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IN THE MATTER OF ARBITRATION BETWEEN:	*	
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STATE OF OHIO	*	Grievance Case No.
	*	09-00921230-0039-01-14-T
DEPARTMENT OF DEVELOPMENT	*	Grievant: Dian Glover
	*	
-and-	*	
	*	
OCSEA/AFSCME, LOCAL 11	*	
	*	

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

Representing the State: Lou Kitchen

Representing The Union: Maxine S. Hicks

The Ohio Civil Service Employees Association/American Federation of State, County and Municipal Employees, Local 11 (the Union) brought this matter to arbitration challenging, as without just cause, the December 17, 1992, decision of the Department of Development (the DOD) to remove the Grievant, Dian Glover. The parties stipulated that this matter is properly before the Arbitrator.

Hearings in this case were held July 9, and August 5, 1993, at the Union's headquarters in 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 hearings, the parties presented closing arguments in support of their respective positions. The entire record, including the parties' arguments, has been carefully considered by the Arbitrator in reaching her decision.

ISSUE

The parties stipulated that the issue to be decided is: Was the Grievant removed from her position for just cause? If not, what shall the remedy be?

Relevant Contract Provisions

Article 24-Discipline

> Section 24.01 Disciplinary action shall not be imposed except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action...

Article 29- Sick Leave

> Section 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.

Employees Handbook

III:5 USE AND ABUSE OF SICK LEAVE,ALL EMPLOYEES

> ....
> Abuse of sick leave will not be tolerated. Employees who abuse sick leave may be subject to discipline up to and including removal.

Background

The parties stipulated that the Grievant was first employed by DOD on July 8, 1985, and was removed on December 17, 1992. It was further stipulated that the Grievant held the position of Administrative Assistant I in the DOD's International Trade Division at the time of her removal. The removal letter, dated December 17, signed by Mr. Donald Jakeway, the DOD's Director, stated in pertinent part: "Your termination is a result of your violation of the Sick Leave Policy as defined in the 1992-1994 OCSEA/AFSCME Agreement." On December 30, the Grievant and a Union official signed a grievance contesting the termination as without just cause asserting that the Grievant "has been harassed. This is an act of retaliation. Ms. Glover brought in documentation of her illness."

The record contains Joint Exhibits documenting the following past disciplinary actions against the Grievant:

1. October 9, 1991 - Written reprimand for comments considered "offensive, insulting and unprofessional in nature."

2. December 11, 1992- Two day suspension for "willful disobedience of a direct order by a superior..."

3. February 3, 1992- Three day suspension and a warning that "failure to comply with departmental policy will result in more severe discipline, up to and including removal" for "unauthorized absence on October 28, 29, 30, 31, 1991."

4. July 23, 1992- Written reprimand for failing "to telephone the office before 8:30 am," which is "standard operating procedure...if you will not be in the office that day."

5. November 4, 1992- Ten day suspension and warning for "unauthorized absences and excessive absenteeism." The Warning provided: "Future unauthorized absences will not be tolerated. Any additional attendance related violations of the Development Employee Handbook or AFSCME union contract will result in your termination."

There are additional Joint Exhibits in the Record documenting the following notices received by the Grievant regarding her use of sick leave:

1. October 15, 1991- Pursuant to Article 29 of the Agreement the Grievant's use of sick leave was reviewed and found to "indicate evidence of "pattern of abuse" in the following area(s): Excessive Absenteeism." The Grievant was informed that "substantiated 'pattern abuse' may result in disciplinary proceedings."

2. October 15, 1991- Physician's Verification Notice (Article 29) was issued the Grievant, which stated as follows: "Under the guidelines of the State Sick leave Policy (Article 29- AFSCME/OCSEA Agreement), the [DOD] finds it necessary to require you to provide a physician's verification for future absence due to illness or injury. In accordance with the State Sick Leave Policy, the verification shall be personally signed by the attending physician. Please have your physician include dates of treatment and dates that you were considered unable to report to work.

Your absence will be considered for approval only if the physician's verification is provided within three (3) days after returning to work. Failure to provide the physician's verification within this time frame may result in unauthorized use of sick leave, which is subject to discipline. This requirement shall be in effect until such times as you have accrued a reasonable sick leave balance."

