#1770

STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION & CORRECTION AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION & CORRECTION

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 11, AFL-CIO

GRIEVANT: **Dawn Fender**
GRIEVANCE NO.: **27-33-20030919-1079-01-03**

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: July 7, 2004

APPEARANCES

For the Employer

Janet L. Thomas	Personnel Officer 3
Renee Hughley	Personnel Officer 1
Linda Gabauer	Administrative Assistant 2
Joe Trejo	Office of Collective Bargaining
Beth Lewis	Assistant Chief, Labor Relations
Kay Mussio	Advocate

For the Union

Dawn Fender	Grievant
Shelly Johnson	Correctional Fund Service Coordinator
Karma Clayton	Paralegal
Sibyl Cercarik	Unit Manager
Ronnie L. Morton	Chapter President
Doug Sollitto	Executive Board
George Yerkes	Advocate

INTRODUCTION

This is a proceeding under Article 25-Grievance Procedure, Section 25.03 – Arbitration Procedures, of an agreement between the State of Ohio, Ohio Department of Rehabilitation and Correction (hereinafter referred to as the Employer), and Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO (hereinafter referred to as the Union), for the period March 1, 2003 through February 28, 2006 (Joint Exhibit 1).

An arbitration hearing was held on May 7, 2004, at the Ohio State Penitentiary (OSP). The parties had selected Dr. David M. Pincus as the Arbitrator. At the hearing, the parties were allowed to examine and cross-examine witnesses, and to proffer any other evidence and testimony deemed necessary to establish or rebut necessary proofs and arguments. The parties, moreover, were asked by the Arbitrator at the conclusion of the hearing, if they wished to submit post-hearing briefs. They declined, resulting in the record of the disputed matter closing on May 7, 2004.

Neither party raised substantive nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

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. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected from the separate panel of abuse case arbitrators established pursuant to Section 25.04. Employees of the Lottery Commission shall be governed by O.R.C. Section 3770.02(1).

24.02 – Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.
Disciplinary action shall include:

A. one or more oral reprimand(s) (with appropriate notation in employee's file);
B. one or more written reprimand(s);
C. working suspension;
D. one or more fines in an amount of one (1) to five (5) days, the first fine for an employee shall not exceed three (3) days pay for any form of discipline; to be implemented only after approval from OCB.
E. one or more day(s) suspension(s);
F. termination

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages or fines, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay; or pay the designated fine or;
2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

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ARTICLE 29 – SICK LEAVE

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29.03 – Notification

When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification. The Employer may request a statement, from a physician who has examined the employee or the member of the employee's immediate family, be submitted within a reasonable period of time. Such physician's statement must be signed by the physician or his/her designee. In institutional

agencies or in agencies where staffing requires advance notice, the call must be made at least ninety (90) minutes prior to the start of the shift or in accordance with current practice, whichever period is less. Failure to notify the Employer in accordance with the provisions of this paragraph shall result in the employee forfeiting any rights to pay for the time period which elapsed prior to notification unless unusual extenuating circumstances existed to prevent such notification.

If sick leave continues past the first day, the employee will notify his/her supervisor or designee of the anticipated duration of the absence. The employee is responsible for establishing a report-in schedule that is acceptable to the supervisor for the anticipated duration of the absence. If an acceptable schedule is not established the employee will notify his/her supervisor every day pursuant to agency reporting procedures.

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(Joint Exhibit 1, Pgs. 87-88)

ARTICLE 31 – LEAVES OF ABSENCE

C. Extended Illness

For an extended illness up to one (1) year, if an employee has exhausted all other paid leave. The employee shall provide periodic, written verification by a medical doctor showing the diagnosis, prognosis and expected duration of the illness. Prior to requesting an extended illness leave, the employee shall inform the Employer in writing of the nature of the illness and estimated length of time needed for leave, with written verification by a medical doctor. If the Employer questions the employee's ability to perform his/her regularly assigned duties, the Employer may require a decision from an impartial medical doctor paid by the Employer as to determine the employee's ability to return to work. If the employee is determined to be physically capable to return to work, the employee may be terminated if he/she refuses to return to work. In the event of conflicting medical opinion in Worker's Compensation Cases, the order of the Industrial Commission District Hearing Officer shall be controlling with regard to the employee's ability to return to work.

