#863

ARBITRATION

In the Matter of the Arbitration

Between	:	Grievance No. 27-25-(9/21/92)-378-06-10
STATE COUNCIL OF PROFESSIONAL EDUCATORS/OHIO EDUCATION ASSOCIATION	:	Grievance of Mary Lou Kennedy Southern Ohio Correctional Facility (SOCF)
And The	:	
STATE OF OHIO	:	

The hearing in this matter took place on February 10. 1993 in Columbus, Ohio.

Appearances:

For the Union:
Henry L. Stevens, SCOPE/OEA
James M. Bowling, SCOPE/OEA
Mary Lou Kennedy, Grievant

For the Employer:
Renee Coil, Advocate
Lou Kitchen, Advocate
Victor Crum, Labor Relations officer
Dave Colley, School Administrator

I. INTRODUCTION

The State of Ohio ("Employer") and State Council of Professional Educators ("OEA/NEA") ("SCOPE") or ("Union") are parties to a Collective Bargaining Agreement effective July 1, 1992 and which continues until June 30, 1994. ARTICLE 5 of the Collective Bargaining Agreement contains a multi-step grievance procedure and ARTICLE 6 sets forth the parameters of binding arbitration in the event a dispute is not resolved through the grievance procedure. The expenses of arbitration are to be shared equally between the parties and Section 6.05 provides that the Arbitrator may only consider disputes involving the interpretation, application or alleged violations of provisions of this agreement. The Arbitrator shall have no power to add to, subtract from or modify any of the terms of this agreement; nor shall the Arbitrator impose on either party a limitation or obligation not specifically required by the express language of the agreement. The parties have stipulated that all procedural matters leading to arbitration have been complied with and that this grievance is properly before this Arbitrator for a binding decision.

The Grievant, Mary Lou Kennedy, filed the subject grievance on September 18, 1992 after receiving a ten day suspension without pay for allegedly being excessively absent in violation of the work rules and policies promulgated by the Employer.

II. ISSUE

The issue for resolution by this Arbitrator is whether or not the discipline issue to the Grievant was for just cause under the Collective Bargaining Agreement. If the grievance is sustained, the Arbitrator shall issue the appropriate make whole remedy.

III. FACTS

The following facts were ascertained from the exhibits and testimony submitted at the hearing. The Grievant is employed as an elementary education teacher at the Southern Ohio Correctional Facility. The employee performance reviews issued in 1991 and 1992 established that the Grievant is a good worker and performs her job according to the evaluation criteria except for her attendance. In 1991 her written evaluation notes that the Grievant has had problems with attendance in the past year and "needs to improve on this matter drastically." In 1992 the evaluation form states that the attendance problems still exists, that disciplinary action has been issued but that the quantity of the Grievant's work is "very good when she's here." In July and September of 1992 the Grievant was notified by her supervisors that she used an excessive amount of sick leave time since December 15, 1991. On March 12, 1991 the Grievant received a written reprimand for excessive absenteeism for missing twenty (20) days of work from August 1, 1990 through January 30, 1991. A three-day suspension was issued to the Grievant on May 2, 1991 for excessive absenteeism. The language of the suspension states as follows:

> Since March 12, 1991, you have missed 5½ days (44 hours). You requested vacation from March

> 25, 1991 through April 1, 1991 (a total of 48 hours). However, you only had 28 hours vacation time accrued. Therefore, you are on unauthorized leave for 2½ days (20 hours). Then you called off sick April 1-3, 1991, and requested to use sick leave for these days (24 hours). However, you only had a total of 12 hours accrued sick leave and therefore were on unauthorized leave one and one-half days (12 hours). These are violations of Rule 8 and 3K of the Standards of Employee Conduct.

The Grievant further received a five day suspension on September 10, 1991 for excessive absenteeism. The Grievant missed seven days from work since May 30, 1991 and several of the days were before or after weekends. The Grievant accepted the above reprimand and suspensions without filing a grievance.

