In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union

and

Industrial Commission of Ohio
(Office of Collective
Bargaining)

Employer.

Grievance No. 17-00-(07-06-92)
34-01-09
Grievant Dorothy Ward

Hearing Date: October 29, 1992

Award Date: November 30, 1992

Arbitrator: R. Rivera

For the Union: Steven W. Lieber

For the Employer: Paul Kirschner
Georgia Brokaw

Present at the Hearing in addition to the Grievant and Advocates were Ev Janish, OSCEA Steward (witness), Sue Newell, Assistant Manager, Human Resources (witness), Verlena McKissic, Word Processing Supervisor (witness), and Janet Van Buren, Secretary to Commissioner (witness).

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. All witnesses were sworn.

Joint Exhibits

1. Contract

2. Industrial Commission of Ohio Policy and Procedure Memo No. A-4 and Disciplinary Guidelines - dated July 1, 1989

3. Policy and Procedure Memo No. E-5 - Disability Leave, dated March 1, 1992

4. Policy and Procedure Memo No. E-1 - Sick Leave, dated March 1, 1992

5. Discipline Trail

   a. May 11, 1992 -- Letter to Dorothy Ward from Jan Van Buren
   b. May 15, 1992 -- Letter of notice to Dorothy Ward from Jan Van Buren
   c. May 15, 1992 -- Addendum to above (#2) from Sue Newell
   d. May 20, 1992 -- Agreement to re-schedule Pre-Disciplinary meeting (to Joe Ealy from Sue Newell)
   e. June 4, 1992 -- Memo of pre-disciplinary meeting
   f. June 4, 1992 -- Resolution of Removal of Dorothy Ward by Ohio Industrial Commission
   g. June 5, 1992 -- Notice of removal (to Dorothy Ward from Donald M. Colasurd)

6. Prior Disciplines

   a. 1-Day Suspension -- March 15, 1991
   b. Oral Reprimand -- June 24, 1991
   c. Written Reprimand -- December 12, 1991
   d. Oral Reprimand -- March 2, 1992
   e. Written Reprimand -- March 4, 1992

7. Grievance Trail

   a. Grievance -- June 25, 1992
   b. Agreement to extend time limits for Step 3 grievance meeting (Ev Janish to Sue Newell)
   c. Same (Sue Newell to Ev Janish)
   d. Step 3 response to grievance from Sue Newell -- August 24, 1992
   e. Arb. request -- August 24, 1992

8. Physician's Statements

   a. May 21, 1992
   b. June 12, 1991

9. Grievant's Evaluations

Union Exhibits

1. Record of Grievant's Leave Usage -- January 13, 1990 through May 16, 1992

Employer's Exhibit

1. Grievant's Disability Documents for 1987

Relevant Contract Sections

§ 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. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02.

§ 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.

§ 24.04 - Pre-Discipline

An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. Absent any extenuating circumstances, failure to appear at the meeting will result in a waiver of the right to a meeting. An employee who is charged, or his/her representative, may make a written request for a continuance of up to 48 hours. Such continuance shall not be unreasonably denied. A continuance may be longer than 48 hours if mutually agreed to by the parties. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee. The Employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the

employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges.

§ 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting. At the discretion of the Employer, the forty-five (45) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. The OCSEA Chapter President shall notify the agency head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment.

§ 24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

The retention period may be extended by a period equal to employee leaves of fourteen (14) consecutive days or longer, except for approved periods of vacation leave.

ARTICLE 35A -- DISABILITY BENEFITS
§ 35A.01 -- Eligibility

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, except that effective March 1, 1992:

A. The waiting period for disability benefits shall be twenty-eight (28) calendar days; and

B. Part-time or fixed-term regular and irregular employees who have worked 1500 or more hours within the 12 calendar months preceding disability shall be entitled to disability benefits based upon the average regular weekly earnings for weeks worked over that 12 month period.

