1461

STATE OF OHIO VOLUNTARY ARBITRATION PROCEEDING

THE STATE OF OHIO,
OHIO LOTTERY COMMISSION

-AND-

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1099

GRIEVANT: **CAROLYN SMITH (DISCHARGE)**
GRIEVANCE NUMBER: **22-03(99-07-02)05-03-08**

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: DECEMBER 11, 2000

APPEARANCES:

For the Employer

Michael Popadiuk	Benefits Payroll Officer
Andre Burton	Deputy Director of Labor Relations
Jim Lendavic	Second Chair, Office of Collective Bargaining
Scott Ford	Advocate

For the Union

Carolyn Smith	Grievant
Mary Lanier	Director of Collective Bargaining and Servicing
John J. Marrone	Union Representative
Steve Fricke	Union Representative
Doug Breaier	Union Representative
Teresa Kimble	Union Representative
Amy Roberson	Union Representative
Scott Adkins	Union Representative
Thomas J. Kircher	Advocate

INTRODUCTION

This is a proceeding under the auspicious of Article 11 – Grievance Procedure, Section 11.08 – Arbitration of the Agreement between The State of Ohio, Ohio Lottery Commission (hereinafter referred to as the "Employer") and the United Food and

Local 1099 (hereinafter referred to as the "Union") for the period April 1, 2000 (Joint Exhibit 1).

ıearing was held on April 10, 2000 and June 29, 2000, at the ımercial Workers Union Hall, 913 Lebanon Street, Monroe, Ohio. :ted David M. Pincus as the Arbitrator. At the hearing, the parties ent and introduce documents, testimony and evidence. They were, examine and cross-examine witnesses. At the conclusion of the /ere asked if they wished to provide post-hearing briefs. Both ply briefs. The Arbitrator provided the Union with an extension; :quest was deemed reasonable under the circumstances.

PERTINENT CONTRACT PROVISIONS

ARTICLE 10 – DISCIPLINE

***

ndard

shall be disciplined or discharged without just cause. Employees Commission shall also be governed by O.R.C. 3770.021.

***

(Joint Exhibit 1, Pg. 19)

ICLE 22 – LEAVES OF ABSENCE WITHOUT PAY

***

lure to Return

who fails to return to duty within three (3) working days of the a valid cancellation of a leave of absence may be removed from mployee who fails to return to service from a leave of absence nd is subsequently removed from service is deemed to have a ate corresponding to the starting date of the leave of absence

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(Joint Exhibit 1, Pg. 64)

ISSUES

Employer properly terminate the Grievant in accordance with a Last
Agreement (Joint Exhibit 5(B)? If not, did the Employer have just cause
inate the Grievant? If not, what shall the remedy be?

CASE HISTORY

ievant, Carolyn Smith, began her employment on March 19, 1984. For

f her employment history, the Grievant was classified as a Lottery Sales

e.

ıe 27, 1997, the Grievant was returned to work upon execution of a last

ment. This document contained the following particulars:

***

AGREEMENT

Ms. Smith will be reassigned to the position of Sales Representative 1, with a report date of June 30, 1997, assigned to the Dayton Regional Office, Region 3. She will receive no loss of seniority or other entitlements, but will receive no back pay.

Ms. Smith will be assigned a modified version of her previous sales route.

Any grievance arising out of a violation of Work Rule #3a or Work Rule #14 by Ms. Smith shall have the scope of arbitration of the grievance limited to the question of whether Ms. Smith did indeed violate said work rules. To uphold termination, the Employer need prove only that Ms. Smith violated Work Rule #3a or Work Rule #14. The Arbitrator shall have no right to modify the discipline.

This Agreement is in full force and effect, for a period of one year from June 30, 1997, or Ms. Smith's actual start date, unless extended by a period equal to the employee's leave of fourteen (14) days or longer, except for approved periods of vacation leave.