The Employer, on December 6, 1987, issued Departmental Sick Leave and Tardiness policies to all employees. Sick leave is defined as any absence granted for medical reasons. The unauthorized use of sick leave occurs when employees fail to notify their supervisor of any medical absence, fail to complete the sick leave form, fail to provide any physician's verification when required by the Employer and/or providing fraudulent physician verification. When available sick leave time is exhausted employees may request to use other forms of accrued leave such as compensatory time, vacation or personal leave time, provided such request is granted by the employee's supervisor. Violation of the sick leave policy will result in various forms of progressive discipline including reprimands, suspensions and termination. The Grievant acknowledged receiving the departmental sick leave policy on January 15, 1988.

The Employer issued written standards of employee conduct which sets forth ranges of discipline and penalties for various violations of work rules. These standards became effective on June 17, 1990 and the Grievant acknowledged receiving her copy on June 1, 1990. Regarding attendance, the policy states as follows on page 6:

> Due to the nature of the mission of the Department of Rehabilitation and Correction, attendance is of a vital concern. The abuse or misuse of leave can result in exceeding costs to the employer as overtime may be expended to cover positions for absent personnel. Several violations are listed in the Standards of Employee Conduct to deal with the various elements of attendance violations. However, these individual violations are not mutually exclusive, and progressive discipline need not be measured in terms of using the different violation in pure progression. The proximity and repetitive nature of the violations can be cause to aggravate the penalty.

The range of penalties for the offense of excessive absenteeism is as follows: An oral reprimand or a written reprimand for the first offense, a 1 to 3 day suspension for the second offense, a 3 to 5 day suspension for the third offense, a 5 to 10 day suspension for the fourth offense, and removal from service for the fifth offense.

The Grievant was issued a ten day suspension for missing seventeen days of work between September 4, 1991 through July 24, 1992. The seventeen days breaks down as follows: The Grievant missed an entire day's work on November 18, 1991 and December 2, 1991 because she attended a doctor's appointment. She missed one hour on December 16, 1991 for a doctor's appointment. She missed

the entire day of May 22, 1992 because of foot surgery, the entire day of June 15, 1992 because of a doctor's appointment, the entire day of July 19, 1992 because of foot surgery and the entire day of July 29, 1992 because of a doctor's appointment. She received an unapproved leave of absence for the entire days of July 10, 1992 and July 13, 1992 because of car trouble. She missed the entire day of July 14, 1992 because of a doctor's appointment and she was off from July 15, 1992 through July 24, 1992 because of an acute back problem. The Grievant had obtained a physician's verification statement for each of the above days except for the days related to car trouble.

IV. POSITION OF THE UNION

The Union argues that there is no just cause for the issuance of a ten day suspension to the Grievant for the following reasons.

The Grievant was never given any explanation of the term "excessive absenteeism." There are no definitions provided by the Employer in the Collective Bargaining Agreement or within the Employer's rules and policies. No weight should be given to the Departmental Sick Leave and Tardiness policies issued by the Employer on December 6, 1987, notwithstanding that the Grievant acknowledged receiving the policies on January 15, 1988. The Union argues that the exhibit was altered for the purposes of this arbitration and that the document is incomplete and undated. The term "excessive absenteeism" is not discussed within the policies.

The Employer is not being consistent with respect to its discipline for excessive absenteeism. The Grievant was not told

that her physician statements would not be accepted or that she would be disciplined for excessive absenteeism if she provided physician statements.

Section 26.12 of ARTICLE 26 of the Collective Bargaining Agreement states that the Employer retains the right to establish a fair and reasonable absence control policy. Insofar as this contract is concerned, the Employer has never established an absence control policy. The Grievant was entitled to receive sick leave time because her absences should have been excused.

The Employer did not conduct a reasonable investigation to determine whether or not there is any justification for issuing the Grievant a ten day suspension. An investigatory interview was conducted by the School Administrator pursuant to Section 13.02 of the contract; however, no Union representative attended that meeting. Section 13.03 requires that the Employer present all documentary evidence to be used against the Employee at that conference and this was not done.

Furthermore, the School Administrator who conducted the investigation was the same person who brought the charge against the Grievant. Accordingly, a fair and objective investigation could not be forthcoming.

