IN THE MATTER OF ARBITRATION BETWEEN STATE OF OHIO NORTHWEST OHIO DEVELOPMENT CENTER -and- OCSEA/AFSCME,LOCAL 11	Grievance Case No. 24-10(11-12-91)340-01-04 Robin Methena Discharge

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

Representing the State: Edward Ostrowski,Esq.

Representing The Union: John Hall

The Union brought this matter to arbitration challenging as without just cause the October 21,1991 decision of Northwest Ohio Development Center (NODC) terminating the Grievant Robin Methena. The Hearings in this case were held November 4,1992,and January 21,1993,in The Office of Collective Bargaining,Columbus Ohio. Both parties were represented. They had a full and fair opportunity to present evidence and testimony in support of their case and to cross-examine that presented by the other party. At the conclusion of the hearing,the parties presented closing arguments in support of their respective positions.

ISSUE

The parties stipulated that the issue to be decided herein is:

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

BACKGROUND

The parties entered other stipulations,which are reflective of the record in this hearing. Those stipulations include procedural and factual matters as follows:

The discipline is free of procedural flaw.

The grievance is properly before the Arbitrator.

The grievant was hired 2-26-90 into a part time direct care position at the Northwest Ohio Development Center.

The grievant was discharged from the same position effective 11-2-91.

The grievant worked an approximate total of 1905 hours from her date of hire to September 24,1991,an average of 22.2 hours per week.

The grievant received a written reprimand dated 7-9-90 for client neglect,a verbal reprimand dated 9-14-90 for tardiness and bad judgement,a one day suspension imposed 3-18-91 for refusal to work mandatory overtime,and a two day suspension imposed 10-2-91 for creating a disturbance.

The grievant's prior discipline has not been grieved.

The record reflects that ,during the times herein relevant,the grievant held the position of Therapeutic Program Worker at the Northwest Ohio Development Center(NODC). That facility is a half-way house from institutional life,a group home for approximately 170 residents with 200 employees working three shifts over a 24 hour day,seven day a weeks work schedule. The grievant was notified in writing October 21,1991,that effective November 2 she was terminated for "Neglect of duty (No Call/No Show)".(JX#2) The specific grounds for the termination were stated therein as:

> "On or about 6/9,14,15,,16/91 and 8/20,21,22,23,26/91 you failed to call off or show up for work."

The record shows that the Grievant filed a Request For Leave form, with a doctor's slip, on April 4,1991, for the period March 29 to April 16, because of an "injury to [right] rib cage, stress/anxiety-work related," which was approved.(JX#3A1) She was notified in writing April 30,1991, of disciplinary charges pertaining to an alleged March 29 incident involving "Failure of Good Behavior (Creating a Disturbance) and/or Neglect of Duty and/or Making False Statements".(JX#7A) A conference on that matter was scheduled for May 9. That conference was rescheduled to June 5 at the Grievant's request because she was off sick.(JX#7b,7d) The disciplinary matter discussed at the conference is not a subject of this arbitration. It is merely mentioned as part of the overall factual background of this case, which involves charges against the Grievant for failing to call the NODC as required.

After returning from sick leave, the Grievant worked her scheduled days until May 6, when these days were changed to Friday, Saturday, and Sunday at the Grievant's request. That change was made pursuant to an agreement with Administrative Assistant Victoria Rios, by which the Grievant agreed to go back to her previous schedule if she called off more than twice.((JX#6) On May 8, the Grievant's Sister called in requesting sick leave for the Grievant until June 8, because she was changing medication and was supposed to rest during the transition.(JX#4A1) On May 17, the Grievant submitted a "Request for Leave" form for the period May 8 to June 3, with note from Dr. Barber dated May 8, excusing her from work for that period "because of problems with medication and her medical condition".(JX#3B1,2) That leave was approved, noting the doctor's visit occurred on May 8.