***

(Joint Exhibit 5(B))

rs limit the scope of an arbitrator in terms of applying a just cause

The Grievant returned to work on June 30, 1997. Unfortunately, she injured herself on or about September 19, 1997. She eventually claimed a workplace injury.

On October 3, 1997, Dr. Robert W. Clark examined the Grievant. Dr. Clark deemed the Grievant totally incapacitated, and remarked:

***

> Patient is not to return to work until 75% improved, with the stipulation that the patient not be given the vehicle which makes it necessary to pull her self (sic) up into cab and a vehicle with fully functional cargo door.

***

(Union Exhibit 2)

Several events took place during December of 1997. Dr. Clark returned the Grievant to her workplace because he believed she had realized 75% improvement. The Employer, however, did not return the Grievant to work. Rather, the Employer had the Grievant examined by a doctor of its choosing. The Ohio Bureau of Workers' Compensation terminated the Grievant's benefits, citing maximum medical improvement. The Grievant requested additional time off to appeal the termination of benefits decision. The Employer allowed the Grievant to enter unpaid leave status.

On January 20, 1997, the Grievant aggravated her chronic thoracic condition. She did so while marching in a Martin Luther King holiday parade.

Based on the situation prior to the January 20, 1997 incident, Jeff Inslee, the Regional Manager, required the Grievant's return to work. He stated the following in a letter dated January 29, 1998:

***

> I have been informed that you are medically cleared to return to work. We will expect you to report for duty or arrange for appropriate leave by 9:00 a.m. on Tuesday, February 17, 1998. If you have any questions, please do not hesitate to call me at (937) 264-4200.

***

(Union Exhibit 3)

The Grievant visited Dr. Clark's office shortly after the January 20, 1997 incident. In a letter dated February 25, 1998, Dr. Clark remarked:

***

> The patient continues to experience instability in the mid-thoracic region and it is my recommendation that the patient be on total disability form 1/19/98 until she reaches 75-80% improvement from this flare-up.

***

(Union Exhibit 4)

The Grievant, in response to Inslee's caution, informed him of Dr. Clark's findings.

Care Works, the Employer's managed care organization, referred the Grievant to a specialist. On March 19, 1998, Dr. Michael J. Pedoto recommended a work reconditioning and a work hardening program (Union Exhibit 5). This recommendation, however, was not effectuated until June 30, 1998.

After several weeks of treatment, Dr. Pedoto released the Grievant to return to work. In a document dated August 31, 1998, he noted:

***

> Patient may return to work 8/16/98 3h/day for 1 week then increase to 4h/day for 1 week, then increase to 6h/day for 2 weeks then increase to 8h/day. No prolonged standing > 30 without break to sit or move about. Maximum lifting 20#.

***

(Union Exhibit 7)

nt, however, did not return to work as scheduled.[1] On August 31,

released the Grievant to return to work on September 16, 1998. He

:al Medicine Phone Note on the above-mentioned date where he

lescription containing a requirement of "lift and carry 20 pounds

Exhibit 6). Based on this information, Dr. Pedoto recommended

ırdening and work reconditioning.

ıber 17, 1998, Linda Loxley and Judy Magnus, ProWork

'isited the Grievant's job site. After reviewing a number of job

y authored a document (Union Exhibit 1). The document contained

. regarding work requirements, which revised the program used to help

'n to work.

Moser, and Orthopedic Surgeon, examined the Grievant, at the State's

ɔer 5, 1998. In his report to Care Works, he noted the following:

***

ı: Thoracic strain, resolved.

ı:
ny professional opinion another four weeks of work hardening is
needed for the diagnosis of 847.1 thoracic sprain/strain.