3. August 21, 1991-The Grievant was issued a NOTIFICATION OF NEW SICK LEAVE BALANCE (ARTICLE 29) advising her that she had "used eighty (80) hours of new sick leave or other leave in lieu of sick leave." She was also informed that there would be a meeting August 28, at which time she "can share any extenuating or mitigating circumstance concerning sick leave that may cause you to continue to use sick leave."

4. February 11, 1992, the Grievant was notified by the Director of Human Resources that since December 1, 1991 she had used in excess of sixty four hours of "new sick leave or other leave in lieu of sick leave", and if she had any

extenuating or mitigating circumstances concerning her to continue to use sick leave she could so inform the Director.

5. February 21, 1992 - The Grievant was notified by the Director of Human Resources that she had used in excess of eighty (80) hours of new sick leave,or other leave in lieu of sick leave, since December 1, 1991." Another meeting was scheduled for February 27 at which the Grievant could express any extenuating or mitigating circumstances regarding her use of sick leave.

Facts

Ms. Eleanor Garcia, Commercial Assistant, testified that she supervised the Grievant in their offices on the twenty-seventh floor of the Riffe Center building from May of 1991 to October of 1991. During that period, Ms. Garcia stated the Grievant had "sporadic" attendance problems sometimes documented by a doctor's note. Ms. Garcia said those absences could occur as a pattern with the Grievant being off two days in a row sick, then the third day, she would come to work late. According to Garcia, that pattern also included the Grievant "playing" near the number of days which would require a doctor's slip. Ms. Garcia testified that she had counseled the Grievant about her leave use, and denied her leave because the Grievant had no hours available resulting in the Grievant on occasion taking leave without permission (LWOP). Ms. Garcia recalled the Grievant's absences included illnesses for sore throat; headache; sinus problems; and other absences for personal problems involving the Grievant's son and grandmother. Those absences, Ms. Garcia stated, meant she and others would have to cover the Grievant's work in addition to doing their own work.

Mr. Michael Eberly, Deputy Director of Administration at relevant times herein, testified that the Grievant had attendance problems. He said he was aware that she had had sinus and allergy problems, but believed those problems had been solved as stated in a memo to him by the Grievant, dated August 20, 1991. That memo states, in relevant part:

> "I think relief may be on the way for the sinus/allergy suffers...On Tuesday, August 20th, Tim York, Building Authority confirmed that there was NO air circulation in the office area and that the thermostat had to be recalculated...he stated that the computers in the office contributes to the dryness in the air. It appears that this slight repair to the thermostat should continue to increase a good healthy environment for all."

Mr. Eberly further stated that he has chronic sinusitis and allergy, but did not have the same problems at work the Grievant had complained about, and he does not recall any other employees' complaints regarding the office air quality. He stated that he had counseled the Grievant on several occasions for various matters including her attendance.

Mr. Kevin Milstead, Assistant Deputy Director in charge of finance and personnel for DOD's International Trade Division testified that, on January 5, 1992, he issued work rules to the office administrative staff at a meeting, where the Grievant was present. Included in those rules were the following:

Telephone-in Procedures:

> The ITD [International Trade Division] office hours are from 8:00 am to 5:00 pm. If you are unable to get to the office, I expect you to telephone me prior to 8:30 am. You must speak with me and if I am not available, Brenda Pritchard is my alternative. It does not suffice to leave a message with the receptionist. If I do not hear from you prior to 8:30 am you will be considered Absent

> Without Leave and I will have to take disciplinary action.

The record reflects that, on February 4, 1992, Mr. Milstead issued a notice clarifying the earlier procedures to include:

> If extenuating circumstances arise, you should interrupt me if I am in a meeting (unless it is with Mr. Harpley and then please see Brenda Pritchard as my back-up). If I am on the telephone, please get my attention and I will finish the call so we can discuss the matter. If neither Brenda nor myself are in the office, please make arrangements with the receptionist and leave a written explanation for me.
> ....
> Failure to comply with these policies will result in progressive disciplinary action.

