In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

Ohio Department of Corrections
and Rehabilitation
OCB

Employer.

Grievance No. 27-11
(3-19-90)-48-01-03

Grievant (Williams, L.)

Hearing Date: August 23, 1990

Award Date: September 28, 1990
" # 494

Union Advocate: Michael Temple

Employer Advocate: Joseph B. Shaver

In addition to the Advocates named above and the Grievant, the following persons attended the hearing: Beverly Martin, Steward, Robert Thorton, 2nd Chair Employer, William H. Dallman, Warden (Lebanon), B. J. McCollum, Personnel, Charles E. Bales, Labor Relations Officer.

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible

publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Issue

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

Joint Exhibits

1. Contract
2. Grievance Trail

Relevant Contract Section

§ 24.01 - Standard (in part)

> 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.

§ 24.02 - Progressive Discipline

> The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:
>
> A. One or more verbal reprimand(s) (with appropriate notation in employee's file);

B. One or more written reprimand(s);
C. One of more suspension(s);
D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

§ 29.01 - Definitions: Sick Leave for State Employees

1. Active pay status means the conditions under which an employee is eligible to receive pay, and includes, but is not limited to, vacation leave, sick leave, and personal leave.

2. No pay status means the conditions under which an employee is ineligible to receive pay and includes, but is not limited to, leave without pay, leave of absence, and disability leave.

3. Full-time employee means an employee whose regular hours of duty total eighty in a pay period in a state agency, and whose appointment is not for a limited period of time.

§ 29.03 - Notification

When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification. The Employer may request a statement, personally written and signed by a physician who has examined the employee or the member of the employee's immediate family, be submitted within a reasonable period of time. In institutional agencies or in agencies where staffing requires advance notice, the call must be made at least ninety (90) minutes prior to the start of the shift or in accordance with current practice, whichever period is less.

If sick leave continues past the first day, the employee will notify his/her supervisor or designee every day unless prior notification was given of the number of days off. When institutionalization, hospitalization, or convalescence at home is required the employee is responsible for notifying the supervisor at the start and end of such period.

§ 35.03 - Disability Leave - Eligibility (in part)

Eligibility shall be pursuant to current Ohio law and the Administrative Rules of the Department of Administrative Services in effect as of the effective date of this Agreement.

Standards of Employee Conduct

		Offenses				
		1st	2nd	3rd	4th	5th
2.	Job Abandonment- three or more days (consecutive) without proper notice.	5-10/R	R			

Facts

Grievant was employed as of July 21, 1984. At the time of the events leading to this Grievance, Grievant was a Teacher's Aide 2, assigned to the library at Lebanon Correctional Institution.

On April 4, 1988, the Grievant suffered "a mild compression fracture of the 6th thoracic vertebra" in her home. She was hospitalized. Her doctor at that time was T.P. Matrka, M.D. (Employer's Exhibit E-18). Grievant applied for and was granted, disability leave beginning April 5, 1988 (Exhibit E-3). That

leave was extended three (3) times with an end date of January 8, 1989 (Exhibits E-4, E-5, E-6). Grievant was informed on 12/15/88 that to extend her disability leave beyond 1/8/89, she had to file additional medical information (Exhibit E-6). Grievant, on 2/10/89, requested a third party review of her medical records; such a review is her right under the statute (Exhibit E-6). On March 21, 1989, Grievant was notified that the disability was disapproved beyond 1/8/89 (Exhibit E-8). Grievant was informed that under Chapter 119 (ORC) she had a right to a hearing (Exhibit E-8). On May 3, 1989, she was notified that her hearing was set for June 7, 1989 (Exhibit E-9). On December 8, 1989, Grievant was notified that her appeal was denied and that her administrative internal review rights were exhausted. Her recourse lay with the courts (Exhibit E-10). On December 10, 1989, the Personnel Officer at Lebanon received a letter from Department of Administrative Services notifying Lebanon that the Grievant's appeal was denied.

The record reveals that in February-March, 1989, the Grievant stopped seeing Dr. Matrka and as of 2/2/89 entered treatment with Dr. Reed, D.C. (Exhibits E-18 and E-14). Dr. Reed's affidavit indicates that he saw the Grievant on the following dates in late 89-early 90:

11/30/89
12/7/89
12/14/89
1/8/90
1/16/90

Dr. Reed indicated that on or about 11/30/89, Grievant began a new treatment so that "she appeared to be experiencing longer relief." (Exhibit E-14).

