

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 592

OCB GRIEVANCE NUMBER: 33-00-900806-0267-01-05

GRIEVANT NAME: MOORE, LYVONNE

UNION: OCSEA/AFSCME

DEPARTMENT: OHIO VETERANS HOME

ARBITRATOR: RIVERA, RHONDA

MANAGEMENT ADVOCATE: COE, ROGER

2ND CHAIR: FISHMAN, ELLIOT

UNION ADVOCATE: HALL, JOHN

ARBITRATION DATE: APRIL 25, 1991

DECISION DATE: MAY 9, 1991

DECISION: DENIED

CONTRACT SECTIONS
AND/OR ISSUES: REMOVAL FOR ABSENTEEISM - PATTERN ABUSE

HOLDING: GRIEVANT WAS FULLY AWARE OF OVH POLICIES; WAS COUNSELED AND OFFERED EAP (WHICH SHE DECLINED); HAD PRIOR DISCIPLINE WHICH DID NOT PROVE TO BE CORRECTIVE. EMPLOYER EVEN ARRANGED & PAID FOR A PHYSICAL EXAM WHICH INDICATED NO REASON FOR MISSING WORK. REMOVAL IS JUST, COMMENSURATE & PROGRESSIVE.

ARB COST: \$450.00

C

In the Matter of the
Arbitration Between

#592

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

Office of Collective
Bargaining for the
Ohio Veterans Home

Employer.

Grievance No. 33-00-(90-08-06)

0267-01-05

Grievant (Moore, Lyvonne)

Hearing Date: April 25, 1991

Award Date: May 9, 1991

Arbitrator: Rivera

For the Union: John Hall
Robert Boger

For the Employer: Roger Coe, Esq.
Elliot Fishman, Esq.

Present at the Hearing were the Advocates named above and the following witnesses John Cochran, Food Services Administrator, Ohio Veteran's Home (witness) and Anthony Washington, Labor Relations Coordinator, Ohio Veteran's Home (witness).

The Grievant did not attend the Hearing, although she had notice. (See Union Exhibit 2 and Testimony of Robert Boger.)

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.

Joint Exhibits

1. Contract 1989-1991
2. Grievance Trail
 - a. Step 3 Grievance Response dated 9/25/1990
 - b. Grievance dated 8/4/90
 - c. List of dates when Disciplinary Guidelines and grid were mailed to employees including Grievant 10/27/88
 - d. Certified receipt of 2nd Discipline Grid 9/27/89 (signed by Grievant)
3. Discipline Tail
 - a. Resolution of Board of Trustees of Ohio Veterans' Home approving removal of Grievant 7/26/90
 - b. Overview of Discipline prepared for Board by Anthony Washington, LRC
 - c. Notice of Pre-Discipline Meeting (dated 7/11/90) to be held 7/18/90
 - d. Removal Letter (dated 7/25/90)
 - e. Notice that Removal Letter was given to Grievant
 - f. Acknowledgement of Pre-Discipline Meeting by Bob Bogne, OCSEA, Chapter President dated 7/13/90
4. Stipulations of Fact
 - a. The Grievant was an eleven year employee of the Ohio Veterans' Home.

- b. The Grievant has two previous disciplines for related offenses: a 3 day suspension for "willful disobedience of a direct order" and a 10 day suspension for the same offense. Both of these disciplines were for attendance problems.
 - c. The relevant agency rules are reasonably related to the mission of the agency.
 - d. The Grievant was on notice as to the content of the relevant agency work rules.
 - e. The departmental directives relating to "Leaves of Absence" and "Notification" are reasonably related to the mission of the agency.
 - f. The Grievant was on notice as to the content of the two policies cited in paragraph number "e" above.
 - g. Management made a fair and diligent investigation of the charges.
 - h. As of the dates in question, the Grievant had zero sick leave balances.
 - i. As of the dates in question, the Grievant had zero or near zero balances of other types of leave.
 - j. The Grievant was found to be physically capable of performing her job by a physician.
 - k. The Grievant had been counseled about the consequences of future absenteeism by the Food Services Administrator after the report by the Medical Doctor had been given to the agency, but prior to the incidents of absence giving rise to the grievance in the instant case.
 - l. The Grievant was given an opportunity to explain her absence by her supervisor as well as the labor relations officer.
 - m. The Grievant was properly placed on notice that she had a zero sick leave balance as required by Section 29.03 of the labor contract.
5. Memo to All Department Heads, Supervisors, and Employees from Tony Washington, LRO, re: Implementation of Disciplinary Guidelines (dated 9/19/88).
- a. Policy No. 27003 Subject: Discipline Effective 9/26/88.

