VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	OPINION AND AWARD
	*	
OHIO CIVIL SERVICE	*	Anna DuVal Smith, Arbitrator
EMPLOYEES ASSOCIATION	*	
LOCAL 11, AFSCME, AFL/CIO	*	Case No. 31-08-960629-0012-01-09
	*	
and	*	
	*	Connie Wiley, Grievant
OHIO DEPARTMENT OF	*	Discharge
TRANSPORTATION	*	

Appearances

For the Ohio Department of Transportation:

Carl C. Best
Labor Relations Officer
Ohio Department of Transportaiton

Lou Kitchen
Labor Relations Specialist
Ohio Office of Collective Bargaining

For the Ohio Civil Service Employees Association:

Michael Muenchen
Ohio Civil Service Employees Association

I. HEARING

A hearing on this matter was held at 9:00 a.m. on June 17, 1997 and continued on July 1, at the District 8 offices of the Ohio Department of Transportation (ODOT) in Lebanon, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties from their permanent panel, pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter was properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn and excluded, and to argue their respective positions. Testifying for the Employer were James Fife (Acting Human Resources Manager), David Yacchari (Superintendent), Diana Martin (Business and Human Services Administrator) and Carl Best (over the objection of the Union). Also present was Ed Flynn, Labor Relations Administrator, who examined Mr. Best. Testifying for the Union were Dianne Padich (Rehabilitation Specialist, Bureau of Workers' Compensation), Hugh Williams (District 6 President and TWP Committeeman, testifying by speaker phone) and Connie Wiley, the Grievant. Also present was Doug Jansen, Steward. A number of documents were admitted into evidence (Joint Ex. 1-8, Employer Ex. 1-3, and Union Ex. 1-4. The hearing concluded at 4:00 p.m. on July 1, whereupon the record was closed. This opinion and award is based solely on the record as described herein.

II. BACKGROUND

Prior to her removal for an unauthorized absence of three or more consecutive days, the Grievant, Connie Wiley, was employed as an Engineering Clerk in the construction unit

of ODOT's Region 8. Before her successful bid for this position in 1989, she had spent approximately three years as a Highway Worker II. Her performance evaluations were satisfactory until 1994 when she received one "below expectations" rating for poor quality work attributed to excessive personal phone calls. This rating was upheld on appeal. No prior disciplinary actions were placed on the record. James Fife, formerly Safety Supervisor, testified Ms. Wiley had a number of lost-time injuries over the years for which she filed workers' compensation claims. Rehabilitation Specialist Dianne Paddich testified there were eleven since 1990. Two of these injuries were the events that ultimately led to her removal and the instant grievance.

Work in the construction department is seasonal. During the winter, the Grievant, like other employees in the department, is temporarily reassigned under the 1000-hour program agreement with the Union. For Ms. Wiley, this was to the Highway Worker II classification in Hamilton County, a position for which she bid. On January 13, 1995, she sustained an injury to her elbow while using a hand-held pound post, but did not lose time for this until May. On September 25, 1995, she injured her shoulder while removing a screw and nut from a post, going on sick leave approved by the Bureau of Workers' Compensation (BWC) on September 29. While she was being treated by John M. Roberts V, M.D., for the shoulder injury, she reported pain from the previous elbow injury. For this she received the diagnosis of 726.32 lateral epicondylitis and underwent surgery. Bureau of Workers' Compensation C-84 requests for temporary total disability compensation were submitted beginning on October, covering her absences to an estimated return-to-work date of February 30, 1996 (later determined to be March 1, 1996).

As the estimated return-to-work date approached, Fife testified he began trying to reach the Grievant to remind her a new C-84 was needed if she was not yet fit for work. He said he was aware of her pager and had used it, but was not always successful in reaching her. The Personnel Department did not have her phone number, so he called her grandmother's phone (which he had gotten from a co-worker) a number of times and left word. On March 5, Fife and the Union signed off on the Grievant's participation in the Transition to Work Program, and Fife's office faxed the forms to Dr. Roberts. However, according to Fife, Roberts would not agree that Wiley could perform the duties of a highway maintenance worker since he was no longer her physician, and the Grievant was unable, unwilling and/or uninterested in the program. Hugh Williams, TWP Committeeman, testified about the voluntary Transition to Work Program, saying that it has had success in returning employees to permanent employment and that he thought ODOT would have many places for an engineering clerk to transition back to after rehabilitation.