Thereafter, the Grievant submitted an undated "Request for Leave" form seeking sick leave and/or leave without pay for the period June 4 through July 31 for a non-work related illness or injury, which is stamped received by the NODC on June 19.(JX#3C1) That request indicates that because of "no call/no show", on June 9,14,15, and 16, it was not approved by Victoria Rios, and Dan Housepian, then Assistant Superintendent in Charge of Program and Medical Services (who later became Acting Superintendent, July 12 until November of 1991). Attached to the Request for Leave were two notes from Dr. Barber.(JX#3C3,2) The one dated May 29, states that, because the Grievant is still her anticonvulsant medication, he recommends that she remain off work until that transition is

complete. The other note is dated June 19, and recommends that the Grievant remain off work "an additional 6 weeks"to stabilize her "seizure condition".

Ms. Rios testified that employees are instructed during their orientation about the attendance rules. The record shows that the Grievant received such information(JX#8A). According to Ms. Rios, those rules require employees who are off on extended leave to have documentation supporting such leave and to submit the request for leave within two weeks of the first day of that leave. Ms. Rios stated that, under those rules: (1) employees still must call off each day they are off during the two week period to inform management how long they will be off; and (2) a doctor's slip for leave does not absolve employees of that initial duty to call off.

The record contains pertinent portions of those attendance rules from the employee handbook.(JX#8A,and UNION Ex.#1) The handbook provides, in relevant part:

> A call off to the designated supervisor, according to the department procedure, and request for leave papers MUST be submitted to the designated supervisor for any absence from scheduled work, no matter what the reason. In cases of illness or emergency, lasting less than 2 weeks, these leave papers must be submitted within 24 hours after your return to work. Failure to do so will result in disapproval of your absence (AWOL), and disciplinary action, including removal. During extended absences, a new call off must be made whenever the previous leave expires, or you will be in no call/no show status.
>
> In order for the [NODC] to provide the best possible habitation for the residents, regular attendance and punctuality are essential requirements of your employment.... Therefore, attendance violations may result in appropriate corrective action....
>
> You are expected to request permission from your supervisor to be off duty, regardless of the reason, as

> far in advance as possible.... Request for Leave forms... are available from your supervisor. If your request is not made in accordance with NODC policies and procedures, your request will not be approved.... Absence from duty without approval will result in loss of pay status and/or other corrective action, including removal. (JX 8A, emphasis in original)

Ms. Rios testified that call offs are recorded by the switchboard, as well as on "Sick/Tardy Call Sheet" (call sheet). Those records reflect that the Grievant did not call off on June 9,14,15, and 16, but did call in June 22.(See JX#4 & A1 et. seq.) The call sheet for June 22 indicates that the Grievant wanted to extend her leave to August 5, and that she was told to speak directly to Ms. Rios about the matter. Ms. Rios testified that she spoke to the Grievant a few days later.

Mr. Housepian testified that he met with the Grievant on June 18, regarding the March 29 altercation. At the conclusion of the meeting, he stated the he asked the Grievant about her leave status, and told her of her recent no call/no show problems. According to Mr. Housepian, the Grievant said she was on a leave of absence and he told her that she had to bring in physician statements the next day or she would continue to be marked AWOL. The next day, the NODC received the Grievant's Request for Leave application with the doctor slips as previously mentioned.

Tom Dufrene, NODC Residential Services Coordinator, testified that he was at the August 5 meeting when the Grievant presented a note with Dr. Barber's name on it, dated July 1, and indicating that the Grievant "may return to full duty work on 8-5-91".(JX#3D1) Messrs. Dufrene and Housepian testified that they were concerned

with that note because it did not address any of the specific medical problems, including hepatitis, stress, and convulsions that the Grievant had been off on leave for, and the signature did not appear to be Dr. Barber's. Mr. Dufrene stated, based on these concerns, that the Grievant was not allowed to return to work and was instructed to get a medical release from Dr. Barber concerning the status of specific medical problems she recently had been treated for by her attending physician. Mr. Dufrene further stated that the Grievant was told to call in every day she was out until she could inform the NODC when she would have a doctor's appointment and get the required medical documentation. Mr. Housepian testified that the Grievant gave every indication that she would promptly get the doctor's release, so no disciplinary action was taken while she was on leave and he was awaiting the release.