- b. Procedure No. 27003-27003-I Discipline Effective 9/26/88.
- c. Disciplinary Guidelines.

Union Exhibits

- 1. Opening Statement
- 2. Return Receipt signed by Grievant dated 3/23/91

Employer's Exhibits

- 1. Opening Statement
- 2. Letter from Dr. Vernon D. Patterson re: Grievant (dated 5/31/90).
- 3. Memo from John E. Cochran, Food Services Administrator, to Dietary Staff Subject: "sick leave notice per Contract Article 29:03" (dated 6/5/90).
- 4. Memo from John E. Cochran, Food Services Administrator, to Dietary Staff re: Leaves of Absence (dated January 16, 1990).
- 5. A prepared statement which listed every pay period for Grievant since her first employment showing actual days worked, leave balances, and sick days.
- 6. Notice to Grievant of zero sick leave balance dated 11/13/89.
- 7. Letter from Tony Washington, LRO, to K. Mahan, Department of Aging re: meeting held on 5/17/90 between Grievant, Mr. Randleman, Union Vice President, Mr. Day, Personnel Officer, and Mr. Washington.

Relevant Contract Sections

Article 9 - Employee Assistance Program (in part)

A. The Employer and the Union recognize the value of counseling and assistance programs to those employees who have personal problems which interfere with their job duties and responsibilities. The Union

and the Employer, therefore, agree to continue the existing E.A.P. and to work jointly to promote the program.

D. Employee participation

1. Records regarding treatment and participation in the E.A.P. shall be confidential. No records shall be maintained in the employee's personnel file except those that relate to the job or are provided for in Article 23.
2. If an employee has exhausted all available leave and requests time off to have an initial appointment with a community agency, the Agency shall provide such time off.
3. The Employer or its representative shall not direct an employee to participate in the E.A.P. Such participation shall be strictly voluntary.
4. Seeking and/or accepting assistance to alleviate an alcohol, other drug, behavioral or emotional problem will not in and of itself jeopardize an employee's job security or consideration for advancement.

§ 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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse.

§ 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 or 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.

§ 29.02 - Sick Leave Accrual

Beginning with the pay period which includes December 1, 1989, all employees shall accrue sick leave at the rate of 3.1 hours for each eighty (80) hours in active pay status, excluding overtime hours, not to exceed eighty (80) hours in one year.

Less than full-time employees shall receive 3.1 hours of sick leave for each eighty (80) hours of completed service, not to exceed eighty (80) hours in one year.

Less than full-time employees shall receive 3.1 hours of sick leave for each eighty (80) hours of completed service, not to exceed eighty (80) hours in one year.

Employees that are on approved leave of absence or receiving Workers' Compensation benefits shall be credited with those sick leave hours which they normally would have accrued upon their approved return to work.

Sick leave shall be granted to employees who are unable to work because of illness or injury of the employee or a member of his/her immediate family or because of medical appointments or other ongoing treatment. The definition of "immediate family" for purposes of this Article shall be: spouse, significant other ("significant other" as used in this Agreement, is defined to mean one who stands in place of a spouse, and who resides with the employee), child, step-child, grandchild, parents, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparents, brother, sister, brother-in-law, sister-in-law or legal guardian or other person who stands in place of a parent.

A period of up to ten (10) working days of sick leave will be allowed for parenting during the postnatal period or following an adoption. The amount of sick leave charged against an employee's accrual shall be the amount used, rounded to the nearest one half (1/2) hour. Employees shall be paid for sick leave used at their regular rate. After employees have used all of their accrued sick leave, they may choose to use accrued vacation, compensatory time or personal days or may be granted leave without pay.