:ording to the job description submitted with the request for this
ort, I believe that Ms. Smith can return to her former position of
ployment.

el that Ms. Smith is still in need of a small amount of
onditioning. I would recommend that she be placed on a home
gram with daily increasing the weight that she lifts and carries
n 35# to approximately 80#. I do not feel that a formal Work
rdening Program is necessary for this to occur. Provided that

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confusing regarding some of the dates in question. Dr. Pedoto's note (Union Exhibit
1, 1998, yet references a return date of August 16, 1998. A phone note (Union
by Dr. Pedoto on August 31, 1998 recommends a return to work on September 16,

she is given two more weeks to increase her lifting tolerance, I feel that her optimal level of functioning will occur in two more weeks.

If you have any questions concerning this report, please don't hesitate to contact the office.

***

(Joint Exhibit 12, Pg. 2)

Dr. Pedoto, The Grievant's physician countered Dr. Moser's assessment on October 20, 1998. In his review, he noted some confusion. Dr. Pedoto stated Dr. Moser's finding was based on a potentially defective job description standard (i.e. twenty pounds lift), while his was based on a job site evaluation conducted by ProWork personnel. Dr. Pedoto concluded by saying:

***

...For this reason, I would recommend that she continue with another four weeks of work hardening. Hopefully, she would be ready to return to work at that time. If not, then she will likely have reached maximal medical improvement and she should undergo vocational rehabilitation or return to work with modified duties if available.

***

(Joint Exhibit 13)

It should be noted Dr. Moser's findings were adopted by the Bureau of Workers' Compensation. The Grievant initiated an additional request for unpaid leave; the request was allowed by the Employer.

The Grievant was again examined by Dr. Moser on April 1, 1999. In the discussion portion, Dr. Moser remarked:

***

Discussion: I have reviewed the job description forwarded with the request for this examination. It is my opinion, based upon a reasonable degree of medical probability, that Ms. Carolyn Smith can return to work and perform

of this job description with a 20# weight limitation. The job
n states that she must be able to lift and carry 20# routinely and,
rthopedic standpoint, I think that she is able to do that at this
time.

***

(Joint Exhibit 11)

27, 1999, Scott Ford, the Labor Relations Officer, advised the Grievant

nces attached to Dr. Moser's findings:

***

ysician's medical opinion is that you are fit enough to return to
r this reason, we would like to schedule a return to work date of
May 3, 1999.

***

(Joint Exhibit 6)

st 30, 1999, Andre Burton, Deputy Director of Labor Relations,

Grievant. Burton was told "...she didn't feel like she was well enough to

The Grievant also mentioned that she was serving on jury duty."

4, 1999, the Employer requested the Grievant to clarify her status. It

ollowing demands:

***

ou failed to return to work Monday, May 03, 1999. You told Andre
n Friday, April 30, 1999, that you were expected on jury duty.
me on April 1, 1999, that you had been called for jury duty on
1999.

Ve need to have confirmation of the reason for your absence.
submit to your Regional Office verification of your jury duty (on
r other days) no later than the close of business, Thursday, May 6,
this submission of verification is not possible, please call Mr.

> Burton or me by that time with an explanation. Failure to call or submit evidence by then will result in your being marked AWOL for the time missed.
>
> ***

(Joint Exhibit 7)

The record disclosed the Grievant never provided the requested documentation. She did, however, leave a voice mail for Burton. She told him that the Employer would have to "take her word" regarding her jury duty status. Also, the Grievant asserted she could not come back to work because of her physical condition.

On May 14, 1999, the Grievant was notified of an upcoming pre-disciplinary hearing to be held on Thursday, May 20, 1999. The meeting was justified for the following reasons:

***

> ...This meeting is the result of your failure to return from a leave of absence on Monday, May 3, 1999. You provided no documentation for your claim of jury duty, and are in direct violation of Article 22.03 of the Bargaining Agreement. You stated on a May 6, 1999 telephone message that you forwarded documentation for your absence, but none was received.
>
> ***

(Joint Exhibit 8)

On May 20, 1999, a pre-disciplinary hearing, indeed, was held. The Grievant produced a jury summons (Joint Exhibit 10) indicating she was "on call" to the court for the three week period from April 19 until May 7, 1999. Burton later verified the Grievant was called to serve, and paid for her attendance, for April 19, 1999 and May 3, 1999 (Joint Exhibit 14).

