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IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF REHABILITATION AND CORRECTIONS

AND

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

Grievant: Sharma Rhodes

Case No. 27-05 (20031010) 1143-01-03

Date of Hearing: June 2, 2004

Place of Hearing: Orient, Ohio

APPEARANCES:

For the Union:

Advocate: Dave Justice
2nd Chair: Jamie Kuhner

Witnesses:

Mavis Wingard
Sharma Rhodes

For the Employer:

Advocate: Krista M. Weida
2nd Chair: Beth Lewis

Witnesses:

Captain Daniel Justice
Christina Wendell, Esquire

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: August 25, 2004

INTRODUCTION

The matter before the Arbitrator is a grievance pursuant to the Collective Bargaining Agreement ("CBA"), in effect March 1, 2003, through February 28, 2006, between the State of Ohio - Department of Rehabilitation and Corrections ("DR&C") and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union").

The issue before the Arbitrator is whether just cause exists to support removal of the Grievant, Sharma Rhodes ("Rhodes"), for violating Rule 3 – Failure to provide physician verification.

The removal of the Grievant occurred on October 3, 2003, and was appealed in accordance with Article 24 of the CBA. This matter was heard on June 2, 2004, and is properly before the Arbitrator for resolution. Both parties had the opportunity to present evidence through witnesses and exhibits. Both parties submitted post-hearing briefs, with the record being closed as of July 10, 2004.

BACKGROUND

The Grievant worked for the DR&C as a Correction Officer ("CO") at the Corrections Reception Center ("CRC") located in Orient, Ohio. The Grievant began her employment with DR&C in 1989 as a CO.

On August 1, 2003, the Grievant was classified as a Special Duty Officer, which required that she work different assignments, i.e., sally port, mail or transportation, based upon staffing needs of the institution. Lieutenant M. Fisher ("Fisher") advised the Grievant that her assignment on August 1, 2003, was to report to special fog alert duty. Lt. Fisher prepared an incident report, which indicated the Grievant was directed to work Exterior Post Zone 2, during a fog alert. (Joint Exhibit ("JX") 4, p.19). However, a few minutes later, the Grievant informed Lt. Fisher that she was going home sick. (JX 4,

p.19). The fog alert assignment was an undesirable post and, according to DR&C, it was raining and the Grievant's illness was related to her unwillingness to work that assignment.

The Grievant called the special duty supervisor, Captain Daniel Justice ("Justice"), after learning of her assignment. She informed him that she was sick due to a medical condition recognized under the Family Medical Leave Act ("FMLA") by DR&C and she wanted to go home on FMLA leave. Capt. Justice denied the Grievant's use of FMLA leave, but granted her a gate pass due to her illness and advised the Grievant to bring a physician's verification note covering her illness on August 1, 2003.

The Grievant was off from work on August 1st, 4th, and 5th due to her illness. On August 6, 2003, the Grievant returned to work with a statement from her chiropractor indicating that she was seen in his office on August 5, 2003, for problems related to her spine. (JX 11, p.16).

On August 6, 2003, the Grievant completed the Request for Leave form seeking FMLA leave for August 1st, 4th, and 5th, 2003. (JX 11, p.15). FMLA leave was approved by DR&C for August 4th and 5th, but not for August 1st. (JX 11, p.15). However, DR&C's timekeeper system (used to track an employee's leave to ensure accuracy of pay regarding leave categories) credited the Grievant with FMLA leave on August 1st, 4th and 5th. (JX 9, p.10). The Grievant's FMLA balance was diminished, by crediting her eight (8) hours of usage, even though the FMLA leave on August 1, 2003 was disapproved.[1]

Regarding her request for FMLA leave, the Grievant's medical condition was certified on July 7, 2003, by DR&C, and a monthly physician certification was required. (Union Exhibit ("UN Ex") 2, pp.2-6). The FMLA allows an employer to request re-certification every thirty (30) days. It is undisputed that on August 1, 2003, the Grievant

[1] FMLA permits employee(s) to utilize up to twelve (12) weeks of leave during a twelve (12) month period to care for a serious health condition affecting the employee or a family member. Intermittent leave is permissible, if medically required. See, 29 U.S.C. § 2601, et seq.

was approved for FMLA leave. The Union submits that the Grievant should not have been required to provide a physician's verification on August 1st, 4th or 5th since her illness was the subject matter of her FMLA condition.

