

#1705

IN THE MATTER OF ARBITRATION

BETWEEN

SEIU 1199 AFL-CIO

AND

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS

Before: Robert G. Stein, Arbitrator

Grievant(s): Karen Ebersole

Case # 27-30-02-10-29-1592-02-12

Termination

Advocate(s) for the UNION:

Lee Alvis, Organizer

SEIU 1199 AFL-CIO

1395 Dublin Road

Columbus OH 43215

Advocate for the EMPLOYER:

David Burrus, DRC Labor Rel.

OHIO DEPARTMENT OF REHABILITATION AND CORRECTIONS

1050 Freeway Dr. North

Columbus OH 43229

INTRODUCTION

A hearing on the above referenced matter was held on June 24, 2003 at the North Central Correctional Institute in Marion, Ohio. The parties agreed that the issue is properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. The parties submitted written briefs in lieu of verbal closing arguments. The case was closed on July 12, 2003.

ISSUE

The parties agreed to the following definition of the issue:

Did the Employer discharge the Grievant for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference, see Agreement for language)

ARTICLE 8

BACKGROUND

The facts of this case are reasonably straightforward. The Grievant is Karen Ebersole, who was employed as a Correctional Program Specialist, with the Ohio Department of Corrections ("Employer" or "Department") at its North Central Correctional Institution (NCCI) in Marion, Ohio. She began her employment at NCCI in August of 1994, first as a secretary and then moved to the position of Correctional Program Specialist.

On October 24, 2002, the Grievant was terminated from her position for violation of Departmental Rule #04 – Job Abandonment – absent three (3) or more consecutive days without proper notice. The Grievant was accused of not having documentation to properly account for her absence from work. The Employer asserts the Grievant was absent without leave (AWOL) from work.

The Grievant's absence from work has been episodic since June of 2001 when she injured her left knee getting into a van while on the job. This was her second work-related injury. The first was in 1998 and was the result of an inmate's aggressive behavior. She pursued claims through the Bureau of Worker's Compensation (BWC). In November of 2001 she participated in the Department's new Return to Work Partnership (RTW) program. The RTW is a 60-90 day individualized and progressive program

designed to gradually return an employee with temporary restriction(s) to full-time unrestricted duty (Ex 1). It allows an employee to come back to work with limitations and without being fully recovered. Employees in the program may have modified job assignments. The Grievant worked in the RTW program until January 30, 2002, when the Employer determined the Grievant was regressing and had re-injured herself. The Employer claims that two (2) days later (February 1, 2002), the Grievant called off work and said she would not be returning or calling.

Based upon an independent medical examination, the BWC determined on May 25, 2002 that the Grievant had reached maximum medical improvement from her original injuries under which she filed with BWC. The examination also determined that she could return to her job as Correctional Program Specialist (Jx 2, p. 23, 2 and 3). The Grievant appealed the BWC ruling, but withdrew her appeal on July 12, 2002 (Jx 2, p. 26). From July 20, 2002 (date Employer received BWC information, Jx 2, p. 26) to September 18, 2002 the Employer claims NCCI sought clarification from the Department on how to proceed.

On September 18, 2002, Warden Gordon A. Lane sent the Grievant a letter and asked her to clarify her status because the Department did not consider her to be on approved leave (Jx 2, p. 6). In the letter the Warden told the Grievant she *"may be considered to be on Absent Without Leave (AWOL)"* and may be subject to removal (fired) if she did

not take the necessary steps to document her absence by September 25, 2002.

Ms. Ebersole received the Warden's letter and communicated by e-mail to Buffy Andrews, LRO at NCCI, asking for an extension of the Warden's September 25th deadline. Ms. Ebersole stated in her communication that she did not understand the Warden's request. Ms. Andrews sent an e-mail to Ms. Ebersole and denied her request for an extension.

After holding a Predisciplinary hearing on October 3, 2002, the Employer determined that the Grievant demonstrated a pattern of continued failure to notify the Employer of her absence status and violated Department Rule # 04 when she did not properly respond to Warden Lane's letter of September 18, 2002. The Grievant filed a grievance in response to her removal.

SUMMARY OF EMPLOYER'S POSITION

The Employer argues the Grievant is guilty of abandoning her job in violation of Department Rule # 4. It contends that this case is a clear example of an employee taking advantage of her injury leave benefits. The Employer claims the Grievant feigned ignorance of procedures required to obtain a proper leave of absence and had no intention of returning to work. The Grievant lives near NCCI, and it would have been

fairly simple for her to respond to the Warden's September 18th letter by coming to the facility to submit a leave form to avoid being absent without leave, asserts the Employer. The Employer further asserts that during the predisciplinary hearing, the grievance process, and arbitration, the Grievant failed to bring proper documentation of her need to be absent. In the Employer's words,

"Ms. Ebersole has had multiple opportunities to do something to maintain her employment. It was her decision not to act and when she made that decision it became management's responsibility to do something" (Employer's brief).

Based upon the above, the Employer requests the grievance be denied.

SUMMARY OF UNION'S POSITION

The Union argues that the Grievant was injured as a result of an inmate assault (12/20/98) and as a result of entering a van at work in June of 2001. The Union argues there is evidence that the state of Ohio was confused as to what to do in this matter and that the Grievant is *"...nothing more than a victim caught in between various agencies, doctors, the Department of Corrections who ...gave the grievant little or no assistance when she requested clarification" (Union's brief).*

The Union asserts the Grievant was not on AWOL and that the Department failed to follow the principles of progressive discipline in this

matter. The Union contends that this entire situation could have been avoided if the State had communicated with the Grievant.