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(Joint Exhibit 1, Pg. 96)

STIPULATED ISSUE

Did the Department of Rehabilitation and Correction remove the Grievant for just cause? If not, what shall the remedy be?

JOINT STIPULATIONS

- The Grievance is properly before the Arbitrator
- The Grievant began her employment with the Department of Rehabilitation and Correction on October 27, 1997.
- The Grievant took a voluntary demotion to Account Clerk 2 in July, 1999.
- On September 12, 2003 the Grievant was removed for Failure to provide documentation of absence when required; Being absent without proper authorization; and Job Abandonment – 3 or more consecutive workdays without proper notice.
- That the Grievant was in violation of Rule 3e Failure to provide proper documentation when required and Rule 3h Being absent without proper authorization.
- That the penalty for a first occurrence of Rule 3e is a written reprimand or a 1 day fine or suspension.
- That the penalty for a first occurrence of Rule 3h is a 1 day fine or suspension.
- That the Grievant had no active discipline.
- That there are not procedural objections.
- That the Grievant called into shift between 12/23/02 and 4/7/03.
- Following her absence that began on 12/23/02 the Grievant filed a claim for Disability of 4/22/02.
- Joint Exhibit 6, Pgs. 1-4 reflects the attendance policy in effect at the time of the disputed matter.
- Officer D. Abair was removed January 23, 2003 pursuant to a settlement agreement. C.O. Abair was to be reinstated on July 14, 2003. C.O. Abair never returned to work and was subsequently removed a second time for job abandonment.
- The parties' stipulate that Bob Elias' testimony would correspond to his incident report dated 6/30/03 (Joint Exhibit 12), and the contents of the 8/7/03 Pre-D Hearing Officer's Report (Joint Exhibit 13).
- The Union stipulated to violations of Rule 3E – Failure to Provide Documentation of Absence when required and Rule 3H – Being Absent Without Proper Authorization.

CASE HISTORY

Dawn Fender, the Grievant, began her employment with the Employer on October 27, 1997 as a Correction Officer. In July of 1999, the Grievant accepted a voluntary demotion to an Account Clerk's position.

From April 25, 2002 to November 4, 2002, the Grievant was on approved disability leave. She eventually returned on November 4, 2002. Janet Thomas,

the Grievant's immediate supervisor and Personnel Director, testified the Grievant had consumed her available leave balances, and was placed on Physician Verification.

On December 23, 2003, the Grievant called the shift office. She told the attendant she would not return until December 30, 2002, and based her absence on"FMLA and Pending Disability." On December 31, 2002, Renee Hughley, a Personnel Officer 1, sent the Grievant a set of disability forms. Yet, the Grievant failed to submit these documents or contact the personnel office.

Hughley again attempted to contact the Grievant on January 13, 2003 and January 14, 2003. Hughley left voice mail messages instructing the Grievant she needed to call the personnel department about disability forms. Again, the Grievant failed to respond.

On January 15, 2003, Thomas wrote the Grievant. The letter contained the following particulars:

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> To date we have not received any paper work from you regarding your recent absence. You stated in your call off that you are on FMLA. We do not have any FMLA documents. However, after checking your work calendar for the past year, you do not qualify for FMLA because you have not worked 1,250 hours during the past year (See attached FMLA Policy). Also, you do not have any leave balances, as discussed with you on 12/10/02, when you were placed on Physician's Verification Notice. In addition, you have failed to submit any requests for leave for the time period 12/23/02 until the present.
>
> According to the Standards of Employee Conduct you are in violation of the work rules under the Absenteeism track. You are now being given a written directive to provide acceptable documentation substantiating your absence and a written letter of intent from you concerning your employment at O.S.P. This must be submitted to the Warden's Office on or before **January 24, 2003 by 4:30 PM.**

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(Joint Exhibit 4, Pg. 20)

It appears the Grievant never complied with the above requests in a timely manner.

