

#1317

**IN THE MATTER  
OF  
ARBITRATION  
OPINION & AWARD**

**BETWEEN**  
  
**District 1199**  
**The Health Care and Social Service**  
**Union, Service Employees**  
**International Union, AFL-CIO**

**and the**  
  
**STATE OF OHIO,**  
**OFFICE OF COLLECTIVE**  
**BARGAINING**

**Case No.: 27-11-970820-0722-02-11**

**Grievant: Ron Bailey**

**Arbitrator: John S. Weisheit**

**Issue: Discipline**

**Date of Hearing: August 27, 1998**

**Award Issued: September 26, 1998**

**APPEARANCES  
FOR THE**

<b>EMPLOYER</b>	<b>UNION</b>
Heather Reese, OCB Advocate Camble Wilson, OCB 2 <sup>nd</sup> Chair Ron Hart, LRO-LCCI	Matt Mahoney, Adm. Organizer Ronald P. Bailey, Grievant

**GRIEVANCE DEFINED**

**"Was the Grievant, Ron Bailey, disciplined for just cause? If not, what shall the remedy be?"**

**DECISION**

The Grievance is sustained in part and denied in part.

## **AUTHORITY**

The above named Arbitrator was selected by the parties for the purpose of attaining final and binding resolution of this matter in keeping with terms in the Contract between the parties. His authority is limited by specific provisions included in the Contract, applicable laws of the State of Ohio and the United States of America.

A Hearing was held on August 27, 1998, in Columbus, Ohio. At that time, each party was given the opportunity to present documentation and testimony considered relevant to their position. Prior to closing of the Hearing, the parties indicated that they had a fair and ample opportunity to present such evidence considered relevant to their respective position. All witnesses were sworn in and testified under oath. The Arbitrator's notes constitute the official record of the Hearing.

This Opinion and Award is based on the testimony and documentation provided.

## **BACKGROUND**

The State of Ohio, hereinafter referred to as the "State" and/or "Employer", entered into a series of collective bargaining agreements with District 1199, The Health Care & Social Service Union, Service Employees International Union, AFL-CIO, hereinafter referred to as the "Union" and/or "1199". Said Agreements govern certain terms and conditions of employment for employees in defined classifications. The most recent Agreement entered into was for the period of 1997-2000. The issue in this instant case arose in the previous Collective Bargaining Agreement between the parties for the period of 1994-1997 (JX#1).

The Grievant is employed as a nurse at the State of Ohio, Department of Rehabilitation and Correction, Lebanon Correctional Institution. On March 21, 1997, the Grievant submitted a written request for use of three (3) hours of leave charged to personal leave. The leave request was approved by his supervisor (JX #4). On May 12, 1997, he was notified that his accrued and unused personal leave was less than 3 hours. The Grievant discussed the matter with his supervisor, completed another Request for Leave Form for the time used, and charged the used time against Compensatory Time (JX#5). The Form was signed and included the recommendation of his supervisor but was ultimately rejected. Following internal investigation and pre-disciplinary hearing, the Grievant was disciplined with a one-day fine (10% of a bi-weekly wage) (JX #2). As a

result of the disciplinary action imposed, the immediate Grievance was filed and processed through administrative procedures of the grievance procedure. It was ultimately moved to arbitration for final and binding resolution.

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### **STIPULATIONS**

The parties stipulated that no question of jurisdictional or procedural arbitrability exists and the matter was properly before the Arbitrator for determination on its merit.

The parties, by joint submission, entered a number of joint exhibits by stipulations, including the CBA from which the grievance arose (JX#1), and the Grievance, as originally filed with administrative responses (JX#2). It was further stipulated by the parties that the Opinion & Award was authorized for publication by professional and academic sources.

### **SUMMATION OF UNION CONTENTION**

The Union contends the Grievant was improperly disciplined in this instant case. It argues the Grievant's action was a clerical error not an intent to obtain a benefit or privilege for which he was eligible. It considers the penalty excessive and inappropriate since the leave was initially approved by the Grievant's supervisor, his attempt to correct the error in use of paid leave was not accepted by the Employer, when the matter was brought to his attention some two months later. The union notes that the Grievant has a clean disciplinary record except for this instant matter.

The Union concludes the Grievance should be sustained and the Grievant made whole for the penalty imposed.

### **SUMMATION OF EMPLOYER CONTENTION**

The Employer contends that the Grievant used 3 hours of personal leave on March 21, 1997, when, in fact, he lacked one hour and forty-two minutes of accrued time for such leave. It contends employees are responsible for being aware of their available leave accrual at the time of use and such documentation is provided on the employee's bi-weekly check stub. It further states that employees can contact the Timekeeping Office to verify leave balance. The Employer further argues that the Grievant knew, or should have known, the procedures and practices regarding use

of personal leave. The fact that the Grievant took time off, when sufficient time is not available, is being absent without leave (AWOL), an infraction of Rule 3h. As such, it was determined that just cause existed for disciplinary action. Under the Employer's standard absenteeism discipline policy, a first offense of AWOL is subject to a 1 - 3 day suspension or a fine of up to 2-days. It concludes the discipline was for just cause and the discipline was appropriate and proper for the offense.

The Employer concludes that the Grievance should be denied in its entirety.