§ 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.

§ 29.04 - Sick Leave Policy

It is the policy of the State of Ohio to grant sick leave to employees when requested. It is also the policy of the State to take corrective action for unauthorized use of sick leave and/or abuse of sick leave. It is further the policy of the State that when corrective and/or disciplinary action is taken, it will be applied progressively and consistently.

It is the desire of the State of Ohio that when discipline is applied it will serve the purpose of correcting the performance of the employee.

Sick Leave Policy

I. Purpose

The purpose of this policy is to establish a consistent method of authorizing employee sick leave, defining inappropriate use of sick leave, and outlining the discipline and corrective action for such inappropriate use. The policy provides for the equitable treatment of employees without being arbitrary and capricious, while allowing management the ability to exercise its administrative discretion fairly and consistently.

II. Definition

A. Sick Leave

Absence granted per negotiated contract for medical reasons.

B. Unauthorized use of sick leave

1. Failure to notify supervisor of medical absence;
2. Failure to complete standard sick leave form;
3. Failure to provide physician's verification when required;
4. Fraudulent physician verification.

C. Misuse of sick leave

Use of sick leave for that which it was not intended or provided.

D. Pattern abuse

Consistent periods of sick leave usage, for example:

1. Before and/or after holidays;
2. Before and/or after weekends or regular days off;
3. After pay days;
4. Any one specific day;
5. Absence following overtime worked;
6. Half days;
7. Continued pattern of maintaining zero or near zero leave balances; or
8. Excessive absenteeism - use of more sick leave than granted.

III. Procedure

A. Notification of leave balance

Sick leave usage will be measured from December 1 through November 30 of each year. When an employee's sick leave balance reaches or falls below 16 hours of new sick leave according to the payroll journal, the Personnel Department will notify the employee using "Notification of New Sick Leave Balance" form of his/her sick leave balance. Copies will go to the Agency Head or designee, immediate supervisor and Labor Relations Officer. The Agency Head or designee or the Labor Relations Officer will make himself/herself available if the employee wishes to discuss extenuating or mitigating circumstances.

If and/or when the new sick leave balance is exhausted, the Personnel Office will again notify the employee in writing of a zero balance in new sick leave with copies to the Agency Head or designee, the immediate supervisor, and the Labor Relations Officer. The Agency Head or designee and the Labor Relations Officer shall jointly meet with the employee to discuss his/her use of sick leave. The purpose of this meeting shall be to allow the employee the opportunity to

discuss any extenuating circumstances concerning the use of sick leave of which the supervisor should be aware. This meeting is not for the purpose of requiring the employee to explain his/her prior use of sick leave, nor is it to be considered as disciplinary in nature.

B. 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, personally written and signed by a physician who had examined the employee or the member of the employee's immediate family, for all future illness. 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.

C. Unauthorized use or abuse of sick leave

When unauthorized use or abuse of sick leave is substantiated, the Agency Head or designee will effect corrective and progressive discipline, keeping in mind any extenuating or mitigating circumstances.

When progressive discipline reaches the first suspension, under this policy, a corrective counseling session will be conducted with the employee. The Agency Head or designee and Labor Relations Officer will jointly explain the serious consequences of continued unauthorized use or abuse of sick leave. The Agency Head or designee shall be available and receptive to a request for an Employee Assistance Program in accordance with Article 9 (EAP). If the above does not produce the desired positive change in performance, the Agency Head or designee will proceed

with progressive discipline up to and including termination.

D. Pattern abuse

If an employee abuses sick leave in a pattern, per examples noted in the section under definitions (not limited to those listed), the Agency Head or designee may reasonably suspect pattern abuse. If it is suspected, the Agency Head or designee will notify the employee in writing that pattern abuse is suspected. The Agency Head or designee will use the "Pattern Abuse" form for notification. The notice will also invite the employee to explain, rebut, or refute the pattern abuse claim. Short of a satisfactory explanation, the Agency Head or designee may begin corrective and progressive disciplinary action.

