checking on contraband and unusual incidents, providing guard or security in different areas and preventing escapes from the correctional institution.

On May 6, 1989 while he was on his day off, the Grievant was involved in an automobile accident in Lancaster, Ohio. As a result of the automobile accident, the Grievant suffered back injuries. It is undisputed that the Grievant's father called the State on May 8 to indicate that the Grievant was in an automobile accident. According to Heskell Wagoner, the Personnel Officer, the Grievant's father did not give the Grievant's date of return but he said that he would be out approximately ten (10) days.

According to Wagoner his assistant, Dorothy Drum, received a telephone call from the Grievant on May 12. The Grievant called because he requested disability forms and indicated to Drum that his sister would pick up the documents the next day. According to Wagoner, the Grievant did not give any indication of when he would return to work. Since the disability forms were not picked up on the following day, the State mailed the forms to the Grievant on May 17.

On May 15, the Grievant called the control center and stated that he would be returning to work on May 25, 1989. The Grievant failed to return to work on that date.

It should be noted that Wagoner stated that the State's policy requires employees who are off from work to either call in daily or they are required to submit a doctor's statement which would indicate the expected date that they will return to work. Since the Grievant

did not return to work on May 25 although he had indicated on May 15 that he would be doing so, Wagoner sent the Grievant a notice that an investigatory interview would be held on Tuesday, June 6 to address the Grievant's possible violation of the Standards of Employee's Conduct Rule 1 a, which covers Unauthorized Absence and Rule 2, which covers Job Abandonment. On June 1 the Grievant called Wagoner and inquired about the notice of investigatory interview. Wagoner said that he referred to the Grievant's failure to return to work on May 25 and he also advised him to follow the policies and procedures of calling off every day or providing a doctor's statement in lieu of calling off every day. Wagoner said that he covered the policy at least twice. Wagoner went on to state that he told the Grievant that he was to call off every day or provide a doctor's statement before June 6. By Wagoner's account of their telephone discussion, the Grievant told him that he would provide him with a doctor's statement. The Grievant indicated to Wagoner that he might not be able to physically attend the June 6 interview.

On both June 2 and 3, 1989 the Grievant failed to call off. On June 6 the Grievant called and talked to Drum who after getting off the phone with the Grievant indicated to Wagoner that the Grievant would be at the facility with a doctor's statement at 4:30 p.m. and to pick up his check. At approximately 4:30 p.m. the Grievant showed up at the facility and Wagoner gave him his pay check and he asked

him for a doctor's statement. The Grievant told Wagoner that he did not have a doctor's statement, but that he was going to visit his doctor on Thursday, June 8 and would be able to obtain a doctor's statement at that time. Wagoner advised the Grievant that he was to call off or to provide him with a doctor's statement.

An investigatory interview of the Grievant was not held on June 6. The reason for not doing so, according to Wagoner, was that he was waiting to see if the Grievant would bring in the doctor's statement after visiting his doctor. On June 7 the Grievant did not call off. On June 8 the Grievant called off and did so again the following day, June 9.

On June 15 the Grievant submitted the disability forms which were filled out. It should be noted that the Grievant's application for disability leave was approved between May 23 to June 4. Since there is a fourteen (14) day waiting period in order for the request for disability leave to be approved the fourteen (14) days waiting period took place between May 9 and 22, 1989. It should be noted that the papers supporting the application for disability leave benefits included an indication from Dr. Richard E. Hartle, the Grievant's physician, that the estimated date of the Grievant's return to work was June 12, 1989.

On June 16, 1989 Benjamin G. Bower sent a notice to the Grievant that a pre-disciplinary conference was scheduled for June 21, 1989 concerning the Grievant's alleged violation of the Standards of Employee Conduct which are set forth as follows:

"Rule 1 a - Unauthorized absence, including habitual absenteeism, pattern abuse, tardiness and early departure. Rule 2 - Job Abandonment - three (3) or more days consecutive without proper notice; Rule 3 Excessive Absenteeism."

On June 21, 1989 a pre-disciplinary conference was held at which the Grievant was represented by the Union. At the pre-disciplinary conference, the Grievant submitted a handwritten note from his physician, Dr. Hartle which indicated that the Grievant was unable to work between May 6 and June 20, 1989 "due to injuries from auto accident". The doctor's note also indicated that the Grievant "will continue to need physical therapy 3 days per week with reevaluation 2 weeks". Dr. Hartle's note was dated June 20, 1989.