There are call sheets in the record which show that the Grievant complied with the instructions on consecutive days from August 6 to August 19.(JX#4d through JX#5d13) Among other things, those sheets contain an August 13 message from the Grievant that "it won't be long now", and she has one blood test, and an August 19 comment that she would have information about a doctor appointment that night. Mr. Dufrene testified that he spoke to the Grievant on August 16, at which time she said she still had six to eight weeks to wait before she could get a doctor's appointment. According to Mr. Dufrene, the Grievant asked if she could waive the call in requirement and he told her that he would check with Mr.

Housepian. When this was done, Mr. Housepain told Mr. Dufrene that he would not waive the Grievant's calling in until she produced a doctor's statement saying she had an appointment in accordance with standard procedure. Mr. Dufrene also stated that he never told the Grievant during this time that she did not have to call in.

He also testified that he called Dr. Berger's office, on August 19, and verified the six to eight weeks wait for appointments, that the Grievant did not have an appointment at that time, and that the office would provide documentation. He stated that the doctor's office informed him that the Grievant did not have a July 1 appointment with the doctor, but merely had a record check that day; her last appointment was June 19.

There are no call sheets for August 20,21,22,23, and 26 reflecting that the Grievant had called off those days. There is an August 27 call sheet whereon it is stated that the Grievant reported that she had a doctor appointment for September 23.(See JX#3e) Mr. Dufrene stated that he spoke with the Grievant on August 27, and that she told him that she was now working at a part-time job somewhere else and that it was difficult to call in. After he received verification of the doctor's appointment, Mr. Dufrene informed the Grievant she did not have to continue calling in.

According to Mr. Dufrene, he was at a September 24 meeting, involving, in part, changing the Grievant's work schedule. Also present meeting were Ms.Rios, Mr.Housepian and the Grievant, who provided a note from Dr. Berger, dated September 23, showing that

the Grievant had been ready to return to work since August 1 "as her seizures are under excellent control".(JX#3F) That note, according to Mr. Dufrene was not satisfactory because it did not address the hepatitis condition, it had a different release date than the July 1 note purportedly from Dr. Berger, and the doctor's signature on those two notes were different. For those reasons, Mr. Dufrene stated that the Grievant was placed on administrative leave with pay as long as she called in every day, which she did for purposes of this record.

On October 1, the Grievant was given written notice of charges against her for "Neglect of Duty-No Call/ No Show AWOL" for the dates in question, and of a conference to be held on October 8 regarding these charges. Mr. Dufrene testified that, at that conference, the Grievant admitted that she stopped calling in because she got tired of making the calls, she had another job she wanted to do well at, and she wanted to get on with her life. Mr. Housepian testified that, with respect to the June 9,14,15,16 no call offs a "PERSONNEL ACTION" form the Grievant presented as a defense, that she admitted to receiving the document two weeks earlier, reflecting that she was on personal leave from May 1 until July 31 .(JX#5) He said that he told the Grievant that the document does not authorize her absence, but only reflects in general the reason she was not working. Mr. Housepian stated that she did not dispute the August days, but challenged his authority to require her to call in every day. According to this witness, the Grievant said she was in orientation at another job and that it

was a nuisance to call in every day as he required.

The Union President James Floyd testified on the Grievant's behalf. He stated that the normal procedure for employees off on sick leave is that they do not have to call in on their regularly scheduled days off. Mr. Floyd also testified that, if an employee does not have a return date, that employee cannot submit a request for leave form. He acknowledged, on cross-examination, that employees are required to call in again when the previous leave they had been on expires.