It should be noted the Grievant never returned to work after December 23, 2002. She did, however, call the Shift Office to report her absences for the period December 23, 2002 through April 7, 2003. The Grievant was eventually placed on administrative leave on April 7, 2003.

On August 25, 2003, the Grievant was removed for the following infractions:

> Rule 3E – Failure to provide documentation of absence when required.
>
> Rule 4 – Job Abandonment – 3 or more consecutive workdays without proper notice.
>
> Rule 3H – Being absent without proper authorization.

(Joint Exhibit 1, Pg. 4)

On September 12, 2003, the Grievant formally protested her removal. The grievance contained the following Statement of facts:

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> The Union and Dawn Fender is (sic) aggrieved over Ms. Fender's removal from employment at the Ohio State Pen. Ms. Fender followed call off procedures (calling off work through (sic) shift – as call off slips confirm. Mgt. Rep. Requesting discipline (Bowen) at pre-d hearing stated that they did not (author's emphasis) have any documentation to show job abandonment. Yet the "neutral" Hearing Officer Dep. Warden chose to disregard the Mgt. Rep. Asking for discipline statement (See Hearing Officer's Report). All employees have been required to call off (through shift) and fill out proper paper work within (3) days of return to work (See employee code of conduct Rule #3, Track #1).

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(Joint Exhibit 3, Pg. 1)

The parties were unable to settle the disputed matter during subsequent portions of the grievance procedure. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Employer's Position

The Employer opined it had just cause to remove the Grievant from employment with the Department. The focal point of the Employer's analysis rests on a job abandonment charge. A violation of Rule 4 – Job Abandonment – 3 or more consecutive workdays without proper notice.

The Grievant violated departmental policy and mutually agreed to contract provisions when she abandoned her job. The Grievant violated Rule 4 when she failed to provide proper and sufficient notice. The Employee Attendance Policy (Joint Exhibit 6, Pg. 3) in effect at the time of the disputed matter references the AFSCME contract for guidance. Article 29 – Sick Leave, Section 29.03 – Notification requires an employee to "notify his/her immediate supervisor...unless circumstances preclude this notification. " This provision, moreover, requires an employee to notify his/her supervisor or designee when an illness exceeds one (1) day of illness. He/she must then communicate the anticipated duration of the absence, and establish a report-in schedule that is acceptable to the supervisor for the duration in question. An additional responsibility is placed on an employee. If an acceptable report-in schedule is not established, the employee must then notify his/her supervisor every day in accordance with existing agency procedures.

The Grievant's notification attempts failed to comply with the notification requirements contained in Section 29.02. She never contacted her supervisor nor helped establish an approved report-in schedule.

The Grievant's calls do not comport with the notification requirements, they subverted the authorized process. She reported during times when no one was available in the personnel department. These calls normally took place as early as 5:20 a.m., and as late at 10:00 p.m.

Several witnesses corroborated the Employer's perspective. Their reporting protocols reflected the Institutional Policy under the Collective Bargaining Agreement and relevant provisions. They testified that they called their shift and supervisor. The policy in the personnel department is of sole impart. Any other contrary testimony bears little relevance to the disputed matter.

The hand delivery incident allowed to by the Union failed to establish a binding practice mutually agreed to by the parties. The Employer acknowledged the incident in question. Since the Union was only able to raise this isolated incident, the Grievant could not rely on this exception to justify her inaction.

Unlike the Grievant's subversive actions, the Employer engaged different approaches to contact the Grievant without a successful outcome. The Employer attempted to contact the Grievant by telephone, regular and certified mail. Yet these various efforts failed to generate any response. Hughley's testimony regarding her telephone efforts should be given significant weight. Her testimony was supported by a log which documented her attempts to call the Grievant.

Even the Grievant's justifications for her absence were contrived based on her status and prior experiences. She justified her absences by noting FMLA and disability reasons. The Grievant never completed paperwork to certify FMLA leave. If the Grievant had initiated proper inquiries, she would have determined that she was not FMLA qualified. Similarly, the Grievant had filed timely disability paperwork in the

recent past. She should have, therefore, known the timing requirements for any disability claim. Any proper filing would have notified the Employer about the anticipated duration of her alleged disability.