There is no question that the Grievant was entitled to use her sick leave because she had established that she was injured or ill under the terms of the Collective Bargaining Agreement. Sick leave usage is to be measured from December 1st through November 30th of each year, but in this case the Grievant was disciplined after a

review of her absences during a time period which extended from 1991 through 1992. If the Employer would have adhered to the Sick Leave Policy there should only be one discipline from December 1, 1990 through November 30, 1991. Instead, she was progressively disciplined within that same time period.

The Grievant's absences were legitimate. She was ill and injured. She was further entitled to personal leave days for emergencies and unusual concerns. Therefore, she should have been granted a personal leave for the days in which she had automobile trouble.

The Grievant was further subject to disparate treatment. Several employees at the Southern Ohio Correctional facility have been absent for lengthy periods of time and have not been disciplined. Mr. Bowling testified that he was in the hospital for fourteen days and recuperating for two more days. He received no discipline. Mr. Giles and Mr. Aeh were absent for lengthy periods and received no discipline. The same considerations were not given to the Grievant.

Finally, the discipline was too severe given the circumstances. The Grievant was given a letter of reprimand for being absent thirty-five (35) days over a twelve month time period. The discipline for the subject Grievant was a ten (10) day suspension for being absent only seven (7) days over a ten month time period. The purpose of progressive discipline is to provide an opportunity for an employee to correct their behavior and to improve their performance. The Grievant was in fact improving her attendance.

The issuance of the maximum penalty of a ten (10) day suspension for this offense was unreasonable and too severe under the circumstances.

IV. POSITION OF THE EMPLOYER

The issuance of a ten (10) day suspension to the Grievant for excessive absenteeism was justified under the circumstances. Excessive absenteeism is the State's most serious personnel problem. Unexpected absences among the work force causes operating expenses to increase. When work schedules are disrupted productivity is affected and the problem imposes additional supervisory and co-worker responsibilities. The Grievant is a teacher who is responsible to assist with the rehabilitation of inmates. It is important that inmates attend classes in order to become educated. On many occasions when the Grievant was absent her students remained confined and were not required to attend classes.

When the Grievant's circumstances are analyzed, it is apparent that she was taking advantage of the personnel policies. The Grievant was absent on many occasions for the entire day merely to attend an office visit with her physician. The Grievant should have arranged her appointment so that she would only be absent for a portion of the day instead of the entire day or she should have attempted to schedule her appointments for non-working days. The Grievant, however, would generally call in for an absence on the day of her doctor's appointment without providing any advance notice to her supervisor. The Grievant was warned, progressively disciplined and still continued to be excessively absent from work.

The issue is not whether the Grievant was ill or injured. Even if she had good reason to be absent, the repeated intermittent absences were disruptive and had an adverse effect upon the Grievant's job performance. During the time the Grievant was absent, the inmates either received no instruction or received instruction from teacher's aides and not teachers.

The procedural issues raised by the Union are superficial. The Grievant was property notified of the charges against her, she was given an opportunity to be heard and she otherwise received due process. Insofar as the claim of disparate treatment is concerned, the other employees who were absent and not disciplined did not have an attendance record comparable to that of the Grievant.

V. DISCUSSION

The Union's claims of procedural irregularities and the lack of due process are without merit. The Chief Steward of the Union received notice of the scheduled Pre-Disciplinary Conference. The list of documents described by the Employer in the Pre-Disciplinary Conference may have been incomplete because the Departmental Sick Leave and Tardiness Policies were not included within the described list; nevertheless, the Grievant acknowledged receiving that document on January 15, 1988, and it cannot be found that the Grievant was prejudiced in any respect. Both the Grievant and the Union were aware of the policies and rules upon which the Employer was relying for the issuance of the discipline to the Grievant. The Employer may not have specifically articulated an absence control policy; however, the concept of excessive absenteeism is a

term which is understandable in the work place and it cannot be said that the Grievant was not aware of what was expected of her with respect to attendance. The Grievant received progressive discipline. She was warned and counseled. She must have understood that the consequences of continued and repeated absences would result in further discipline by way of suspensions. It is important to note that the Grievant did not file a grievance after she received a written reprimand. a three-day suspension and a five-day suspension.