The Grievant was present throughout the arbitration proceedings, but elected not to testify in her own behalf. In response to a direct question by the Arbitrator, the Grievant acknowledged that her decision not to testify was knowingly and voluntarily made by her.

POSITIONS OF THE PARTIES

The State Position:

The State contends that the discharge was for just cause, and the grievance should be denied. It stresses that this case is about the fundamental employee obligation to show up for work as scheduled or to apprise management that the employee cannot do so and to indicate when he/she expects to return to work.

The State also points out that the Grievant was a relatively new hire who had actually worked only 1900 hours, but had managed to incurr four separate disciplinary actions prior to her discharge. There is nothing in the Grievant's record, the State

thus maintains, that would constitute mitigation for termination.

According to the State, her excuses for not calling in should not be credited. It points out that she was told to call in every day, but stopped doing so, contending that the NODC did not have the "right" to make her call off. The State maintains that such behavior is contrary to established policy and cannot be tolerated in a continuous client care setting like NODC. It asserts, therefore, that discharge is the appropriate penalty for the third offense of no call, no show.

Finally, the State contends that negative inferences should be drawn from the Grievant's failure to testify. It asks, therefore, that this grievance be denied.

The Union Position:

The Union argues that the discharge was not for just cause, and contends that the Grievant should be reinstated and made whole for losses sustained. It points out that the Grievant was on approved leave from May 1 to July 31, and thus should not be charged with the no call/no show of June 9,14,15, and 16. According to the Union, the Grievant was not put on notice of those AWOL charges until August 5. It argues that the rules only require an employee to turn in the request for leave papers 24 hours after returning to work. The Union emphasizes the fact that this Grievant never returned to work and, thus, cannot be properly held responsible for failing to timely submit leave papers.

With respect to the August dates, the Union emphasizes that they involve dates after the doctor's statement said that the

Grievant could go back to work, but she was held off by Mr. Housepian's refusal to accept that statement based on a difference in signatures and a need for additional information. However, the Union points out an inconsistency in Mr. Houspian administration shince he had accepted other doctor notes with different signatures, and did not question subsequent doctor statements that the Grievant's seizures were under control and that she could return to work. The Union asserts the Grievant was led to believe that she was going back to work due to discussions regarding schedule which took place at the September 24 meeting. It points out that the Grievant was, nevertheless, placed on administrative leave.

Also according to the Union, the record does not contain a work schedule for the Grievant requiring her to work the August days in question. It argues, therefore, that this time cannot be held against her as a basis for termination. Other mitigation, the Union contends, is that the Grievant had no other choice but to take another job to help pay her medical costs since her State health and welfare benefits had lapsed. For the aforesaid reasons, the Union asks that the Grievant be reinstated and made whole.

DISCUSSION

After a careful and complete examination of the record, the Arbitrator concludes that there was just cause for the Grievant's discharge. It is well accepted in the field of Labor- Management relations that absenteeism can adversely effect the efficiency of an employer's operations. In the instant case, that is a

particularly critical consideration given the nature of the NODC's mission. Furthermore, regularity of attendance and adherence to properly established, reasonable rules of attendance is one of the fundamental components of the quid pro quo for an employee's wages, hours, and conditions of employment. It is also generally understood that, unless otherwise restricted by law or by the collective bargaining agreement, employers have the authority to control absenteeism, first, through the promulgation of reasonable attendance rules, and second, through discipline and discharge in accordance with just cause principles.