Issue

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

Facts

The Grievant in this case held the position of Word Processing Specialist 2 at the time of this Grievance. She worked in the Cleveland Office of the Industrial Commission. At the time of the incident at issue, she had worked for the State for fourteen (14) years. Her prior discipline at the time of this incident consisted of

(1) a written reprimand dated March 4, 1992 for being rude to a supervisor,

(2) a verbal reprimand dated March 2, 1992 for failure to submit production sheets,

(3) a written reprimand for failure to follow proper call-in procedures over a 4 day period (dated December 12, 1991),

(4) a verbal reprimand for negative leave balances dated June 24, 1991, and

(5) a one (1) day suspension for fighting with a co-worker dated March 15, 1991.

Her evaluations from 1986 to 1991 showed a competent employee who was meeting the expectations of her employer. (Joint Exhibit 9) The sequence of events leading to the discipline began April 29, 1992 (Wednesday). On that date, the Grievant "called-off" sick. She called off on April 30, 1992 (Thursday), May 1, 1992 (Friday) and May 4, 1992 (Monday).

When the Grievant called-off on May 4, 1992, she spoke with her Supervisor, Verlena McKissic. According to Ms. McKissic when the Grievant called in on May 4, 1992, the Grievant told Ms. McKissic that she "might be going off on disability," that as a diabetic, she was having severe trouble with both her ankles, and

that she "had been seeing her doctor." Ms. McKissic told the Grievant "to keep in touch with her" (the Supervisor). Ms. McKissic testified that the Grievant did not call in on May 5. Ms. McKissic said that normally she would have contacted Human Resources on the 5th and told them of the lack of call-off; however, she did not do so this time. She gave no explanation of this failure. However, on May 6 (Thursday), Ms. McKissic testified that she spoke to Sue Newell who said she "would take care of it."

Ms. Janet Van Buren, Manager of Human Resources at the time of the incident, testified at the Arbitration Hearing. She said that the Grievant's absence and lack of daily call-in since May 5 were called to her attention on May 11 (Monday) and, as a consequence, on that day (May 11, 1992) she sent Grievant a letter. (See Joint Exhibit 5a) That letter reads as follows:

> It has been brought to my attention that you have been absent from work since noon on May 1, 1992. You called your supervisor on Monday, May 4, 1992 and told her you were going on disability leave. You have not contacted your supervisor since that time, nor have you contacted this office regarding disability forms.
>
> It is imperative that you contact this office no later than the close of business, Friday, May 15, 1992. Failure to do so may result in disciplinary action including removal.

On May 14, 1992 (Thursday), the Grievant called the Human Resources office in response to the letter. According to Ms. Newell, the Grievant said she had been sick since the 29th but had not seen a doctor. The Grievant said she was disabled. Ms.

Newell told her that without a doctor's authorization she was on unauthorized leave.

The Grievant said that when she talked with her Supervisor, Ms. McKissic, she believed that she had told Ms. McKissic that she (the Grievant) was going on disability. The Grievant said that when she received the letter of May 11th she panicked and was afraid of losing her job, so she called right away. After the phone call with Ms. Newell, the Grievant said that she made the first appointment available with her doctor. Then she called her work site to advise them. Ms. McKissic was not available, so she spoke with Eva McCaleb.

On that same day, the Human Resources department sent the Grievant a letter claiming that she, the Grievant, had "in essence . . . abandoned your job" and notifying the Grievant that they recommended that she be removed. A pre-disciplinary conference was referred to but not mentioned in the letter. (See Joint Exhibit 5b) Later that same day, a second letter was sent notifying the Grievant of the date of the pre-disciplinary meeting, to wit May 22, 1992. (See Joint Exhibit 5c) (The pre-disciplinary meeting was subsequently rescheduled for May 27, 1992.) (See Joint Exhibit 5d) On June 4, 1992, a pre-disciplinary hearing report was issued. (See Joint Exhibit 5E) The hearing officer found that on May 15, 1992 disability papers were sent to the Grievant as requested by the Grievant. The Grievant told the hearing officer that she had been unable to walk and, therefore, could not have returned to work. She (the

Grievant) also said she did not know the procedures for disability.