Mr. Milstead testified that prior to the Grievant's removal, he had written Ms. Kathleen McNeil, Director of Human Resources, about problems with the Grievant's attendance. On February 18, 1992, he had written Ms. McNeil that he was:

> ...concerned because she is frequently not in the office and does not have sufficient sick, comp, personal, or vacation time to cover her leave requests. Although she accrues time (sick, personal and vacation) every pay period, the balances are often close to zero. Mr. Harpley and I have not approved any requests from any ITD staff for leave without pay and, therefore, we have both consistently disapproved her requests for leave without pay.
>
> Ms. Glover has worked in the ITD as of 18 December 1991.... Since the beginning of her employment with ITD, she was eligible to work 288 hours, <u>but</u> [has] been out of the office 124 hours. She averages 43% of the time out of the office and I consider this excessive absenteeism.[1]

On April 20, 1992, wrote Ms. McNeil a memo updating the Grievant's absences as of that date. He noted that, "During this

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[1]That memo included a chart identifying the dates the Grievant was not at work and the type of leave used, including vacation, personal, sick, and leave without pay.

time period Ms. Glover was eligible to work 392 hours, but has been out of the office 133.5 hours. She has averaged 34% out of the office and I consider this excessive absenteeism." He also commented in that memo about the importance of the Grievant's job and the problems caused by her absences. Those problems, Mr. Milstead testified, included a loss of productivity for the office, and employee complaints and morale problems, as a result of no one else in the office having as extensive an absentee record as the Grievant.

The record contains a November 19, 1992, memo Mr. Milstead wrote Ms. McNeil about a meeting he and McNeil had with the Grievant November 13, 1992. At this meeting, the Grievant said she had a doctor's appointment that day, and expected to be back in the office Monday, November 16. Ms. McNeil explained that she had been suspended ten days for unauthorized absences and excessive sick leave, and was not to return to work until November 24. At that meeting, according to Mr. Milstead's memo, the Grievant said she had not received her written notification of the ten day suspension, nor had she been otherwise informed of that matter by Union representatives. A copy of the suspension notice was given to the Grievant during the course of that meeting, and she signed it to acknowledge receipt.

The Milstead memo goes on to state that the Grievant said the process was a "kangaroo court and that the department was not operating in her best interests." According to the memo, Ms. McNeil told the Grievant the problems were the result of her not

coming to work, her unacceptable absences, and the hardship they caused for co-workers. At that meeting, the Grievant stated that she had sinus and "anger" problems, and that she wanted to be transferred to Human Services. Ms. McNeil responded that she would assist the Grievant in her transfer request and that the Grievant had to follow certain transfer procedures. After a discussion on that subject, the memo reflects that the Grievant "stated that she takes pride in her work and will be back to work November 24, ready to work at the maximum."

In Mr. Milstead's opinion, it was the Grievant's unauthorized absence on November 24, that was the basis for her removal. He stated that race, sex, disability was not the cause for the removal. In his opinion, failure to come to work was a non-discriminatory business reason for the discipline. On November 24, Mr. Milstead wrote Ms. McNeil a memo that reported, in pertinent part, the following:

> This morning at 8:11 am, [the Grievant] telephoned the ITD office to say that she would be out due to illness. I did not speak with her, instead she left a message with the ITD receptionist, Ms. Tammy Walker.
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> At 9:00 a.m., I telephoned [the Grievant] to inform her that by not coming to the office, this constituted an unauthorized absence. [The Grievant] responded that her doctor had not released her and that I should check my facts before making any other statements. At this time the telephone conversation ended....
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> ....
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> This was the first day the [the Grievant] was to return to work following her recent 10 day suspension for excessive absenteeism. I would like to move forward with the next step in progressive discipline.

Mr. Milstead testified that the Grievant should have understood from his memos on the call in procedure what her obligations were, but failed to comply with those procedures. He further stated that the Grievant gave a variety of reasons for her health problems including: sinus; back problems; fatigue; and her children. Mr. Milstead testified that he rated her "below expectation" for her 1992 Performance Evaluation Appraisal due in part to her absences. The Grievant appealed that rating. In an August 21, 1992, meeting on the subject between Mr. Milstead and the Grievant, Mr. Milstead reported that she:

> stated that several doctors have documented that she suffers from "Sick Building Syndrome" which effects her sinuses. No physical documentation was provided to support that fact. Dian also stated that she has many other responsibilities that other employees do not have, such as, being older, sick relatives, children, etc. "No other employee has my problems, and that sometimes I need to be elsewhere and sometimes I need to be at Development."