There is no contention that the attendance rules herein relied upon by the employer regarding the dates of June 9,14,15, and 16 are unreasonable. Among other things, those rules require that an employee call off to the employee's designated supervisor in advance of an absence, that "a new call off must be made whenever the previous leave expires, or you will be in no call/no show status", and that "absence from duty without approval will result in loss of pay status and/or other corrective action, including removal." The Request For Leave form which covers those dates is undated, but could not have been submitted by the Grievant until sometime after June 16, as evidenced by the fact that it was not received by the NODC until June 19. That leave request clearly states that it was not approved by NODC officials Rios and Housepian because the Grievant had not previously called off on the four June dates in question.(see JX#3C1)

Regarding those dates, the Grievant does not deny that she did

not call off on what were her regularly scheduled work days. Her argument that she was on approved leave during that time is not persuasive, based upon the rules quoted in the previous paragraph. Nor is the Grievant's case helped by the State "Personnel Action" report indicating that she was on a leave status during that period. The Arbitrator reached this conclusion in the light of the uncontradicted testimony of Mr. Housepian that the report was not an approval of leave document for purposes of compliance with the attendance rules.

Additionally, the fact that the Grievant, subsequent to those four June dates, submitted a Request for Leave form containing doctor statements covering that period does not excuse her from call off responsibilities for those particular days. To rule otherwise would negate the generally understood reason for the call off rule, which is for the employee to timely inform management of an his/her inability to report to work so that a decision can be made if and how to cover for the absent employee. In the instant case, the Arbitrator found nothing unreasonable or contrary to just cause principles in the fact that the Grievant was disciplined for for failing to call off; especially since she had been provided adequate notice of the rule and of the consequences for abrogation as part of her hiring orientation and otherwise.

Nevertheless, in determining the appropriateness of the discipline, the Arbitrator must consider the totality of circumstances involved in this case, including those charges involving the Grievant's failure to call off for five days in

August. The second charges against the Grievant regarding call in contain the dates of August 20,21,22,23, and 26. Those dates were part of the period during which she had been directly instructed by authorized NODC officials to call in to keep management apprised of her efforts to obtain from her doctor specific information about her recovery from such ailments as stress, hepatitis, medication change problems. That was not an unreasonable instruction given the seriousness of the Grievant's medical problems, the possible repercussions they could have at the NODC if not corrected, and the vagueness of the note purportedly signed by Dr. Barber on June 1, in effect predicting an ability to return to work in five weeks without further explanation or examination. That concern, coupled with the clearly observable fact that the signature of Dr. Barber on the note is markedly different from his signature on other notes makes the reaction of Mr. Housepain not only understandable, but also reasonable under the circumstances.

Moreover, the Grievant clearly understood that instruction to call in and implemented it on a daily basis for an extended time prior to the dates in question. Although the Union attempted, albeit unsuccessfully, argue to the contrary, the call in was an activity which was not related to her work schedule, but rather was tied to the Grievant's obtaining the necessary information from her doctor before she could be considered medically cleared and able to return to work.

That the Grievant took it upon herself to stop calling in on the days in question, she did so at her own risk. In this regard,

the testimony of Messrs. Dufrene and Housepian that the Grievant acknowledged that she was more concerned with her other, newly obtained job than with fulfilling her NODC instructions is unrebutted and supports a negative inference regarding the Grievant's case. Although the Union vigorously and ably argued her case, the fact that the Grievant voluntarily arrived at the decision not to testify at the arbitration hearing makes it difficult, if not impossible, to discredit the State's witnesses or to credit unsubstantiated assertions made on her behalf by the Union in its attempt to provide an affirmative defense.

Thus, the State has clearly established that the Grievant engaged in the misconduct as charged. Such misconduct is not minor or insignificant, but rather is recognized under the attendance rules and under general principles of just cause, as conduct for which discipline up to and including discharge can be appropriate depending upon the circumstances of a case. In this proceeding, the two attendance related infractions coupled with the Grievant's overall disciplinary record (which includes earlier attendance as well as other, unrelated infractions) during her short employment history at NODC justify sustaining the State's decision to discharge the Grievant. There is insufficient evidence of mitigating circumstances to warrant modification of the termination decision.

AWARD

The grievance is denied.

Dated: February 13,1993

Mollie H. Bowers

Mollie H. Bowers,
Arbitrator