On December 30, 1990, the Grievant's family bowled in the lane next to the warden and his son.

On January 3, 1990, Lebanon sent the Grievant a letter signed by the warden ordering her to return to work 1/8/90 at 7:30 a.m. because "your appeal to have your disability leave extended has been denied." The letter contained the following statement:

> Failure to report as scheduled could constitute a violation of the appropriate provisions of the Employee Standards of Conduct and could result in disciplinary action. (Exhibit E-12).

The letter was sent certified mail and received by Grievant on January 4, 1990 (Thursday).

The Grievant called the institution on January 5, 1990. First she spoke to Ms. Hodgson of Personnel. The Grievant told Ms. Hodgson that she (the Grievant) could not return to work on January 8, 1990 because "her doctor told her she could not go back to work until 1/29/90." Ms. Hodgson told the Grievant that she could not authorize any leave and that the Grievant had to deal with the warden. The Grievant called the warden's office and spoke to his secretary. The secretary indicated that the warden was off for the day. The Grievant testified that she told the Warden's secretary that she (the Grievant) could not return to work on the 8th because her doctor would not release her until

1/29/90. The secretary told the Grievant that she "would give the warden your message." On the stand, the warden acknowledged that he had received the message.

An incident report dated January 12, 1990 was drawn up by Mr. Newton, Labor Relations Officer, reporting that she had not reported as ordered on 1/8/90. The report made no mention of the two phone calls. A notice of a pre-disciplinary hearing, dated 1/11/90, was prepared and sent to the Grievant, alleging a violation of Job Abandonment (Rule #2). The hearing was set for January 18, 1990.

On January 16, 1990, the Grievant visited Dr. Reed. His notes indicated that the Grievant was showing improvement and that they discussed returning her to work 1/29/90 (Exhibit E-14).

The pre-disciplinary hearing was held January 22, 1990 and on that date, the Grievant tendered a written statement from Dr. Reed dated 1/22/90, permitting a return to work on 1/29/90 (Exhibit E-13).

On January 31, 1990, the Grievant was removed. The Grievant filed a grievance dated March 6, 1990 (Exhibit J-2). On March 16, 1990, the Grievant wrote to the warden drawing his attention, inter alia, to her phone calls (Exhibit E-15). He replied on March 28, 1990. The main body of the letter was as follows:

> Your letter indicates you are failing to recognize several important facts. First of all, we were notified that your appeal was denied. This means that you were **no longer on an authorized leave.** I personally notified you in writing of this fact and told you to report to work or face disciplinary action. You calling

> and announcing that you weren't coming to work changes nothing. You were clearly ordered to come to work. You cannot merely call and unilaterally announce and decide that you are putting yourself on leave. Neither you or your doctor determine your work rules. Had you returned to work as required on January 8, 1990 you would have not been removed. You indicate that you were ready to return to work on January 29, 1990. I can't help from reflecting on the fact that your alleged disability did not keep you from bowling during the time you claim you couldn't do your duties as a librarian.
>
> In summary, I do not intend to rescind the removal. (Exhibit E-16).

The Grievant responded, and her letter was received April 26, 1990. The gist of her letter was she had called and hence her actions were not "unilateral." Secondly, she said that she had not been bowling and had only thrown 3 balls (children's weight) two handed and had spent the rest of the time watching her family bowl (Exhibit E-17).

Testimony at the hearing added some relevant material to the evidence in the documentary trail.

The warden was adamant that he had seen the Grievant bowling on 12/30/90; she was equally adamant that she had done very little "bowling."

The state introduced an affidavit from Dr. Reed (Exhibit E-14) which concluded as follows:

> On the visit of January 16th I note that she was showing improvement, and we discussed her returning to work on January 29th. I had a member of my staff prepare a return to work slip, and this was done on January 22nd. I do not recall any discussion taking place with Ms. Williams prior to January 16th relative to her being

ordered to return to work nor when such action would be advisable.

The above facts are true and accurate to the best of my recollection.

The Grievant maintained in her testimony that she had spoken with Dr. Reed since his affidavit, that he had rechecked his notes, and that on 6/6/90 he wrote a note stating that she was not released on 1/8/90 (Exhibit U-3). The Grievant also introduced a copy of her phone bill to substantiate her call to the prison on January 5. (The phone call shows a call at 3:26 p.m. to the prison.) (Exhibit U-4). The Grievant also introduced affidavits from various family members in which they stated that on 12/30/89 the Grievant was not bowling (Exhibits U-5, U-6, and U-7).