Issue

Was the Grievant removed from her employment from the Ohio Veterans Home for just cause? If not, what shall the remedy be?

Facts

The Grievant is an 11 year employee of the Ohio Veterans Home.

John Cochran, Food Services Administrator, testified. He said that he had counseled the Grievant numerous times while he was his supervisor. After a long and continuing pattern of absenteeism on the Grievant's part (see Employer's Exhibit 5), Mr. Cochran directed the Grievant to take a physical examination at the Employer's expense. The Grievant did so on May 31, 1990. (See Employer's Exhibit 2) Mr. Cochran said that when the report came back, and he was told that the doctor's conclusion was that "no restrictions to perform job description as a food service

worker," he met with Mr. Randelman, Union Vice President and the Grievant and reviewed the doctor's conclusion with her.

Subsequent to this counseling, the Grievant was on time and at work for 3 or 4 days and then the problems began again.

Mr. Cochran testified that both sick leave policy and call-in policy were posted. Moreover, both policies were given out by supervisors to employees with explanation; the Grievant attended such a meeting.

On 6/20/90, 6/25/90, 6/26/90, and 7/2/90, the Grievant was absent and failed to call in properly. On 7/3/90, she was absent and failed to call in until 3:30 p.m. when she notified Mr. Cochran that she would not be in until 7/6/90.

On cross, Mr. Cochran stated that he had discussed EAP for the Grievant with her steward and asked him to discuss it with her. The steward never got back to Mr. Cochran.

Mr. Anthony Washington, Labor Relations Coordinator, also testified. He said that after he presented the 10 day suspension request to the Board which they approved, he was directed by the President of the Board to meet with the Grievant to discuss her absenteeism and to present EAP. Mr. Washington testified that he met with the Grievant, Mr. Randleman of the Union, and Mr. Day of the Personnel Office. Mr. Washington said he asked the Grievant if management could help in any way. The Grievant allegedly said "I don't have any problems; I always bring an excuse." Mr. Washington said he discussed EAP fully and gave her the confidential 800 number for EAP. This meeting was May 17, 1990.

Mr. Washington testified that he prepared an overview of the Grievant's work record and discipline for the Trustees (Joint Exhibit 3). This document indicated and Mr. Washington so testified, that the Grievant had been disciplined on 4/26/90 with a 10 day suspension and 12/20/89 with a 3 day suspension. The exhibit on time worked illustrates that the Grievant worked only 34% of the time in her 11 year employment (Employer's Exhibit 5). Mr. Washington said that he appropriately notified the Grievant per § 29.03, the expanded sick leave policy mandated under the 1989-91 contract (Employer's Exhibit 6_). Under cross examination, Mr. Washington stated that the sick leave policy and the call-in policy had both been posted in Grievant's work area. He testified that at the Pre-Disciplinary Hearing, the Grievant testified that she knew "all about the policies." Mr. Washington said that removal was chosen because a 3 day and then a 10 day discipline did not prove corrective and because looking at the Grievant's total work record a removal was commensurate. Mr. Washington stated that he had given the Grievant full information on EAP but that to his knowledge she had not entered EAP.

The Employer called Robert Boger as an adverse witness. Mr. Boger is Steward and local Chapter President. Mr. Boger said that he had repeatedly talked with the Grievant and so had Mr. Randleman. She said that she was advised by her lawyer not to participate in the arbitration process. Mr. Boger said he went to her home 12 times looking for her, the last time being the immediately preceding Monday night.

Employer's Position

The Grievant has had a consistent pattern of extreme absenteeism and leave abuse throughout her tenure with the agency. She has only worked 34% of the time she was scheduled to work in her entire history with the Veterans' Home.

The Employer will not make any attempt to assess the nature and quality of the various ailments and explanations of the Grievant's egregious work record. The Grievant was examined at the Employer's expense and direction in order to determine whether the Grievant was capable of performing the tasks associated with her work responsibilities.