Ms. Millie Milam, Labor Relations and EEO Officer, testified that the Grievant violated the Ohio DOD disciplinary Guidelines rule pertaining to unauthorized absence, and that the Grievant had been notified that continued attendance problems could lead to her removal. She stated that she met with the Grievant on August 28, 1991, to discuss her sick leave usage and whether there were any extenuating or mitigating circumstances, but the Grievant provided no explanation for her behavior. According to this witness, the Grievant also did not explain or rebut the October 15, 1991, determination that she exhibited a pattern of absence abuse. Ms. Milam further testified that at a March 31, 1992, meeting with the

Grievant regarding her accumulation of 80 hours of absence, the Grievant stated she suffered from "seething" resulting from interaction with Mr. Eberly, her previous Supervisor. According to this witness, the Grievant described her relationship with Mr. Milstead as "okay," commented that the air was better, and rebuffed Ms. Milam's inquiry about any other accommodation she might need as an "inappropriate question."

Ms. Milam testified that she prepared summations of the Grievant's absences based upon information contained on the official Time and Attendance Records. Those records reflect that the Grievant was at work in 1990 approximately 80% of her scheduled work time with no work related absences cited. In 1990, the Grievant had 8 instances of sick leave totaling 85 hours, 74 hours vacation, 5 instances of personal leave totaling 33 hours, and 24 hours leave without pay for one occasion. In 1991, the Grievant worked approximately 70% of her scheduled hours with three instances of purported work related absences, but none of which had a doctor's statement associated with them. There were also 9 instances of sick leave totaling 64 hours, 9 uses of personal leave for 21 hours, and 16 instances of leave without pay for a total of 360.5 hours. In 1992, the Grievant worked approximately 40% of her scheduled work time with 9 instances of sick leave for 52.5 hours, 4 instances of personal leave for 14 hours, and 26 times off for leave without pay, totaling 1034 hours. Also in 1992, the Grievant claimed six instances of job related illness or injury, for which the Grievant provided doctor statements on five occasions. All of

those doctor statements were on the stationery of VXKu Grayson, Doctor of Osteopathy.

Ms. Milam further testified that the DOD has 50 to 55% females and 30% minorities, well above the compliance standards set by the Department of Administrative services, which are 41% and 17% respectively. According to this witness, the Grievant was routinely the first employee to receive the 64 and 80 hour use of sick leave notifications each year. Ms. Milam submitted records showing that the Grievant was denied disability leave because "CAUSAL RELATIONSHIP IS QUESTIONED". According to Milam, the Grievant was the first and only person to have raised the sick building syndrome until the time of her removal; after her removal others employees on another floor complained.

Ms. Milam stated that she hears the third step grievances and that she would have considered the Grievant's doctor statements, although she found they contained some conflicting information. According to Ms. Milam, while the DOD could have requested an impartial medical opinion of the Grievant under the Agreement, it did not do so. The conflicting information referred to by Ms. Milam was that, although the Grievant said on November 13 that she would be back to work on November 24, the December 2 written statement on the stationery of VXKu Grayson, D.O. stated, in pertinent part, that the Grievant:

> ...was totally disabled from 1/2/92 through 11/25/92, in order to verify the diagnosis made by an allergist and otolaryngologist that [the Grievant] suffers from allergies to the building in which she works. During the time off work, [the Grievant] returned to her previous state of health. She was free of the symptoms associated

> with allergic reactions, including eye irritation, coughing, sneezing, and head congestion. The stress that she was experiencing as a result of these symptoms also has diminished. After returning to work on 11/25/92, she again experienced the above stated symptoms, causing her to miss work on 11/27/92.

Dr. Grayson, D.O. did not testify at the arbitration hearing. The record does not contain any documentation from any allergist or otolaryngologist referred to in the above statement. It is also noted that the DOD's time and attendance records show that the Grievant worked a full 8 hours on October 2, contrary to the statement by Dr. Grayson.

In support of the DOD's case, the record also contains the testimony of Mr. Robert Mohr, Manager of Facilities Management. This witness testified that he has not received any complaints about office environment since the Vern Riffe Center building was occupied by DOD in 1988. Mr. Edward Eing, Maintenance Superintendent at the Riffe Center, testified as to the 85% efficient hospital quality of the air filtration system. He said only one complaint ever had been filed about the air quality of the building and that involved a different floor than at issue here. That complaint was an anonymous one in 1988. The record shows that complaint was investigated by the Industrial Commission of Ohio, Division of Safety and Hygiene, which determined in an August 24, 1989, report that the air quality did not meet or exceed safe levels set by the Occupational Safety and Health Administration standards, or those recommended by the American Conference of Governmental Industrial Hygienists, or the National Institute for Occupational Safety and Health.