Looking at the substance of this case, there are various types of attendance problems and absenteeism which require discipline from a management perspective. Unexcused absences and a pattern abuse cannot be tolerated in the work place. The minimum requirement expected from employees is to appear for work on time. Even excused absences may be excessive under certain circumstances. Long periods of absences for illness and injury are relatively easy to manage and control in the work place. Substitute employees may be obtained with little disruption and inefficiency. Consequently, employers rarely discipline employees for being absent over extended continuous periods of time. Eventually, however, the absences could become so excessive as to render the employee valueless to the employer and some remedial action would have to be taken, such as the replacement of an employee.

The type of absences by the Grievant in this case are the most egregious from the management point of view. Supervisors were required to adjust working schedules on the spur of the moment. If

schedules could not be adjusted the student inmates would simply receive no instruction. Employers cannot be expected to tolerate this type of disruption and inefficiency in the work place. The Grievant and other employees have a responsibility to minimize this disruption whenever possible by providing advance notice and by otherwise adjusting their schedules to avoid even necessary absences. Accordingly, the Grievant was properly disciplined for her excessive absences up to the point of the ten-day suspension which gave rise to this grievance, notwithstanding that her absences may have been otherwise excused for legitimate reasons. The Grievant had a duty to be a reliable employee and she did not comply with her duties and responsibilities.

There is no evidence of disparate treatment. The other employees referred to by the Union did not have a poor attendance record and prior discipline experienced by the Grievant.

The remaining issue for consideration is the severity of the discipline which was issued to the Grievant under the circumstances. There is evidence that the Grievant responded favorably to the progressive discipline which was issued to her. She was absent thirty-five (35) days from the period of January 18, 1990 through January 30, 1991. She was absent twenty (20) days within the last six months of that period. She was issued a written reprimand. Thereafter, she was issued a three (3) day suspension for missing five and one-half days in a period from March 12, 1991 through May 21, 1991. In addition, she had unauthorized leave days for exceeding her vacation time and her sick leave time. She received

a five day suspension for missing seven (7) days from the period May 30, 1991 through September 10, 1991, a period of less than three and one-half months.

The 10-day suspension, however, which is the subject of this grievance is for seventeen (17) days of absence in a period from September 4, 1991 through July 24, 1992, a period of approximately eleven (11) months. However, it is undisputed that nine (9) of those days were continuous from the period of July 14th through July 24th and resulted from a back injury suffered by the Grievant. If those days are considered as one occasion when viewing the Grievant's intermittent attendance problem, the Grievant would only have missed work on eight occasions during the 11-month period instead of seventeen (17) calculated by the Employer. While eight absence periods over that time may not be acceptable given the Grievant's prior record, it is not as deplorable as the Employer presents. Accordingly, the issuance of a ten-day suspension for eight absence incidents over an 11-month period is unreasonable under these circumstances. The Employer by its own admission, is concerned with the intermittent absences which were taken without notice and which were extremely disruptive to the work environment. When the absences are considered on an intermittent basis and the consecutive absences in July are treated as one absence, the Grievant demonstrates some improvement in her attendance problems. This slight improvement should have been acknowledged by the Employer under the principals set forth in the personnel policies and rules regarding corrective action and progressive discipline.

Consequently, the Grievant should not have received the most severe discipline of a ten-day suspension within the disciplinary range of five to ten days. The reasonable application of the Employer's policy in this Arbitrator's judgment would call for a five (5) day suspension at the low end of the range.

V. AWARD

The grievance is sustained in part and denied in part. The ten-day suspension is reduced to a five-day suspension and the Grievant is entitled to receive lost back pay and benefits for five days. This Arbitrator reserves jurisdiction to resolve any disputes which may arise relative to the computation of back pay and benefits as a result of the issuance of this Award.

SO ORDERED:

Date: April 9, 1993

Mitchell B. Goldberg, Arbitrator

69016.1