On June 21, 1999, the Grievant was informed of an upcoming termination on Tuesday, June 22, 1999. It was issued for the following reasons:

***

You hereby are notified that your employment with the Ohio Lottery Commission is terminated. The termination is effective at the close of business on Tuesday, June 22, 1999, and is the result of violations of Lottery Work Rules.

This termination is based on documentation and evidence presented at the pre-disciplinary hearing attended by you on May 20, 1999. You were found in violation of:

A. Work Rule #12c [Absence Without Leave (AWOL) three or more work days (job abandonment)];
B. Work Rule #28 [Violation of the Standards of Conduct set out in §124.34 of the Ohio Revised Code];
C. Work Rule #31 [Conduct that hinders or prevents the agency from carrying out its mission].

Although each of these offenses constitutes adequate grounds to terminate your employment, your AWOL offense alone constitutes grounds for termination under the agreement you signed on June 27, 1997. You are instructed to turn in all State property in your possession. Human Resources will contact you concerning your benefits and final pay.

***

(Joint Exhibit 9)

The Grievant protested the removal on July 2, 1999. The Statement of Facts contained the following justifications:

***

Carolyn Smith was terminated, effective 6-22-99, in violation of a) the Collective Bargaining Agreement, and b) the Agreement of June 27, 1997.

***

(Joint Exhibit 2)

)-3 grievance hearing was held on July 30, 1999. The Grievant, again,
ealth condition as an impediment to returning to work. She was asked for
umentation to support this claim, but was unable to provide any at the
mutual agreement between the parties, the Grievant was given until
7, 1999 to produce documentation in support of her "inability to work" claim.
itation was provided by the Grievant on or before the agreed to date.
contested grievance was not settled in subsequent portions of the grievance
Neither party raised procedural nor substantive arbitrability concerns. As
ievance is properly before the Arbitrator.

THE MERITS OF THE CASE

yer's Position

Employer opined that the termination was properly executed and warranted.
a threshold matter, on the terms and conditions contained in the Last
reement (Joint Exhibit 5 (B)). This document provided for the Grievant's
ork unless she violated specific work rules within her next year of active duty.
cified terms, an arbitrator determining the propriety of any termination
as limited to an evidentiary determination of whether the Grievant violated
dealing with approved leave of absence. In other words, a traditional
the record, in terms of just cause considerations, was outside the scope of
tor's authority.
Grievant was absent without leave justifying the application of the Last
greement (Joint Exhibit 5 (B)), and her eventual removal. The Grievant never
ny documentation refuting the independent physician's finding, nor supporting

her claim of disability. Also, her jury duty argument was clearly defective further supporting the absent without leave finding.

In May of 1999, the Employer asked the Grievant to return to work after Dr. Moser declared her physically able to perform responsibilities contained in her job description. The Grievant, subsequently, advised Burton that she was unable to return to work on the day in question because of jury duty and physical disability. She, moreover, advised Burton that documentation would be forthcoming.

Documentation never arrived as promised. The Grievant did, however, contact the Employer via voice mail. She remarked that verification would not be arriving, and the Employer should "take her word for it."

At the predisciplinary hearing, the Grievant did, indeed, provide some documentation. She provided some documentation concerning her jury duty status, but provided no evidence to substantiate her disability claim.

The Employer had no way of knowing that the Grievant was too disabled to work. The record strongly supported the claim that the Sales Representative 1 was not required to lift more than 20 lbs. routinely. As such, Dr. Moser's finding was borne out by the record, which refuted the Grievant's disability claim. Her absence was without leave because she was able to return to work, but refused to do so.