Union Position

The Grievant reported off properly under Article 29.03 on January 5, 1990; she did not abandon her position. Grievant was not allowed to work until 1/29/90, per Dr. Reed. Her termination was without just cause.

Employer Position

Grievant abandoned her job. She was told to report to work 1/8/90 and warned of possible disciplinary action if she failed to

comply. Her call of 1/5/90 and her statements to a Labor Relations Officer and the warden's secretary were insufficient. She should have made further attempts to speak to the warden. Her conduct should be viewed in the context of the denial of her disability. Removal is a stated option for the first offense of job abandonment. The Grievant's termination was for just cause.

Discussion

Did Grievant abandon her job? The Grievant claims her call of 1/5/90 was sufficient notice. After 1/5/90 until 1/12/90 (when she presumptively received notice of her pre-disciplinary hearing), she made no other attempt to discuss her situation with the warden. Given that her notice came from the warden, that she was told by Ms. Hodgson that the warden was the proper person to talk to, and that she never reached him, her failure to call him again, especially when he did not return her call, was unreasonable and negligent on her part. Given the unusual circumstances of her return to work, she had a duty to do more. Once she received the return-to-work letter after the denial of her disability leave, she had clear cut choices. If she was unable to return to work from the injury which caused the disability, she could either refuse to return to work and rely on the court to eventually vindicate her position or she could chose to return to work. If she had a new injury or a temporary

illness, she could "report off" under 29.03 and meet the proper standards of her employer.

The evidence adduced at the hearing indicated that the injury which kept her from work on 1/8/90 was the same injury which was the cause of the previous disability leave. Given that situation, she had a special obligation to reach the warden and explain the situation. By her own admission, she did not have a new injury or a new illness. The fact that she was appealing the final agency decision in the court was irrelevant to the behavior of the agency unless she obtained a court order mandating some action or lack of action on their part. Her employer was acting properly when it called her back to work. The choice of action was now hers. If, indeed, the Grievant was still disabled, the Arbitrator does not wish to diminish the toughness of her choice. However, she had a duty to clearly inform the Employer of her choice. Arguably, her message to the warden could be interpreted as "I regard myself as still disabled and cannot come to work; therefore, I will rely on the court to vindicate my position." However, since she added words about the 29th as a start date, her message was ambiguous.

In his letter to the Grievant subsequent to the events, the warden told her that she could not unilaterally announce a continuing disability. He is, of course, correct. However, a fair minded person could have found her delivered message ambiguous. Moreover, the message was transmitted through a third

party. The warden's secretary is his agent. If she tells an employee that a message will reach him, the presumption is that it will. The warden admitted receiving the message and admitted that he made no attempt to contact the Grievant. While not unmindful of the toughness of the warden's job, the Arbitrator finds this conduct negligent also. Having received a potentially harmful and clearly ambiguous message from an employee, the warden had a reasonable duty to return the call. He did not.

No doubt the warden was put off by seeing the employee at the bowling alley, apparently acting inconsistently with a serious, disabling back injury. However, neither the warden nor the Arbitrator are the medical experts nor the decision makers on disability issues. Regardless of his conclusion, no matter how correct, the warden should have returned the Grievant's call.

By her behavior, the Grievant did abandon her job. However, mitigating factors exist:

1. No prior discipline was introduced.
2. The situation could have been clarified, perhaps, had the warden called back.

The "grid" allows a 10 day suspension for job abandonment. That penalty is progressive and commensurate.

Award

Grievance denied in part.

Discipline reduced to a 10 day suspension.

The Arbitrator retains jurisdiction until a potential back pay award is calculated.

First of all, the Grievant maintains she could not have worked on January 8, 1990. Therefore, she is estopped by her own words. January 29 is her "start" date and the 10 day suspension is to begin then. The Grievant must produce a personal affidavit and doctor's statement attesting to her ability to return to work January 29, 1990. Any back pay award shall be reduced by unemployment compensation received and any other sums received in mitigation. The Grievant is to be returned to her position if available or a comparable position if her PCN has been filled.

September 28, 1990
Date

Rhonda R. Rivera
Arbitrator