Based upon the above, the Union urges the Arbitrator to sustain the Grievance.

DISCUSSION

The key period of time in this case is from July 12, 2002 to September 18, 2002. During this time the Grievant did not have an active appeal of BWC's determination that she has reached "maximum medical improvement" (MMI) and could return to work (Jx 2, p. 23). However, as early as March 13, 2002 Dr. Gerald M. Papp, one of the medical experts involved in this case, determined the Grievant could return to work. When asked whether the injured worker could return to her former position, Dr. Papp stated:

"Considering the allowed claim of sprain of the medial collateral ligament, she can return to her former position of employment as a corrections program specialist. The exam findings and medical information does not support her being unable to work 1/31/02 to estimated 3/1/02"

It is clear from the evidence that the Grievant sustained multiple injuries at work (12/98 involving an inmate) and again in June of 2001 involving her knee hitting a van upon entry. These injuries and the actions of the Employer appeared to have caused the Grievant considerable hardship. However, whatever the Grievant had to endure medically,

does not excuse her from properly notifying her employer of her inability to return to work.

For over two (2) months (July 12, 2002 to September 18, 2002) the Grievant failed to inform NCCI of her status, in spite of the fact she should have been aware that NCCI had information from BWC that she had reached maximum medical improvement on or about May 25, 2002 (Jx 2, p. 19). The receipt of such information would prompt any reasonable person to communicate with his or her employer.

I found the Grievant's statements and testimony to lack a basic sense of responsibility for her job. How can an employee be absent from work for months without any formal excuse and not feel obligated to communicate her status to her employer? It defies common sense. In her letter of September 25, 2002 to Warden Lane she states, "*All I wanted to do was return to my job.*" If this were the case, there would have been evidence of the Grievant making an effort to keep her job by simply keeping NCCI informed of her ability to work. The Grievant also stated in her September 25th letter to Warden Lane:

"Gordon, I have told Mrs. Tripp again and again that there is no reason why I cannot work. My medical records have shown all along that I will eventually need a knee replacement. That does not mean that I cannot be gainfully employed until that time comes."

Again, if this were the case, why did the Grievant let at least two (2) months pass (July 12, 2002 to September 25, 2002) without notifying NCCI?

Employers have a fundamental interest in employee reliability due to the impact on operations (Insley Mfg. Corp., 52 LA 59, 73 (1968)). Furthermore, the governing of leaves of absence is regulated by the Collective Bargaining Agreement, which in the case of many leaves becomes a judgment call by management (See Jx 1). The judgment rendered by management must not be arbitrary or capricious in nature, and very often is accompanied by the legitimate request of management for medical proof (75 LA 21, 25-27 (Ipavec)).

I found no evidence to lead me to believe that the Employer acted arbitrarily during the period of July 12, 2002 and September 18, 2002. Again, I find this is the central period in question. Although the Grievant agreed that her removal from the RTW program has relevancy, I do not agree. The RTW program is a short-term, 60 to 90 day program to transition an employee back to work. Several months after the program would have reached the ninety- (90) day mark (September 2002); the Grievant had yet to make a meaningful effort to return to her job.

Employees are presumed to have a copy of the Collective Bargaining Agreement or to have access to delegates who can help them understand their rights. Article 26.03 clearly states:

"When an employee is off work due to a compensable on-the-job injury, he/she shall be on leave of absence for the length of the time he/she receives Worker's Compensation" (Jx 1).

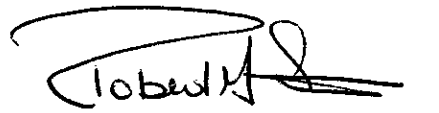
The BWC notified the Grievant on May 25, 2002 that her temporary total benefits were stopped because she had reached maximum medical improvement. She appealed this ruling but eventually withdrew her appeal. At the time she withdrew her appeal she was no longer under Worker's Compensation Leave as defined in Article 26.03. The section of the Collective Bargaining Agreement directly following Worker's Compensation leave (Article 26.04) clearly explains that an employee must request in writing any leaves of absence without pay and include reasons and dates. There was no evidence that the Grievant followed this procedure in order to attempt to preserve her employment.

In summary, I find the rationale provided by the Grievant that the Employer would not allow her to work to be vague, largely unsupported by the evidence, and of suspicious validity given the timing of its utterance. It is incumbent upon employees to responsibly communicate with their employer if they are unable to work. In this matter, the Employer proved the Grievant's failure to fulfill her obligation to secure a proper leave of absence. This was following a specific request by the Warden to do so or face removal. Absent evidence of the Grievant's inability to work, the Employer had little choice but to consider that the Grievant abandoned her job.

AWARD

The grievance is denied in substantial part. However, given the circumstances of this case, and the fact her original injury was caused by an inmate, the Grievant shall be permitted to substitute a letter of resignation for her termination. The letter of resignation must be sent to NCCI within thirty (30) days of the date of this Award in order to be considered valid.

Respectfully submitted to the parties this 20th day of August, 2003.



Robert G. Stein, Arbitrator