Four witnesses and the Grievant testified in support of the Union's case. Ms. Marcia Kay, Administrative Assistant I in another division of DOD and Union Officer, testified that she has suffered from respiratory and sinus problems her entire life. She related that, while at home during maternity leave, she noticed that those problems were not as severe as when working. She attributed the difference to poor air circulation at the Riffe Center. Ms. Kay stated that many unidentified DOD employees have sinus problems and three of those persons, including the Grievant, had complained.

Ms. Pat Hammet testified that she worked on the twenty-eighth floor in the building from April 1990, until she was terminated in October of 1992. She stated that her sinus problems worsened at the building and that she discussed her condition with her supervisor, who also had sinus problems. She said that on occasion, building maintenance was called but no cause for the irritation was found. Ms. Tammy Walker, Secretary, Division of International Trade, testified that she did not have any problems from working in that office during the last five years, and was not aware of anyone other than the Grievant who complained of sinus problems.

Ms. Mary Anderson, Public Inquires Assistant at DOD and Chief Union Steward, testified that she has received complaints about the building since it was first occupied in 1988, which she brought to the attention of Ms. Dianne Cudgel, management's official responsible for health and safety. She identified for the record

some material from various publications about indoor air pollution and the effect it has on office workers. According to Ms. Anderson, the joint agency and Union Health and Safety Committee set up under the Agreement has not met in the last two years for unexplained reasons. This witness also testified that there were many complaints by unidentified employees when the Riffe Center first opened in 1988.

The Grievant testified that the majority of the time she was off was on her doctor's recommendation, such as when she on October 2 and November 25, 1992. At that time, according to the Grievant, her doctor wanted her to see how she reacted to not being in the building for thirty days, and so informed Mr. Milstead. She said that after a year of testing she became suspicious that her allergies were attributable to sick building syndrome[2]. It was her opinion that "the longer I was off the better I felt". She stated that she noticed the change in air quality when she first moved into the Riffe building and, when she complained, she was told that the problem would tapper off. She began working on the twenty-seventh floor at the end of 1990.

According the Grievant, her medical problems were due to the building because she did not drink or smoke and Dr. Ratliff "started pinning down her work area and the building as the cause"

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[2]No evidence was introduced on behalf of the Grievant showing that she had received any specific testing as testified to above.

of her medical problems[3]. She stated that the doctor's note dated March 12, 1992, regarding her "chronic sinusitis" was in the third step grievance package.[4] According to the Grievant, the sick building syndrome would cause her to have itchy eyes, and a dry and irritated throat by 10 a.m. each morning and resulted in a decline in her productivity, performance, and attendance. She stated that she was told by DOD officials that her doctors were not "real doctors", not competent, credible, or able to make a reliable diagnosis. After her termination, the Grievant said she contacted the Ohio Department of Health and was told that the Riffe building was on a list of buildings to be investigated the second half of 1993.

The Grievant further testified that other unidentified employees complained about allergies, however, she commented that "people were just accepting their work conditions." She acknowledged that her applications for disability have been twice denied by the State and she had been requested to provide additional information. She stated that her current interim

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[3]The only material in the record regarding Ratliff D.O. is a note stamped with his name and address stating that the Grievant had been under his care from October 9 to 11, 1991, and that she could return to work on October 15. The record shows that the Grievant was off work from October 9 through November 5, 1991.

[4]That note was on the stationery of Horizon Imaging Center, which states at that bottom of the form "Limited to Radiography only". It is next to History/Comments on that form that there is written the following "chronic sinusitis & R/O mass- upper neck". On the form is the stamped name and address of George W. Shahade, D.O.

earnings were from the Franklin County Department of Human Services, which did not include unemployment compensation.[5]

On cross examination the Grievant acknowledged that none of her doctors made any inquires to the building's management about air quality. She also admitted that she had told Ms. McNeil that she would return to work on November 24. She stated that Dr. Shahade conducted a full battery of allergy tests.[6] The Grievant stated that during the period March to October, 1992, she had other testing performed including mammogram and heart tests, but offered no evidence in support of that testimony. According to the Grievant, she started as a seamstress "recently" because of her need for money apparently after she was removed.

The DOD placed in evidence numerous documents showing that the Grievant has been running a modern African garments and accessories business since May 1990, using as its name her initials. These documents included September 1990, fliers for showing her merchandise, the August 1990, registration of her trade name DTG Collections with the State of Ohio (in which it is stated she had been using that name since May 1990), and a July 1993, newspaper article describing "her company." The Grievant denied doing her private business work during DOD working hours, saying she would respond to any calls received at work after 5 p.m.