The Grievant was placed on notice as to the work rules violated in this matter. Mr. John Cochran, Food Services Administrator, personally counseled the Grievant about her unacceptable work record and met with the Grievant, as well as the Grievant's steward, after the physical examination report was rendered, and, once again, clearly explained to the Grievant the consequences of any future problems associated with her absenteeism. The food service department must be able to rely upon its employees to work their scheduled shift. Failure to do so places a hardship upon their scheduled shift. Failure to do so places a hardship upon the agency, as well as on fellow employees. Such failure to work also increases expense in a time of extreme budgetary problems resulting from a short fall of tax revenues.

The Grievant's immediate superior, Mr. Robert Ensign, posted the work rules in question in the working area of the Grievant. The system for call-off of employees in the food service department was violated by the Grievant. The department's labor relations officer, Mr. Tony Washington, properly notified the Grievant concerning sick leave balances as provided for in the contract.

In summary, this case is a classic case of extreme absenteeism. While the evidence also demonstrates an arguable case of malingering, the Employer believes that even a medically justifiable explanation of this pattern of attendance provides the Employer with ample just cause to remove the Grievant from its employ.

An argument can be made, of course, that the Employer effectively acquiesced to the Grievant's virtual part-time employment by not pursuing progressive discipline much before it did. Even if you were to so find, the Employer cured such a defect by clearly informing the Grievant by the use of the discipline process as well as explicit instruction in meetings and counselings that her behavior would not be tolerated and that should her attendance not improve, she would be disciplined.

Management placed the Grievant on notice as to the impropriety of such a record and employed progressive discipline in an attempt to rehabilitate the Grievant as an employee. At some point, however, the Employer, "... must be able to terminate the services of an employee who is unable to work more than part-

time, for whatever reason. Efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity." In re Cleveland Trencher Company and International Association of Machinists District 54, Local 439, FMCS File 67A/1464, April 7, 1967, 48 LA 615. A similar finding was made in which excessive absenteeism was as a result of illness where the Grievant had been absent 16.6% of the time he was scheduled to work. In re Phillips Petroleum Company (Copolymer Plant) and Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 4-463, March 21, 1967, 48 LA 402. Using the analysis of both Cleveland Trencher and Phillips Petroleum in the instant case clearly dictates that a 34% attendance record (conversely, a 66% absentee rate) surely provides just cause for removal absent a compelling defense by the Grievant.

Union's Position

The Grievant has worked at the Ohio Veterans Home for 11 years as a Food Service Worker. The Grievant was removed from her position effective July 26, 1990, for violation of the Ohio Veterans Home disciplinary grid #2 C - "Failure to follow written policies", Article 29.03 of the OCSEA/AFSCME contract - Sick Leave Notification and pattern abuse.

The Grievant's prior disciplinary history includes the following: 1) On April 26, 1990 - a 10 day suspension, 2) On December 20, 1990 - a 3 day suspension. We are looking at the

level of discipline that the Employer imposed. We feel that the removal is not commensurate with the offense. In the OCSEA/AFSCME agreement, under Article 9 it states, "that the employer and the union recognize the value of counseling and assistance programs to those employees who have personal problems which interfere with their job duties."

Discussion

The sick leave policy of the Ohio Veterans Home is consistent with the Contract Article 29.01 and 29.04 (see Joint Exhibit 5). The evidence showed that Employer followed the procedure outlined in § 29.04 III. The Grievant was counseled and appropriately offered EAP pursuant to § 29.04 III(C). The evidence also indicated a use of progressive discipline.

Apparently, the Grievant's long pattern of abuse of sick leave had been tolerated by the Employer for a long time and was relied upon by the employee. However, the evidence showed that the Employer clearly and fairly warned the employee that the rules would now be enforced and that failure to comply would result in discipline.

The Employer went the second mile by arranging and paying for a physical examination (see Employer's Exhibit 2). That examination indicated the employee had no legitimate excuse for missing work. Subsequently, the employee was counseled and offered EAP. The employee declined EAP. In the face of this

situation, the employee failed to call off properly 5 times in a 7 day period and was absent as well.

Removal is just, commensurate, and progressive.

Award

Grievance is denied.

May 9, 1991

Date

Rhonda Rivera
Arbitrator