The Union's Position

The Employer did not have just cause to remove the Grievant. She did not engage in job abandonment, but merely acted in accordance with the practice followed in the personnel department. Actions engaged in by the Employer's representations supported the Union's position and mitigating circumstances support either a modification of the implemented penalty or a ruling in the Grievant's favor.

A job abandonment charge normally anticipates a no call, no show situation. Here, the Grievant called-off from October 25, 2002 to November 4, 2002. She only called her shift, but the Employer never initiated any disciplinary action. If she had violated Section 29.03 and existing policy, the Employer was obligated to notify and/or discipline the Grievant at a much earlier date.

The charge is also defective because the Grievant merely followed the department's existing policy. She had always responded to prior absences by calling the shift without doing anything else. The Grievant's prior supervisor testified and supported her view of the existing policy. This policy or practice was in place prior to Thomas' arrival as her replacement. Absent employees had to call in prior to their subsequent shift, and only contacted their supervisor as a courtesy on a voluntary basis.

The Employer failed to provide the Grievant with proper notice regarding her responsibilities. The Grievant had only worked for Thomas for a number of weeks prior to her return from a disability situation. Thomas was a newly appointed supervisor and

should have placed all employees on notice about an altered notification requirement. Neither the Grievant nor any other person working under Thomas' direction was told that he/she was required to contact his/her supervisor upon experiencing an absence occurrence. Notice, under these circumstances, is required when a supervisor holds expectations which deviate from expectations and policies held by a predecessor supervisor.

The Grievant expressed a desire to return to work by calling in. She called in on numerous occasions and was unable to contact her supervisor even if she wanted to. They worked different work schedules which minimized the opportunity for contact.

The Employer engaged in barren attempts to contact the Grievant while never heightening concerns about her absences. Hughley merely called to inquire about disability papers, while Thomas called about work-related topics. The Employer never made direct contact with the Grievant regarding her FMLA status or whether she needed to file her disability papers.

The certified letter (Joint Exhibit 4, Pg. 20) sent on or about January 15, 2003 cannot be viewed as a direct order to return to work. The Grievant was merely advised "to provide acceptable documentation substantiating your absence and a written letter of intent from you concerning your employment." She was, moreover, advised to submit this information on or before January 24, 2003 by 4:30 p.m.

Putting aside the certified letter's contents, the Grievant never received the disputed letter. The Employer never established that the Grievant was aware of the certified letter.

In terms of mitigating circumstances, the Grievant's state of mind and physical health prevented her return to work. The Grievant's prior disability conditions raised

their ugly heads during the disputed period of time. She continued to experience stress-related issues regarding her divorce and custody battle. The Grievant broke her foot in February 2003 requiring a cast and doctor's care. In addition, her pregnancy was characterized as high risk. The Grievant remarked she hesitated filing a disability claim because she was saving her disability benefits for childbirth purposes.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing and a complete review of the record including pertinent contract provisions, it is this Arbitrator's opinion that the Employer had just cause to remove the Grievant. The Grievant violated departmental policy and related contract provisions. Various practice considerations were not adequately supported by the Union, while credibility concerns lessened the Grievant's version regarding the matter in dispute.

The Grievant clearly violated Rule 4 – Job Abandonment because she was absent three or more consecutive workdays without proper notice. The notice requirement serves as the pivotal characteristic underlying the dispute. Hence, calling master control in a timely manner does not fulfill an employee's notification requirements. Calling master control in a timely manner fulfilled one portion of the requirements, but was flawed in terms of a critical feature. Terms and conditions mutually agreed to by the parties govern the propriety of any employee's actions. Even if the Arbitrator, on a personal level, believed the Grievant's actions supplied sufficient notice, he would be authoring his own brand of industrial jurisprudence if he substituted his judgment for clear and unambiguous language contained in the Agreement (Joint Exhibit 1). Here, the language is clear in terms of unambiguous notice responsibilities.