The hearing officer's statement contains the following charge: "Management feels that [the Grievant] abandoned her job to stay home and enjoy her earnings at the track, which was approximately $76,000." The report did not state who made this statement. Nor was any evidence described in the hearing officer's report to support this charge. The hearing officer was Ms. Van Buren. At the pre-disciplinary hearing, the Grievant submitted a doctor's statement dated May 21, 1992 stating that she had been x-rayed revealing multiple degenerative changes in her ankle and was being treated for pain in both feet. (See Joint Exhibit 8A and B) On June 5, 1992, the Grievant was removed. The removal letter stated

> The charges you have been found in violation of include neglect or duty and/or failure of good behavior based on unauthorized absence/absent without leave and/or job abandonment.
>
> Joint Exhibit 5F

The Grievant filed a Grievance with regard to her removal (see Joint Exhibit 7a) on June 25, 1992. A Step 3 was held on July 29, 1992. The Step 3 hearing officer was Ms. Sue Newell. The Step 3 report upheld the removal. In the Step 3 report the hearing officer noted the doctor's statement and added "it was interesting to note that the Grievant walked into the grievance hearing in high heel shoes. She also wore high heel shoes at her pre-disciplinary hearing, two days after her return to work."

(See Joint Exhibit 7d) The Union requested arbitration. The Arbitration Hearing was held October 29, 1992.

At the Hearing, the Grievant's Supervisor testified to the call-ins on April 29 through May 4. Ms. McKissic indicated that she did not advise the Grievant to call in every day after the 4th but rather "to keep in touch." She said she was aware that the Grievant had diabetes. The Supervisor said that since she knew that the Grievant had prior disability leaves that she "assumed" the Grievant knew how to apply. On cross examination, she said she was surprised to discover that the disability leaves had been in 1987, that she had "assumed they were only a couple of years ago."

Ms. Van Buren was asked about the statement which began "Management feels" and what element of just cause that statement satisfied. She answered "none." She admitted she had no direct knowledge of the facts and had merely "heard of it." Ms. Van Buren stated that the Grievant abandoned her job by not following the call-in procedure and by failing to file for disability.

Ms. Newell testified to routine office procedures with regard to disability leaves. She indicated that once an employee states that he/she is going on disability he/she no longer needs to call-in daily. The employee does need to be under a doctor's care and file disability papers. She said an employee would know these rules from the Commission's procedure (see Joint Exhibit 3) and the Union Contract (see Joint Exhibit 1). Moreover, she indicated, that the Grievant knew about disability because she

had applied twice in the past. Ms. Newell said the correct procedure was "to tell the Supervisor that he or she was going on disability" and then to request disability papers. At that point, she testified the employee need no longer call-in even though the Employer had not seen the doctor's statement. Ms. Newell said that when the Grievant said on May 14, 1992 that she was sick and unable to walk but not under a doctor's care that the Grievant could not be "on disability;" therefore, she was supposed to have called-in daily and thus, her leave was unauthorized, and she had abandoned her job per the rules (see Joint Exhibit 2) and was subject to removal.

The Grievant testified that she had been sick, that she believed to the best of her ability that she had told Ms. McKissic that she was taking disability, and that Ms. McKissic said that she "was very sorry" and to "keep in touch." She said the May 14th letter scared her, and she immediately contacted her employer. She said she did not abandon her job and that she really was sick all that time.

Discussion

Clearly, the Employer had cause to discipline the Grievant. She failed to call-off for 7 working days. The real question is whether removal is either progressive or commensurate. The last discipline of the Grievant was a one day suspension. Removal following a one (1) day suspension does not appear progressive. However, if the offense was so severe and serious, removal might

be commensurate to the offense regardless of the lack of progressivity. The Employer points to its disciplinary grid that the Employer claims mandates removal for job abandonment. One of the major tests of just cause is whether the rule applied is "reasonably related to efficient and safe operations" and whether the application is "just" under the specific circumstances (i.e., was penalty reasonably related to the seriousness of the offense and the employee's past record). (See Grievance Guide 7th ed. BNA (1992 at p. 3).) As part of just cause, any investigation must be fair as well.