Physical Therapist Assistant Linda Loxley was unable to properly support the Grievant's weight lifting claim. She testified she was unaware of the designed weight specified on the Position Description for Sales Representative 1 (Employer Exhibit 1). Otherwise, Loxley would have modified her recommended goal for return to work. Her job site audit, moreover, was defective. She never determined whether the material

carried by individuals in this job classification could be lifted piecemeal. Also, she failed to solicit any feedback regarding her findings from the Regional Manager.

Notwithstanding, Loxley's finding, the Grievant never raised and/or documented her disability claim argument at the time requested. The Employer provided the Grievant with several unpaid leave extensions in an attempt to help the Grievant obtain the proper documentation. Still, she failed to provide any evidence regarding her claim prior to the arbitration hearing.

The jury duty argument further bolsters the propriety of the administered penalty. The Grievant was on call for the stated duration, but only served on April 19, 1999 and May 3, 1999 (Joint Exhibit 14). On all other dates covered by the jury summons, the Grievant was able to work, but failed to do so.

The record clearly supported that the Grievant's actions caused a breach of the Last Chance Agreement (Joint Exhibit 5 (B)). She violated the work rules in question, and the termination was proper. The Union never disputed that the document was properly invoked. Also, the Union failed to raise any dispute regarding the validity of the document at the time of removal.

Arguing in the alternative, the Grievant's absence without leave constituted just cause for removal. The Grievant violated Work Rule #12C (Joint Exhibit 4). She was absent without leave for "three or more days," which is considered to be "job abandonment." The Grievant also violated Article 22.03, which reflects the above-mentioned work rule. By mutually agreeing to Article 22.03, the parties realized that after a specified period of time, an employee must show cause for the unexcused absences. Here, the Grievant failed to properly substantiate her unexcused absences in a timely fashion.

ıio Administrative Code further supports the propriety of the removal.
4-01 allows removal of employees under ORC 124:34 if "An employee who
to duty within three working days of the completion or a valid cancellation
ıbsence without pay without explanation to the appointing authority or his
ɜ." Clearly, the record supports removal in accordance with Ohio
ɜ Code requirements.
ıumber of reasons, the Grievant is limited only to reinstatement. The
int Exhibit 2), itself, solely specifies reinstatement as the remedy
.s such, any request for back pay, or any other remedy other than the one
be totally inappropriate. Also, even if the Grievant's termination is found
ɜr, she would have enjoyed unpaid leave status from the date of her
This status would not afford the Grievant any entitlement to benefits since
ɜr termination.

Position

nion argued the Grievant did not violate Rules 12 (C), 28 and 31 and the
)9 Last Chance Agreement (Joint Exhibit 5 (B)). As such, she was
ɜrminated and should be returned to her former position.
Inion argued that the April 27, 1999 letter (Joint Exhibit 6), and the contents
ɜrein, served as an improper and incomplete return to work directive. A
at "we would like to schedule a return to work date" does not compel
This interpretation seemed especially true when one compared a prior
ıion Exhibit 7), which contained a clear and obvious reporting date. As
te of May 3, 1999 cannot serve as the triggering date for AWOL purposes.

ıployer should not be able to use May 3, 1999 as the triggering event
vas on jury duty from April 19,1999 to May 10, 1999, in accordance with
. As such, the Grievant should not have been expected to return to work
)9.
ı 12.11 is ambiguous in terms of defining the term "serve as juror." It fails
between "serving on a jury" and "being available" or "on call." The
not provide any work rule or policy statement, which requires an employee
ork while on call serving as a juror, while not yet called to serve as a juror.
rievant's perceptions regarding her jury status appeared understandable
:umstances. The Jury Summons (Joint Exhibit 10) required the Grievant to
d warned her "failure to appear as ordered may subject you to contempt of
, she was properly cautious to remain off of work because she felt she had
le continuously.
rievant was clearly unable to return to work as of May 3, 1999. She
rton of her condition as early as April 30, 1999.
ıctual job requirements far exceeded the 20 lbs. weight restriction contained
scription. The ProWork Audit (Union Exhibit 1) adequately suggested a
lard far in excess of the job description standard. This standard was well-
and referenced in Dr. Pedoto's letter (Joint Exhibit 13). His
ation on four more weeks of work hardening was specifically based on the
ıdit. It should be noted, at the time of termination, the Grievant had never
e additional treatment.
Er ıployer knew or should have known that the Grievant was unable to return
ıe Grievant told Chris Tall, the Deputy Director of Sales, in October of 1998,