The Employee Attendance policy in effect at the time of the disputed matter contains a call-off procedure (Joint Exhibit 6, Pg. 3). In this section, employees are advised they "must report off from work following guidelines established by the AFSCME...Union contract(s)." The guidelines are contained in Section 29.03 – Notification (Joint Exhibit 1). Relevant to the present dispute are those guidelines dealing with absences which continue past the first day since a Rule 4 violation requires proper notice for absences of three (3) or more consecutive workdays. Nothing in the Agreement (Joint Exhibit 1) requires additional communication by the Employer to an absent employee. A Return to Work Order, more specifically, does not have to be issued as a pre-condition to any anticipated discipline.

Section 29.03 places specific responsibilities on an employee whose absence continues past the first day. An employee must notify his/her supervisor or designee about the anticipated duration of the absence, and must establish a report-in schedule that is acceptable to the supervisor. If a schedule is not established, then an employee must notify his/her supervisor every day in accordance with an agency's reporting procedures.

Clearly, this language requires direct contact and notification with a supervisor. Otherwise, an acceptable report-in schedule cannot be formulated. This contract, based on the previously described language, does not reflect a voluntary or discretionary response available to any employee. The Union's attempt to cloth this contractual requirement as discretionary is totally misplaced. Clear and unambiguous language such as the language under review reflects the parties' intent. Notification obligations have been agreed to and cannot be fulfilled when viewed as courtesy calls.

Any practice, even if established, cannot bind the parties in the face of clear language negotiated by the parties. A binding practice must be mutually agreed to by the parties and must be in effect for a considerable period of time. The practice, moreover, must be the sole method agreed to by the parties and not one of a variety of practices or approaches utilized in the past. None of these principles were established by the Union. Again, language contained in Section 29.03 and an inability to establish a binding past practice thwart the Union's attempt to overturn the removal decision. These findings apply to t he Union's call-in claim and the hand delivery issue.

The call-in policy was consistently enforced within the personnel department. The Arbitrator places specific reference placed on direct contact with the supervisor. Linda Gabauer, a former Account Clerk III, and Renee Hughley, a Personnel Officer I, noted they contacted master control and their supervisor. Their testimony was consistent and credible. Neither witness viewed their calls to their supervisors as a courtesy, but as an obligation.

Union witnesses' testimony regarding this facet of the case is viewed less favorably because of inconsistent responses. This dampened the witnesses' credibility and the Union's case in chief. Sibyl Cercarik, the Grievant's former supervisor, was unclear and quite evasive. At one point during her testimony, Cercarik noted the Grievant called her "when required to," but that it was a courtesy. Yet later on she provided the following response:

> Q: So it was procedure in your area when you were supervisor of personnel for your staff to call you when they called off sick?
>
> A: Yes, it was procedure and practice.

The Grievant's recollections also seemed selective. The Grievant initially responded that during her entire time in the Personnel Department she called off by calling the shift

office, and never called her supervisor. When asked subsequently if she ever called her supervisor, she testified:

A: As a courtesy, if at all.

Other attempts to support the lax enforcement claim added little to the record. Shelly Johnson and Karma Clayton did not work in the Personnel Department. Their experiences, therefore, can hardly support the claim in dispute.

The Grievant's own actions or inactions exacerbate rather than mitigate the situation. Any reasonable employee experiencing an extended absence should have known that a call to her supervisor was reasonably anticipated. She made no attempt to contact anyone, while the Employer's representatives left voice mails and sent regular and certified letters. Nothing in the record suggests the Employer did not have the Grievant's telephone number or actual mailing address. Neither the Union nor the Grievant alleged that she had moved or changed her telephone number. Without any contrary evidence or testimony, the Arbitrator has to assume the Grievant blatantly disregarded the Employer's efforts. She received the phone calls and letters, but failed to respond. Ironically, if she had responded, the notification issue might have been addressed and she could have filed her disability application in a timely manner.

AWARD

The grievance is denied. The Employer had just cause to remove the Grievant from employment.

July 7, 2004
Moreland Hills, OH

Dr. David M. Pincus
Arbitrator