On June 22 the Grievant submitted a request for leave between May 6, 1989 and ending June 20 for personal illness or injury arising out of his "car accident". The State approved 70.5 hours of leave without pay for a part of the period between May 6 and May 24, 1989, and rejected or disapproved 152 hours of leave without pay.

The Grievant worked from June 22 to July 10 in his regular position as a Correction Officer 2. However, effective July 10 the Grievant was removed from his position for violation of Rules 1 a and Rule 2 and Article 29.02 of the Agreement. The Union filed the instant Policy Grievance protesting his removal from employment.

As a result of this sketch of events, the instant grievance was filed.

DISCUSSION

The parties agreed that the issue to be resolved by this arbitration is as follows: "Was the removal of Edward Jenkins, Grievant, on July 10, 1989 for just cause? If not, what should the remedy be?"

The Grievant was removed from his position as a Correction Officer 2, effective July 10, 1989 for violating the "Standard of Conduct Rules #1a, Unauthorized absence including habitual absenteeism, pattern abuse, tardiness and early departure, #2 Job Abandonment--three or more days (consecutive) without proper notice and Article 29.02 of the OCSEA/AFSCME contract".

The basis for the State's removal from employment of the Grievant was his repeated failure to comply with the State's policy of calling in daily or submitting a doctor's statement which would

include the expected date when he would return to work. The State's Labor Relations Directive #87-005 Tardiness Policy in relevant part, provides in Article IV, A. 1 that "The employee is required to call off at least ninety (90) minutes prior to the established shift that they cannot report to work". Furthermore, Labor Relations Directive #87-004 Sick Leave Policy, in relevant part, defines unauthorized use of sick leave in Article III, B. 3 as the "failure to provide physician's verification when required". Article IV, in relevant part, provides that "[A]t the administrative supervisor's discretion, in consultation with the labor relations officer, the immediate supervisor, may require the employee to provide a physician's verification of any future illnesses that require the employee to be absent from work until such time as the employee has accrued additional sick leave". It should be noted that by June 20, 1989, the Grievant had used up the 80 hours of sick leave which accrued to him annually along with four (4) weeks of vacation. The Grievant acknowledged that he has "seen the State's policies on tardiness and sick leave. He added that he "knew what to do on calling in".

Turning to the events giving rise to the Grievant's removal from employment, I have concluded that he was aware that he failed to comply with the State's call off policy and its policy requiring him to submit a physician's note when he received Wagoner's written notification, dated May 31, 1989 of an investigatory interview on June

6, 1989 "for possible violation of the Standards of Employee Conduct Rule 1 a unauthorized leave; Rule 2 job abandonment. Upon receiving the notification, the Grievant telephoned Wagoner on June 1 because "he wanted to know what was going on".

Before considering their telephone discussion of June 1, the Grievant had not called off daily since May 8 and had not yet submitted a doctor's statement. It is important to underscore that before sending out the May 31 notification of the investigatory interview, the State had not required the Grievant to comply with its policies on calling off daily or submitting a physician's verification of sickness which would set forth when he would be expected to return to work. The State's failure to require the Grievant to comply with its call off policies in understandable in light of the events beginning with May 8, 1989. On May 8, 1989 the Grievant's father telephoned the correctional institution and indicated that the Grievant was involved in an automobile accident on May 6. Although he did not provide a specific date for the Grievant's return to work, he indicated that he would be out for approximately ten (10) days. On May 15, the Grievant called the Control Tower and indicated that he was under a doctor's care and that he would return to work on May 25. Although the Grievant could "not recall telling anyone" that he would return to work on May 25, I am persuaded by the evidence in the record, especially a

slip signed by a "control room officer" that he called at "1:41" p.m. and left such a message.

Thus, by May 25, the Grievant had not called off daily or submitted a doctor's statement. However, the State's failure to inform the Grievant that he had failed to comply with its policies does not indicate that the State condoned or acquiesced in the Grievant's failure to comply with its policies. The State was aware of the automobile accident and that he would be returning to work on May 25. The State was also aware that apparently the Grievant was thinking about applying for disability leave benefits because of his telephone call to the correctional facility on May 12 that his sister would pick up the forms requesting such benefits on May 13. Since the Grievant's sister did not pick up the disability leave forms, the Personnel Office mailed the forms to the Grievant on May 17.