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[5]There is no evidence in the record to support the Grievant's claim that she received disability payments from the County for environmentally caused allergies.

[6]There is no evidence in the record to support that assertion. See also footnotes 2 and 4.

Contentions of the Parties

The Union Position

The Union contends that the decision to remove the Grievant was not for just cause and that the grievance should be sustained with the Grievant reinstated and made whole with full back pay. The Union acknowledges that there "is no dispute about the absenteeism" involved. The Grievant suffered from allergy, sinus, and stress related medical problems. It maintains that those problems were caused or aggravated by "sick building syndrome" at the Riffe Center, which the Union argues constitutes a significant mitigating and extenuating circumstance. Management ignored this circumstance, in the Union's opinion. It also ignored or questioned the doctor statements documenting the resulting medical problems and absences the Grievant incurred because of the sick building syndrome. The Union argues that management, in the "guise of progressive discipline," sought solely to "punish" the Grievant.

The Union emphasizes that management did not prove that the Grievant was involved in her own private business or any fraudulent activity. That the Grievant was attempting to make money after her termination is not grounds for criticism or a factor in determining if the discipline should stand. The Union points out that it is understandable that the Grievant did not file a discrimination complaint within the DOD because the EEO Officer is Ms. Milam, the Labor Relations Officer who is involved in this removal.

The DOD's Position

The DOD contends that the removal was for just cause and that the grievance should be denied. Management argues that it tried to correct the Grievant's behavior and to make her understand the serious problem her unauthorized absences were causing, all without success. It points out that a majority of her absences were shown not to be caused by sinus or respiratory problems. The Grievant, DOD stresses, was allowed to use all the leave she had accrued, even leave without pay, to the point her conduct could not be tolerated further. The DOD asserts that she knew, or should have known, the applicable sick leave policy call in procedures and documentation requirements. It notes that "sick building syndrome" may exist in a general sense, the Union failed to show such syndrome as applicable to the Riffe Center since there was no direct casual link established as to the office air quality and the Grievant's problems.

Furthermore, the DOD contends that the Union was unable to establish that there was any other reason for the Grievant's discipline than that cited by DOD; there was no discrimination based upon race or sex. According to the DOD, "the straw that broke the camel's back" was the Grievant's not coming to work on November 24, 1992. The DOD emphasizes that there is nothing in the record that shows the Grievant received any medical treatment between March and October of 1992, to support the "30 day test period" supposedly prescribed by her physician to see if her illnesses were caused by a sick building syndrome.

Analysis

After a careful and complete examination of the record, the Arbitrator concludes that there was just cause for the discharge. It is well accepted in the field of Labor-Management relations that absenteeism can adversely effect the overall performance of an agency's operations. That is particularly true here where the Grievant's absence resulted in her work load being shifted to the other employees in her office, causing morale and related problems. It is also generally recognized that regularity of attendance and adherence to properly established reasonable rules of attendance are fundamental to the quid pro quo for the employees' employment and the wages, hours, and conditions of that employment. It is further generally understood that unless otherwise restricted by law or by the collective bargaining process, employers have the authority to control chronic absenteeism through discipline and discharge. Consequently, it is fairly well established that employers have the right to adopt unilaterally absentee control programs which do not violate the labor agreement, are reasonable by their terms and application, and provide adequate notice of their terms to employees covered.

There is no contention that the call in rule herein relied upon by the DOD is unreasonable. That rule requires an employee not coming to work as scheduled to call in and speak directly to Mr. Milstead or his designee in his absence, and that failure to do so will result in appropriate discipline. There is no dispute that the Grievant knew the terms of that rule. The record reflects that

she was present at a January 1992, meeting in which that rule was announced. In fact, the Grievant was issued a written reprimand on June 23 for failing to conform to the call in procedure. The Grievant offered no explanation of why she did not follow the proper absence call in procedure on November 24.