On March 18, the Grievant was examined for BWC by Bernard B. Bacevich, M.D., an independent medical examiner who found that the Grievant had reached maximum medical improvement and was unable to return to her former position (as route marker) because of limitations on repetitive lifting, pulling, gripping and squeezing with her right arm. His report was received by BWC on March 25, but it is not clear when ODOT became aware of his findings.

Fife finally talked to the Grievant on or about March 20, saying it was critical to get a new C-84 to cover her absence since the end of February, but, according to Fife, the Grievant berated him, used profanity, threatened to consult an attorney, and said she would

get the C-84 when she was ready. For her part, the Grievant testified that she was upset Fife had disturbed her grandmother and not respected her request that she be contacted by pager. She pointed out that she has no control over when a doctor's office will supply needed documents. In addition, she said Fife made a reference to "you people," which she took as a racial slur, something Fife denies. Wiley reported the incident as harassment to Diana Martin, Business and Human Resources Manager, who spoke to Fife about it. Fife told her the verbal abuse was all Wiley's and that he had been trying to assist her in preventing an unauthorized absence, as he does with other employees. Martin got back to Wiley, telling her it was the Grievant's responsibility to get the paperwork in. During this conversation, the Grievant told Martin she was changing doctors, but, according to Martin, did not try to report off to her, which would have been improper anyway, nor did she request leave. Ms. Martin said the Grievant was agitated and used profanity, but did not threaten or rebuke her.

It was also on March 20, that Martin learned Wiley had been on unapproved leave since February 29 (later determined to be March 1), so she signed April 9 correspondence prepared for her by Carl Best, Labor Relations Officer, giving the Grievant three days from April 15 to return to work or provide proper medical documentation for the period February 29 through April 12. This letter was sent to a number of addresses by registered-return-receipt and regular mail.

Another C-84 was received by the Department on April 18 (stamp indicates "95 [sic] Apr 18"), providing an actual return to work date of April 8, 1996 and stating "this C-84 is being extended to afford the patient time to acquire a new physician of record. She is

dismissed from my care." Copies submitted in arbitration cut off the physician's signature and date part of the form and Fife testified there was no signature, but Dr. Roberts' name and address stamp are clear. The document states the last examination or treatment occurred on February 13, 1996.

Despite this C-84, a pre-disciplinary notice alleging violation of Directive WR-101, Item 17, unauthorized absence for three or more consecutive days from February 29 through April 24 was issued April 24 and mailed to multiple addresses by the same means as the April 9 notice.

The Grievant telephoned the Department on May 1, the day of her scheduled pre-disciplinary hearing to say that she had transportation problems, so the hearing was rescheduled for May 3. At this meeting, the Grievant alleged that she had informed Supt. David Yacchari on April 4 of her absence, but he testified in arbitration that although he had spoken to her in early April, it was in the course of her calling the garage to speak to a friend, and not a call-off. She also brought with her another C-84, signed on April 30 by her new doctor, Bruce F. Siegel, D.O. This covered disability dates from September 25, 1995 to April 30, 1996 and provided an estimated return-to-work date of August 1, 1996. The pre-disciplinary hearing officer nevertheless found, on May 3, that there was just cause for discipline.

Meanwhile, the Grievant had been referred to BWC's Rehabilitation Services. On February 22, 1996, Dianne Paddich wrote her a letter inviting her to participate, and copied ODOT on it. Paddich called the Department on April 9 to determine Wiley's employment status and learned the Department was requesting that she return to work. Paddich

interviewed the Grievant on April 16. Her recommendation was to a program of pain management, reconditioning and work hardening. After Dr. Siegel saw the Grievant on April 30, he provided the necessary prescriptions for this program, and the referral was made May 9, 1996. The Grievant was evaluated on June 13 and entered the program on June 24, but on June 28, Paddich was informed by the pain management clinic that the Grievant had been discharged. Ms. Paddich testified the delay in getting the Grievant into the program was attributable to her own caseload, the change in doctors, and in getting the prescriptions. She could not say the Grievant was uncooperative, but would also not say that the Grievant was doing everything she could in her own best interests. However, she found the Grievant to be untruthful about why she was unable to drive.