about the ProWork document (Union Exhibit 1), and she offered to send it to him. Michael Popadiuk, the Benefits Payroll Officer, acknowledged that he was aware of Dr. Pedoto's recommendation.

Even if the Employer was not aware of the ProWork job site visit and subsequent report (Union Exhibit 1), the actual weight lifting requirements should have been readily apparent. Jeff Insler, the Grievant's supervisor, observed the audit on the day in question, and provided information dealing with the "Daily Lifting Requirement."

The Employer had another means of determining the Grievant's ability to return to work. CareWorks, the Employer's Management Care Organization, had all of this information in its possession. Since Burton was aware of the Grievant's inability to work claim, corroborative information was readily available by merely contacting CareWorks.

The previous review certainly establishes the obvious. The Employer did not request verification of the Grievant's physical condition prior to her removal. The May 4, 1999 directive (Joint Exhibit 7) and the predisciplinary notice (Joint Exhibit 8) merely asked for documentation for her claim of jury duty.

The twenty-pound weight limit proposed by the Employer is a bit confounding. The record disclosed that neither the Grievant, her physicians, nor ProWorks were aware of this standard. If they had known about this standard, their evaluations regarding her ability to return would have resulted in different projected dates of return and work hardening protocols. Clearly, the Grievant would already be working had the Employer properly communicated the standard. In fact, the weight standard has never been twenty pounds, but something in excess of the proposed standard.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, including all pertinent contract provisions, it is the opinion of the Arbitrator that the Grievant was properly removed. As such, there is no need to articulate a just cause analysis, nor is it within the scope of my authority based on the terms of the Last Chance Agreement (Joint Exhibit 5 (B)).

The predicate for the following analysis is based on Item #3 contained in the Last Chance Agreement. It states the following reviewable particulars:

***

> 3. Any grievance arising out of a violation of Work Rule #3a or Work Rule #14 by Ms. Smith shall have the scope of arbitration of the grievance limited to the question of whether Ms. Smith did indeed violate said work rules. To uphold termination, the Employer need prove only that Ms. Smith violated Work Rule #3a or Work Rule #14. The Arbitrator shall have no right to modify the discipline.

***

(Joint Exhibit 5 (B))

As evidenced in the contained clear and unambiguous language, this Arbitrator's scope and authority is limited to an evidentiary determination of whether Grievant violated Work Rule #3a or Work Rule #14. Work Rule 3a deals with Insubordination – Failure To Perform Assigned Work. The matter under review does not deal with this charge. As such, it does not have to be considered for adjudication. Work Rule #14 deals with unauthorized absences, and is, indeed, the focus of the required analysis.

It should be noted that the Union never contested any circumstance surrounding the Last Chance Agreement (Joint Exhibit 5 (B)). That is, matters of coercion, misunderstanding or ambiguity were ever raised as affirmative defenses. The Employer's analysis and interpretation of this document was merely affirmed by the

ıch, the Union and the Grievant are contractually bound to the contract they itional just cause and related due process considerations become outside 's reviewable domain as long as a determination is reached that the ated Work Rule #14. This finding may appear to be harsh, but it is solely ompact fashioned by the parties. Any other interpretation would cause the oreach an agreement independently reached by the parties.

ecord clearly indicates that the Grievant violated Work Rule #14. She was ut leave (unauthorized absence) for three (3) days or more. She also failed ocumentation or submit any evidence in support of her documented The Grievant did properly document her absences for May 3, 1999 and April Court documents (Joint Exhibit 14) indicate the Grievant served and was duty on the articulated date. On the other dates in question, she was "on arly available to work.