It is also clear that Article 29 of the Agreement authorizes the Agency to take corrective and disciplinary action, applied progressively, for unauthorized use and abuse of sick leave. There is no dispute that the Grievant's attendance record prior to this incident had been hardly praise worthy and was getting progressively worse as of the time of her removal. That is evidenced by the fact that in 1990, she worked 80% of her scheduled work hours, which dropped to 70% in 1991, and to 40% in 1992. That decline in attendance was matched by an escalation in endeavors by the DOD to notify the Grievant as to the extent of her sick leave use. The DOD tried unsuccessfully to determine from the Grievant whether there were any extenuating or mitigating circumstances to her sick leave need. The Grievant's chronic absences were also the subject of repeated and progressive discipline in an attempt to correct her behavior in this area; all to no avail. In 1992, the Grievant, in addition to the written reprimand for failure to follow proper call in procedures, was suspended three days and ten days for unauthorized absences and excessive absenteeism, as well as being warned November 4, that any additional attendance related absences would result in her termination.

The absence of November 24 and the failure to follow proper call in procedures occurred on the day the Grievant was to have returned to work following a ten day suspension for unauthorized absences and excessive absenteeism. Her conduct that day was clearly the "straw that broke the camel's back" prompting her removal. Further aggravating the situation was the fact the Grievant had earlier assured the DOD, on November 13, that she would be, in effect, ready, willing, and able to return to her work duties on November 24.

Essentially, the Grievant raises as affirmative defenses that the removal was discriminatory based upon her race and/or sex, and her absences were the result of sick building syndrome, which should be considered as a mitigating and/or extenuating circumstance. The problem with those defenses is that the record lacks sufficiently reliable evidence upon which to sustain them in the Grievant's favor.

The is no evidence that the removal was the result of any discriminatory action of the DOD against the Grievant. As previously discussed there are legitimate and well recognized reasons for an employer to remove an employee for chronic attendance related problems. The Grievant had received progressive discipline for attendance related problems, and had reached the stage of the DOD's disciplinary guidelines where removal was applicable. She had been recently warned that her next attendance related infraction would result in her removal. Therefore, the

Grievant's removal under these circumstances is consistent with the State's policy as noted in the Agreement.

Likewise, the assertion that the Grievant's absences resulting in her removal were caused by sick building syndrome is not supported by sufficiently reliable evidence. This is not a matter in which the Grievant's assertions alone are determinative. In other words, there are serious evidentiary problems associated with her statement that Dr. Ratliff said that syndrome was the cause of her medical problems. Such a statement is pure hearsay, and unreliable. Dr. Ratliff did not testify at this hearing nor was any other evidence entered to support the Grievant's assertion that Dr. Ratliff ever made a statement to that effect. The only evidence bearing Dr. Ratliff's name is a note stamped with his name on the stationery of Horizon Imaging Center, which clearly states the center is "limited to Radiography only." Based upon that limitation, it is questionable whether Dr. Ratliff was qualified to determine whether or not the Grievant's use of sick leave was directly attributable to the sick building syndrome.

Comparable problems exist regarding the Grievant's reliance on Dr. Grayson's note of December 2. Those include the fact that Dr. Grayson did not testify here and the absence of any evidence showing that she was competent to determine whether or not the Grievant's medical problems were caused by the sick building syndrome. Those problems are of further concern because it is indicated in that note that the so called trial period was to "verify the diagnosis made by an allergist and an otolaryngologist

that the Grievant suffers from allergies to the building in which she works." The lack of any evidence in this record from the purported allergist or otolaryngologist severely diminishes the significance of Dr. Grayson's statement. The worth of that statement is further made questionable by the fact that the Grievant worked a full day October 2, yet in that statement Dr. Grayson says the Grievant was "totally disabled" beginning on that date. Lastly, it is inexplicable from that note whether the Grievant was totally disabled medically during the "test period" or held out of work to verify the other purported diagnosis, or both. In the absence of Dr. Grayson's testimony, such questions severely undermine the assertions contained in that statement.

The only other evidence relied upon by the Grievant on this defense are general statements regarding the sick building syndrome and antidotal comments on that subject made by the Grievant and other workers in the building. Such material does not prove that the Grievant's absences were directly attributable to the sick leave syndrome. None of those employees' criticisms of the air quality of the building resulted in formal complaints to appropriate officials causing an investigation to be made during the time in question. The record here contains a report of a State agency charged with investigating such matters finding that, as of 1989, the building met all applicable standards of air quality. That is not to say that such a defense may not be applicable depending on the nature of the facts established in a particular case. Based upon the foregoing, the Grievant has failed to put

forth in this proceeding sufficiently reliable evidence to support her claim that her absences purportedly related to illness were the direct result of any sick building syndrome problems in her work place environment.

AWARD

The grievance is denied. The Grievant was removed for just cause.

Dated August 25, 1993

Mollie H. Bowers
Arbitrator