On June 14, the day after she was evaluated, the Grievant's employment was terminated. Ms. Martin testified once she knew Bacevich's determination, she did not consider disability separation for two reasons. One was that she did not learn of Bacevich's findings until late in the process and they did not negate the fact that the Grievant failed to document her absence. The other was that Bacevich's determination related to the Grievant's temporary assignment as highway worker, not to her regular job as clerk. She was aware that Fife and the Union had agreed to transition the Grievant back to work, but understood the Grievant to be uncooperative. She testified Fife talked to her about rehabilitation before the pre-discipline, but also that she was unaware of the Grievant's involvement in the program until she was released from it.

As for the Grievant, she testified she still is not able to work and now has psychiatric problems. She claims these began before she was discharged but Carl Best, Labor Relations

Officer, testified he knew nothing about this until the parties exchanged documents just prior to the first day of the arbitration's oral hearing. The Grievant testified she wants to return to work, but was not given a chance to do so.

A grievance protesting the removal was filed on June 28 by Steward Douglas Jansen, alleging violation of Articles 24.01 of the Collective Bargaining Agreement and requesting reinstatement, return to work when able, and a make-whole, back-pay remedy as applicable. Being unresolved at lower steps of the grievance procedure, the case was appealed to arbitration where it presently resides for final and binding decision, free of procedural defect.

III. STIPULATED ISSUE

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

IV. PERTINENT CONTRACT PROVISIONS

ARTICLE 24 - DISCIPLINE

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....

V. ARGUMENTS OF THE PARTIES

Argument of the Employer

The Employer argues the issue here is not the Grievant's disability, but her unauthorized absence. It nevertheless points out that she parlayed two relatively minor injuries into nine months of not coming to work. When her doctor did not agree with her own assessment of her condition, she switched doctors. She took her time about getting C-84's in, resisted efforts to rehabilitate her, was difficult to reach because of address and

phone number changes, and when Fife tried to help her, he was rebuked and threatened instead of thanked. She is dishonest, expected the Employer to track her down, and blames others for her predicament even though it is agreed it is the employee's responsibility to get the paperwork in (not the employer's), and her history of eleven claims in ten years shows she knows proper procedure. Her attempts to provide medical documentation should be viewed with suspicion because of the seriousness of her condition and timeliness with which it was submitted. The Employer claims it went beyond the call of duty, whereas the Grievant's actions show she did her best not to return.

The Grievant is not now able to return to work and never has been. The Union has suggested disability separation/retirement as a just outcome. She, herself, could file for disability retirement with PERS. The Employer resists disability separation because it would give her recall rights if released for work, which the Employer contends is unjust in view of the fact that she broke a rule that is applied consistently throughout the state. She abandoned her job and to reinstate her would be unjust.

Argument of the Union

The Union says the Employer attempted and failed to establish just cause for terminating the Grievant on two grounds: that she failed to report off and that she failed to provide proper medical documentation.

With respect to reporting off, the Union argues the Grievant had good communication and met the Employer's expectations. They knew her situation. Fife testified he tries to give the benefit of the doubt to the employee with the goal of bringing injured employees back to work. He is supposed to be lenient. Instead, he was prejudiced,

could not recall if he mentioned to Martin that the Grievant was in rehabilitation, and as much as admitted he was tired of doing his job. Documents putting the Grievant on notice were mailed to the wrong address and no one looked into the independent medical examiner's determination that she had reached maximum medical improvement and could not return to work. In the Union's opinion, the Grievant should be disability separated. The three-day rule is arbitrary and was not applied to take into account the good communication the parties had on this case.

As for the documentation provided, the Union says the Employer tried to make it into an issue of credibility, although it has the right to get a third opinion if it doubts the employee's claim of incapacity. In fact, the Grievant has the right to change doctors and she was enrolled in a rehabilitation program. The Union argues it is a direct violation to terminate an employee under these circumstances. It asks that the Grievant be made whole, put back in the rehabilitation program, and allowed to transition back to work.