A number of issues persuade this Arbitrator that removal in this case is not progressive, not commensurate, nor fairly applied.

Two factors raise serious questions about the fairness of the investigation. The remark in the pre-disciplinary report about the Grievant taking off time to spend her track winnings was entirely gratuitous, based on no evidence before the hearing officer, and called into question the fairness of that hearing officer. The remarks in the Step 3 report about the high heels of the Grievant were again gratuitous and were not tied to the evidence. If the Step 3 officer thought that the wearing of high heels in some way called into question the Grievant's actual illness, she could have asked the Grievant or asked for medical testimony. For all the officer knew those shoes might have been fitted with orthotics or may be the Grievant was faking. The point is the Step 3 hearing officer formed personal conclusions

without gathering evidence or giving the Grievant a chance to rebut those internally held conclusions.

Secondly, the removal was not progressive where the most recent discipline had been a one (1) day suspension. The only way to overcome this clear cut lack of progressivity is show the behavior at issue was so severe as to warrant removal in and of itself.

The Employer's rules state that 3 days leave without authorization is job abandonment. Unless the individual situation is examined, a removal after 3 days unauthorized leave without more is simply unreasonable -- an arbitrary cut off time without evidence of the employee's intention. The ultimate judge of work rule reasonableness is the Arbitrator.

In the application of this rule to this Grievant, a number of anomalies exist. First, the Employer claims that the Grievant did not tell her Supervisor that she was going on disability rather that the Grievant only said "she might be going on disability." (The Employer admitted that if the Grievant said she was going on disability that the Supervisor should have told her (the Grievant) to call Human Resources and get the proper forms.) However, if we look at Joint Exhibit 5b -- the Employer's letter to the Grievant that letter says "On May 4, 1992 you called your supervisor and told her that you were going on disability leave." The Employer's document contradicts the testimony of its witnesses.

The Employer said that once an employee states that they are going on disability, they do not have to call in. Arguably, the Grievant was within the correct procedures according to this testimony.

The Employer said that employees should know the correct way to apply for disability from its written procedures (Joint Exhibit 3) and the Contract. The Arbitrator has carefully read the Memo on Disability Leave. That memo does say that forms are available from Human Resources (on bottom of page 2) but nowhere is there a step-by-step procedure nor are any "warnings" given about the various idiosyncracies testified to by Ms. Newell and Ms. Van Buren. The Contract (JOint Exhibit 1) at 35A.01 does not describe a procedure nor explain the relationship to call-ins. Ms. McKissic and Ms. Newell and Ms. Van Buren all alluded to the fact that the Grievant must know of disability procedures because she had applied "before." "Before" turned out to be 5 years earlier.

In choosing "removal," the Employer failed to consider that the employee was a competent employee (see Evaluations, Joint Exhibit 9) and a long term employee (14 years).

Lest the Arbitrator be misunderstood, the Arbitrator does not condone the behavior of the Grievant. As a long term employee who had been previously disciplined for failure to call-in, she knew the emphasis that the Employer put on call-ins. Scheduling work requires employee communications. As a long term employee, the Grievant knew that some sort of documents were

required. (In fact, she requested them on the 15th and received them.) As a long term employee, she knew that the Employer could expect her to seek medical authorization for long absences.

The Arbitrator finds that the employee knowingly violated call-in rules and sick policy but that the violations did not rise to the level of job abandonment. Once the employee was apprised of her Employer's concern, she responded immediately. No evidence has been adduced to show that the Grievant was not sick. A strong inference of unfair assumptions during the investigation was shown.

Award

The Grievance is upheld in part and denied in part. The removal is set aside and a twenty (20) day suspension is imposed. The Grievant is to be restored to her job with full back pay, benefits, and seniority as of the 21st day after the overturned removal. The Arbitrator imposes the following rule upon the Grievant. For the next two years, any absence that runs longer than 2 days shall require a written doctor's certificate. This requirement is similar to the permissible requirement found in the Contract at § 29.04III (p. 68).

November 30, 1992
Date

Rhonda A. Rivera
Arbitrator