Arbitrator is unpersuaded by the Union's "directive" argument. Ford's letter 27, 1999, advised that based on Dr. Moser's finding (Joint Exhibit 11) a eturn to work date was established and communicated. Monday, May 3, e date specified, which was supported in a contact by Burton and the August 30, 1999. Nothing in the communication raised sufficient ambiguity f the Union's argument. In fact, this issue, although argued, was not d by the record. The Grievant never truly expressed any testimony, which erception that the directive was permissive rather than mandatory. Grievant provided a twofold justification regarding her absence. The jury ation appears to be totally obtuse, unsupported by the record and void of any tionale. It should be noted that the Grievant never responded in a timely

fashion to a document request made by the Employer on May 4, 1999. She finally produced a jury summons (Joint Exhibit 10) on May 20, 1999, the date of her predisciplinary hearing, that indicated she was "on call" to the court for the three week period from April 19, 1999 until May 7, 1999. Any reasonable and intelligent person, like the Grievant, should have known that being "on call" did not, in any way, serve as a plausible bar for her return to work. Other than the two dates that were properly covered, the Grievant should have returned to work. Arguments dealing with the jury summons "warning" are viewed as totally unpersuasive.

The Union attempted to limit the analysis to the jury duty matter in terms of contractual construction under Article 12.1 and the specifics contained in the removal letter. In doing so, it wishes to discard or minimize the absence terms contained in the Last Chance Agreement (Joint Exhibit 5 (B)). As stated before, the predicate for analysis is the Last Chance Agreement (Joint Exhibit 5 (B)) and its particulars. Neither the terms of the removal letter, nor the contractual provision raised by the Union can trump the Last Chance Agreement (Joint Exhibit 5 (B)). Nothing provided by the Union regarding the jury summons, nor related activities, justify the absences in question.

The Union's second justification inability to work argument, is equally flawed. Again, the Grievant failed to provide credible or timely documentation regarding her condition. The Employer provided her with ample opportunity to document her assertion that her condition served as a barrier to return to work. In fact, the parties, at a Step 3 grievance hearing held on July 30, 1999, mutually agreed to give her additional time to provide any medical documentation that would support her claim of disability. As of November 17, 1999, the agreed to date (Joint Exhibit 3 (B)), the Grievant failed to submit any supporting documentation. Without any convincing or credible

documentation at the time of removal, the absences in question were not properly authorized resulting in proper removal.

Other evidence and testimony introduced by the Union attempting to justify the Grievant's absences are outside my present purview. Hence, the Arbitrator reflects on Dr. Pedoto's prior finding (Joint Exhibit 13), Dr. Clark's finding (Union Exhibit 11), the ProWork's analysis (Union Exhibit 1) and the twenty pound standard. These various matters were proffered to provide some justification for the Grievant's absences or failure to report to work. They are attempts to mitigate the Grievant's actions, and are not of probative evidentiary necessity, and thus outside the scope of the present analysis.

The Grievant merely did not report to work as ordered. Her case would have been better served if she had reported, and then, somehow argued her claim. To assume the Employer had these documents available or in its possession, and thus, properly on notice regarding the Grievant's condition is a reach. It attempts to minimize the Grievant's unfettered responsibility to provide any relevant documentation. The best evidence of the Grievant's condition was tendered by Dr. Moser on April 1, 1999 (Joint Exhibit 11). Nothing in the record properly rebuts this finding.

AWARD

The grievance is denied. The Employer properly removed the Grievant for violating the Last Chance Agreement (Joint Exhibit 5 (B)).

December 11, 2000
Moreland Hills, Ohio

Dr. David M. Pincus
Arbitrator