VI. OPINION OF THE ARBITRATOR

In a case like this, it is all too easy to become sidetracked by the ills of the Grievant--her physical, emotional, behavioral and legal problems--and the difficulties these have caused her employer. But as the Employer points out, this case is not about the Grievant's disability. It is about whether she abandoned her job. And the answer to this must be, "no." The fact of the matter is that as her March 1 C-84 was expiring, the Grievant had already had her last appointment with Dr. Roberts and was in the process of finding a new doctor. The record does not disclose when she saw the doctor to whom Roberts referred her (Kiefhaber), but it is evident she was no longer under the care of Roberts at the time

she needed to supply a new C-84 because Roberts would not sign the documents faxed to him on March 5 on the basis that the Grievant was dismissed from his care. Dr. Bacevich also makes reference to the transfer in his March 19 report. As of March 20, when the Grievant spoke to Fife and Roberts, she was still between doctors who could supply the necessary paperwork and she so informed them. However, given that she was delinquent in covering her absence by over a month and had proved difficult to reach by phone, it was entirely reasonable for the Employer to try to get clarification of the Grievant's intentions regarding her job through the April 9 letter that put her on notice of job abandonment if she did not appear for work or supply medical documentation within three days of April 15.

By the time this deadline expired, the Department had, in fact, received Dr. Roberts' final C-84 covering the Grievant through April 8 and providing additional corroboration of her transition to a different doctor. It is clear to me that the Employer completely and arbitrarily disregarded this C-84. Although it does not cover the full period requested by the April 9 notice and no signature is evident on the Arbitrator's copies (because that portion is cut off), it is plain it came from Dr. Roberts' office, for the stamp and handwriting are identical or very similar to those on previous C-84s (expiring 12/6/95, 4/12/96, 4/30/96). The Employer nevertheless issued a pre-disciplinary notice for her absence from February 29 through April 24, including the period covered by this C-84 and extending the period stated on the April 9 notice by nearly two weeks.

Unbeknownst to the Employer, the Grievant had also already seen her new doctor (on April 4), but a C-84 from him was not signed until her second appointment on April 30. She brought this and a note from Siegel with her to her pre-disciplinary hearing (Joint

Ex. 6 and 7), but the pre-disciplinary report makes absolutely no reference to them, nor did Martin refer to them in her testimony. This creates the inference that the appointing authority was not in full possession of the facts when the removal notice was issued. At Step 3, the Employer said bringing this C-84 to the pre-disciplinary hearing was "too little, too late." This makes the pre-disciplinary hearing into a hollow formality, for it implies that no documentation offered for the first time at this hearing would have been acceptable. If the Employer had questions concerning the authenticity of the documents or the matters certified to therein, it had recourse. But to disregard entirely or dismiss as "too little" the April 8 C-84 because it fell short by four days (despite the change in doctors) and "too late" the April 30 C-84 because it came in at the pre-disciplinary hearing (despite the fact that it had been in process since before the April 4 notice was sent) is to unfairly discharge an employee on a technicality.

There is plenty of evidence indicating the Grievant's delinquency was not from job abandonment but from her stalled recovery and search for different treatment. Not only was she seeing doctors, but had also had her intake interview with the rehabilitation specialist. The record does not disclose when Fife became aware of the fact that the Grievant had accepted the February 22 invitation to enter rehabilitation, but Martin testified she was aware through Fife of the Grievant's involvement before the pre-disciplinary hearing. Moreover the rehabilitation specialist had the necessary prescriptions, and transmitted authorization to the pain management clinic shortly after the pre-disciplinary meeting and this delay was adequately explained to be unrelated to be unrelated to the discipline process. The Grievant was even evaluated before the removal letter was signed.

The bottom line is that although the Grievant erred in not keeping the Employer abreast of her whereabouts and the Employer made a good effort to determine the Grievant's status, the Employer also disregarded clear signals that the Grievant had not abandoned her job, but was, in fact, hampered in meeting the technical requirements of notice by virtue of exercising her right to change doctors. The Employer may suspect the motives of the Grievant, the legitimacy of her disability, and her good faith efforts to return to work, but suspicion is not the proper basis for removal under the just cause standard. In other words, the Employer may have begun a course of action to remove the Grievant for job abandonment, but it had ample opportunity to interrupt that process, test the Employee's documentation and claim if it so chose, and then act on the basis of its investigation.

VII. AWARD

The Grievant was not removed for just cause. The grievance is sustained in its entirety and the remedy requested granted. The Arbitrator retains jurisdiction for thirty (30) days to resolve any disputes arising over the implementation of this award.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
August 9, 1997