When the Grievant did not report to work on May 25, it prompted the State to send out its May 31 notice of investigatory interview which was scheduled for June 6. Turning to the June 1 telephone discussion I am persuaded that Wagoner's account of his discussion with the Grievant is credible and trustworthy. In response to the Grievant's query of "what is going on", Wagoner referred to his telephone call on May 15 to the institution in which he indicated that he would be returning to work on May 25. Furthermore, Wagoner

advised the Grievant to call off daily or submit a doctor's statement. Wagoner repeated the State's policies twice. Wagoner said that the Grievant told him that he would not be able to physically attend the June 6 investigatory interview but he would submit a doctor's statement.

The Grievant's account of the June 1 telephone discussion is that Wagoner told him that he was to call him "one time to tell him that he was under a doctor's care". The Grievant called his conversation with Wagoner as "misleading".

The evidentiary record does not support the Grievant's version of his telephone discussion. It cannot be overlooked that the Grievant's call to Wagoner was prompted by receiving the notice of investigatory interview on June 1. It is highly unlikely that the Grievant believed that because he failed to call one time to tell Wagoner that he was under a doctor's care, he would be scheduled for an investigatory interview for possible violation of the Standards of Employee Conduct. Furthermore, the Grievant was aware of the procedure for calling off 90 minutes of his starting time or submitting a doctor's statement. In addition, if all that the Grievant was required to do is call Wagoner to tell him that he was required to call off one time and state that he was under a doctor's care, the Grievant could have satisfied that singular inconsequential obligation in his discussion with Wagoner on June 1.

Clearly, the evidence does not support the Grievant's version of his telephone discussion with Wagoner. Accordingly, Wagoner's version is both credible and trustworthy.

Contrary to the call off procedure which Wagoner indicated to the Grievant in their June 1 telephone discussion the Grievant did not call off on June 2 and June 3. On June 6, the Grievant telephoned the Personnel Office and indicated that he would be at the facility with a doctor's statement and to pick up his check. Later in the day the Grievant came to the facility where Wagoner gave him his paycheck. In response to Wagoner's request for the doctor's statement, the Grievant said that he did not have it. According to Wagoner, the Grievant said that he was going to the doctor's office on Thursday, June 8, at which time he would obtain the doctor's statement. Wagoner again advised him of the call off procedure or to provide him with a doctor's statement.

The Grievant said that when Wagoner gave him the pay check he also told him that he "had to call in", but he never mentioned the "specific number of times" that he had to call in. The Grievant went on to state that the "way I took it" was that he had to call up and let him (Wagoner) know his status. He testified that Wagoner "did not say anything about calling 1, 2, 3 or 4 days or the whole time". As I have already concluded, the evidentiary record warrants the conclusion

that the Grievant was aware of the State's call off procedure. Moreover, it is unreasonable to conclude that Wagoner merely requested the Grievant to call and let Wagoner know of his status. The Grievant could easily have disclosed his status to Wagoner when he saw him at the facility on June 6.

The Grievant did not call off on June 7, but he complied with the State's call off policy on June 8 and 9. The Grievant's compliance with the State's call off policy on June 8 and 9 indicates that he was aware of the requirement to call off daily within 90 minutes of his starting time. Had Wagoner told the Grievant on June 1 and 6 that he merely had to call once to state that he is under a doctor's care or that he merely was required to call to inform Wagoner of his status, it would not make any sense for the Grievant to call off daily on June 8 and 9.

I turn next to the disability forms submitted to the State by the Grievant on June 15. The physician's statement of disability which was one (1) of the forms submitted to the State was the first time since the Grievant's absence on May 8 that the State received a written document from the Grievant's doctor on the Grievant's injury or symptoms arising from his automobile accident on May 6. Among the symptoms listed are "back pain" and "marked limitation of motion with tenderness of lumbar spine * *." Moreover, the Grievant's

physician indicated that the "estimated date of release to return to work" was June 12, 1989.