### DISCUSSION

The basic factual issues in this case are unrefuted. The Grievant "thought" he had sufficient accrued and unused Personal Leave available to use when requesting 3-hours off on March 21, 1997. He acknowledges knowing that it is the employee's responsibility regarding leave time availability at the time of request for leave use. He did timely complete the leave request form (JX#4) and gave it to his Supervisor, who signed and recommended the leave, and submitted it to the "Approving Authority Signature" and was approved. All noted actions on the form were completed on March 21, 1997. On May 12, 1997, the Grievant was given notice of management's allegation that he lacked one hour and forty-two minutes of personal leave accrual on March 21, 1997, and was being charged with AWOL. A pre-disciplinary hearing was held on June 30, 1997, and the Grievant was notified on July 1, 1997, of the Employer's finding of violation and disciplinary action in the manner of a fine equal to one day's wages (JX#2,p7).

The issue in question, raised in the Union grievance, relates to the propriety of the discipline and whether such discipline was progressive in nature. Documentation indicates the Employer's intent to follow the industrial standard of just cause (re: "Just Cause Work Sheet", p.6, JX#2). A rule violation, strictly applied, did occur. Documents submitted into evidence indicate the Employer's attempt to be uniform in disciplinary matters. Yet, this alone, does not necessarily reflect the application of just cause, in keeping with its generally accepted spirit and/or intent. The following principals need further review and consideration regarding this instant case:

Question: Was the Grievant provided prior notice of the Discipline?

Answer: No.

While it is clear that the Grievant was aware of his responsibility to know the availability of leave accumulation at the time of request, the record does not indicate the advance notice to the Grievant, in particular, or employees, in general, that failing to have adequate Personal Leave time applied for, was considered an AWOL offense.

Question: Is the discipline appropriate according to the Employer's offense schedule?

Answer: No.

A 3h violation of AWOL is one of the most serious offenses in the progressive discipline table of Absenteeism offenses. It includes penalty for an employee's failure to report to, or leave without, notice. It is noted that violation, 3g "leaving the work area without permission of a supervisor", first offense is subject to a minimum penalty of a written warning. Work attendance is a serious concern in general employment operations, and is of particular concern to this Employer. The State has exercised its management right to structure a progressive discipline schedule taking into consideration the express terms of the Contract. Exercising such authority requires said procedures apply standards of appropriateness and fairness in application. This infraction is coupled with acts of absences involving fraud, abuse of leave, lack of verification (Re: 3i,3k JX #3). In this instant case such is found flawed. Classifying a leave with full knowledge and site approval of the supervisor as a greater offense than leave without notice is found disparate treatment.

Question: Are there mitigating circumstances?

Answer: Yes.

The Employer indicates that the discipline grid was strictly followed. Such occurred only after making a judgement call regarding the level of offense. By its very term Absent Without Leave (AWOL) clearly implies absent without knowledge of the employer. The Employer was aware of the Grievant's absence. In fact, both his supervisor and leave authorizing manager signed the leave form the day of the leave. The rule infraction, by the Grievant, was failure to determine if he had sufficient Personal Leave time accumulated for the time off requested, not failure to give notice or obtain administrative approval before leaving work.

The Grievant's prior discipline record is clean. This was unrefuted. While his testimony was creditable and he indicated no intent to obtain a benefit beyond what was due, his action did violate a rule of which he was aware (JX#3). However, no evidence was introduced to indicate the Employer provided prior notice of the disciplinary charge to employees, or in particular, the Grievant. The Employer made an initial determination of rule violation without sufficient consideration. Absenteeism, Rule 3c, "Failure to submit a completed Request form within specified time" more closely identifies the Rule infraction than Rule 3h, AWOL in this instant case. The Request for Leave Form provides for the employee signature after the line "I certify that this is a true and complete statement." The form does not require an employee to indicate having checked for, or otherwise to note adequate Personal Leave time is available for the leave requested. The form specifically provides for such notation when other leave is used in lieu of Sick Leave.

The assessment of a fine is the greater penalty for first offense under Rule 3h violation. The Employer indicated that the penalty was considered the minimum provided for a first violation in light of the Grievant's past record and the action was to be corrective in nature rather than punitive. In this case, a fine of eight-hours of lost wages for a one-hour and forty-two minutes is found punitive and improper for the determined appropriate rule violation. Paid leave is not normally given an employee without first meeting the conditions of such leave. The Grievant's offer to substitute compensatory time, when informed that he lacked Personal Leave time, is found to have been made in good faith. However, such an offer does not alter the fact of the previously indicated rule violation; failure to determine sufficient time was available for the specific leave applied for.

## DETERMINATION AND AWARD

Based on the forgoing, the Grievance is sustained in part and denied in part.

It is determined the Grievant did not properly make an effort to determine availability of Personal Leave Time, nor, in fact, had available 3-hour accumulation of Personal Leave, as applied for use on March 21, 1997.

It is determined that the Employer improperly found the Grievant violated Rule 3h (AWOL).

It is further determined that the Grievant did violate Rule 3c "Failure to submit a completed Request for Leave form within specified time".

### Remedy:

The Grievant's record shall reflect Personal Leave use of one-hour and eighteen minutes and Compensatory time of one-hour and forty-two minutes for the three hours absence on March 21, 1997.

The Grievant shall be given a written reprimand dated July 1, 1997, noting his failure to properly determine availability of leave time when completing a leave request form.

The Grievant shall be reimbursed in full for the fine imposed in the Notice of Disciplinary Action, dated June 30, 1997.

### Certificate of Issuance

I hereby certify that the forgoing **Opinion and Award in the Matter of Arbitration between the State of Ohio, Office of Collective Bargaining and District 1199, The Health Care and Social Service Union, Service Employee International Union, AFL-CIO**, is a true copy as issued and signed by me this

26th day of August, 1998, at Galion, OH, Crawford County, OH.

  
John S. Weisheit, Arbitrator