The Grievant had not returned to work on June 12. However, although June 12 is an estimated date of the Grievant's return to work, the Grievant failed to contact the State on June 12. Furthermore his last visit to the doctor before the disability papers were submitted to the State was May 25, 1989. At a minimum the Grievant should have received a doctor's statement on June 12, 1989 which would indicate that he would return to work at a later date than June 12 if that was the case. There is also indicated on the Grievant's application for disability leave benefits that the "date of most recent treatment" was June 13, 1989. When the Grievant was asked about the June 13 "most recent treatment" he said that he "might have made a mistake about the date". In any event, as of June 16, the Grievant failed to call off or provide the State with a doctor's statement setting forth an expected date of return to work. On June 16, the State sent the Grievant a notice that a disciplinary conference was scheduled for June 21. On June 21, the Grievant submitted a doctor's note indicating that he was unable to work from 5/6-6/20/89 due to injuries from auto accident".

Thus, from June 10 to June 20, the Grievant failed to call off daily or provide the State with a physician's statement on his expected date for returning to work. Indeed, in reviewing the

sequence of events from May 8 through June 20, the Grievant failed to provide a doctor's statement setting forth his condition and indicating when he would be returning to work. If the physician's statement on disability is considered the physician's statement which the State required, the Grievant was expected to return to work on June 12. However, he failed to do so as he failed to do so previously on May 25, 1989 after having advised the control room officer that he would do so on May 15. The State had informed the Grievant of its call off policy or to provide it with a doctor's statement on June 1 and June 6. The Grievant had received notice of an investigatory interview on June 1 concerning his failure to comply with the State's call off and sick leave policies. Despite the State's efforts to have the Grievant comply with its call off policy or provide it with a doctor's statement, the Grievant properly called off on merely two (2) days, namely June 8 and 9.

Furthermore, the Grievant's testimony on crucial details relating to his absence and the applicable policies was vague and lacked trustworthiness. He indicated that he could not recall the details of his discussions with Wagoner on June 1 and 6, 1989. He indicated that he had seen the State's policy on sick leave but "did not go through the whole thing detail for detail". Asked whether he read the State's sick leave policy, the Grievant said that he "did not have time to look at the whole thing". As I have indicated, the Grievant said that he was mistaken about inserting the date of June 13 as the "most recent date

of treatment" on his application for disability. It is of great weight that a letter from Dr. Hartle to the State dated April 20, 1990, indicated that after the Grievant was seen on May 25, 1989 "he was rescheduled for [a] follow-up on June 1, 1989 but failed to keep the appointment". Dr. Hartle went on to state that "[A] later appointment was made on June 12, 1989 which he also failed to keep and he was unable to be contacted the following day at the telephone number he had given with the party indicating that he no longer lived there * * *."

Dr. Hartle's April 20, 1990 letter reflects adversely upon the credibility of the Grievant. On June 1 the Grievant indicated to Wagoner that he would provide him with a doctor's statement. On June 6, while he was at the correctional institution the Grievant told Wagoner that he would be visiting his doctor on June 8 at which time he would obtain a doctor's statement. Dr. Hartle's letter indicates that on June 1, when the Grievant called Wagoner because he had received notice of the investigatory interview, he failed to keep an appointment with him [Dr. Hartle]. Furthermore, on June 12, 1989, which Dr. Hartle indicated in his May 25, 1989 statement that accompanied the disability leave documents was the date of the Grievant's estimated date of return to work, the Grievant again failed to keep his appointment to meet with him. The inference to be drawn is that the Grievant was less than truthful in telling Wagoner on June 1 and 6 that he would provide him with a doctor's statement. Moreover, I find that

the very day that Dr. Hartle indicated was the estimated date of the Grievant's return to work namely, June 12, the Grievant failed to keep an appointment with Dr. Hartle. The reasonable inference to be drawn in light of the Grievant's conduct from May 25, 1989 is that had he [the Grievant] kept his appointment on June 12, 1989 he would have been released to return to work.

Dr. Hartle's April 20, 1990 letter also stated that the Grievant "felt better" after he had physical therapy on June 20, 1989. Thus, I have inferred that had the Grievant kept his appointments for physical therapy on June 1 and 12, it might have accelerated his return to work. In light of the evidentiary record, it is more than coincidence or chance that caused the Grievant to return to work on June 22, 1989. I have inferred that the predisciplinary conference held on June 21, with the Grievant knowing that he was facing serious discipline, including discharge that caused him to begin working on June 22.

The evidentiary record demonstrates a blatant disregard by the Grievant of his responsibilities towards his employer. The Grievant indicated that due to the medication that he was taking he was unable to drive to see his doctor. Yet, the Grievant was able to be transported to the facility to pick up his pay check on June 6. Moreover, all the Grievant had to do was perform the simple task of calling off daily. Yet, the Grievant failed to do so, offering the astonishing explanation

that Wagoner told him that he merely had to call one time and state that he was under a doctor's care.

The Grievant's behavior from May 25 and up through June 20, demonstrated an extraordinary indifference to his employment with the State, despite Wagoner's instruction to the Grievant to call off daily or provide the State with a doctor's statement. The State has exhibited extraordinary forbearance restraint and patience in its dealings with the Grievant.

PENALTY

The Grievant submitted a doctor's statement at the predisciplinary conference that was held on June 21, 1989. The statement which is dated June 20 indicates that the Grievant was "unable to work 5/6-6/20/89 due to injuries from auto accident". No explanation is given by the Grievant's doctor as to why he estimated in his statement of disability that the estimated date of release to return to "light" work was June 5, and the estimated date of release to return to his "regular occupation was "June 12". In light of the evidentiary record, the doctor's note submitted on June 21 is "too little and too late". In addition to the inadequacy of the doctor's note itself, it does not excuse the Grievant's persistent, deliberate and blatant disregard of the State's policies on calling off and requiring the

Grievant to provide the State with a doctor's statement between May 25 and June 20, 1989.

It is true that the Grievant's application for disability leave benefits was approved between May 23 and June 4. Furthermore, the Grievant's request for leave dated June 22, 1989 was approved to the extend of granting 70.5 hours leave without pay. Such hours included part of the period between May 6 and May 24, 1989. His request for 152 hours leave which included the period before May 24 and through June 20, 1989 was disapproved.

The disability leave benefits granted to the Grievant does not excuse his deliberate failure to follow the State's policies on call off and sick leave. Furthermore, the disability leave benefits were granted through June 4. After June 4, the Grievant, deliberately continued to fail to follow the State's call off and sick leave policies.

Similarly, the Grievant's request for leave was approved to a partial extent for hours before May 24, 1989. After May 24 the State did not award leave without pay. As I have already established, the grant of leave without pay for the period before May 25 (or even through June 4, as with disability leave benefits) is of no weight concerning the offenses committed by the Grievant.

The Grievant returned to work on June 22, 1989 and was discharged effective July 10, 1989. Again, it should be underscored that the Grievant's return to work after the pre-disciplinary conference of June 22 does not excuse the Grievant offenses committed before June 21.

Before his removal from employment, the Grievant had been employed by the State for approximately six (6) years. Since January 1989, the Grievant has been suspended twice which resulted in two (2) ten (10) day suspensions and he has received a letter of reprimand.

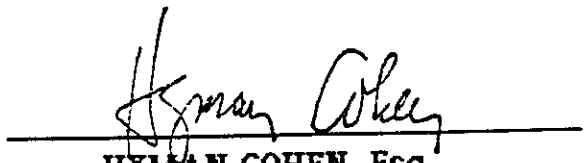
Based upon the evidentiary record, I have concluded that the Grievant violated Rule 1 a of the Standards of Employee Conduct which states: "Unauthorized absence including habitual absenteeism, pattern abuse, tardiness and early departure". The Grievant has also violated Rule 2 of the Standards of Employee which provides that "three or more days (consecutive) without proper notice" constitutes "job abandonment". It should be noted that under the Standards of Employee Conduct, a "1st offense" of job abandonment may result in removal from employment. From June 10, 1989 the Grievant failed to give proper notice of his absence. Or, if the doctor's statement of disability is to be utilized to determine job abandonment, the Grievant failed to give at least three (3) consecutive days of proper notice of absence after June 12, 1989, the estimated date of his return to work.

Accordingly, given the evidentiary record in this case, removal is warranted. Finally, the Grievant has violated Rule 3 of the Standards of Employee Conduct which lists the offense of "Excessive absenteeism".

AWARD

In light of the aforementioned considerations, the State has proved by clear and convincing evidence that the Grievant was discharged for just cause consistent with Article 24, Section 24.01 of the Agreement.

Dated: June 29, 1990
Cuyahoga County
Cleveland, Ohio



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