The DR&C submits that under FMLA, additional information can be sought to ensure that the leave complies with the FMLA certified illness particularly if the facts suggest FMLA abuse.

On October 3, 2003, the Grievant was removed for violating the Department's Standards of Employee Conduct, Rule 3 (F) - Failure to provide physician's verification. Prior to October 3, 2003, active discipline of record included a one (1) day fine in November 2002, a two (2) day fine in January 2003, and a five (5) day fine in April 2003, for violating Rule 3 (H) – Absent without proper authorization. DR&C considered the August 1, 2003, incident as the fourth attendance-related violation, and in accordance with the disciplinary grid, removal was appropriate. (JX 2, p.2). Moreover, in June, October, and December of 2002, and March of 2003, the Grievant received corrective action for attendance violations under Rule 3. Finally, in December 2003, the Grievant received notice of suspected pattern of abuse for excessive absenteeism and was informed that disciplinary proceedings may result if abuse continued. (JX 8).

The Union submits that the Grievant was not required to provide a physician verification if an employee had a FMLA certification on file. The Union alleges that Capt. Justice could not deny the August 1, 2003, leave for FMLA, as Mavis Wingard ("Wingard"), the FMLA Program Administrator, was charged with that responsibility. The Union also submitted evidence that DR&C issued a memo indicating that if an employee is FMLA certified and is on physician verification who call-off stating FMLA as the reason, a physician statement for that absence cannot be required. (UN Ex 1).

The Union seeks reinstatement, back pay and any other available remedy to make the Grievant whole.

ISSUE

Was the Grievant, Sharma Rhodes, removed for just cause? If not, what shall the remedy be?

RELEVANT PROVISION OF THE CBA AND DR&C RULES
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(i).

DR&C STANDARDS OF EMPLOYEE CONDUCT
RULE 3

Rule 3 (F): Failure to provide physician's verification when required.

OFFENSE

1st	2nd	3rd	4th	5th
WR or 1	2	5	R	

Rule 3 (H): Being absent without proper authorization.

OFFENSE

1st	2nd	3rd	4th	5th
1	2	5	R	

POSITION OF THE PARTIES

POSITION OF THE UNION

On August 1, 2003, the Grievant reported to work even though she was ill. Due to her past attendance record, she would have been disciplined based upon the ninety-minute call-in requirement if she didn't report to work on August 1st.

Upon arriving at work, she told Lt. Fisher that she was feeling ill and not to assign her to the post and that she was going to call Capt. Justice and inform him she was going home because of illness. The DR&C's position that the Grievant did not want to work the Fog Alert Post is not supported by the following facts: (1) Lt. Fisher told the Grievant that she was going to work Exterior Post Zone 2; (2) Lt. Fisher, in his incident report, wrote that he gave the Grievant a direct order to work Exterior Post Zone 2; (3) Exterior Post Zone 2 was an armed post; and (4) the Grievant wasn't firearm certified and therefore could not work the post. Simply, no motivation existed for the Grievant to claim sickness as a result of the Fog Alert assignment, regardless of how undesirable it was.

Regarding the Grievant's FMLA certification, Wingard, the FMLA Program Administrator, testified that on July 7, 2003, the Grievant's request for FMLA was approved. (UN Ex 2, p.4). Wingard further indicated that Human Resources ("HR"), makes the determination as to the eligibility of an employee on FMLA, not supervisors. With respect to the Grievant, her FMLA certification stated that on a monthly basis physician verification was required to maintain her FMLA certification. (UN Ex 2, p.6). If additional medical information was required to obtain or maintain FMLA certification, Wingard was responsible for the request, not supervisors. In other words, Capt. Justice could not unilaterally deny the Grievant's FMLA leave request on August 1, 2003.

The Grievant testified that the only time she was instructed to obtain a physician statement while on certified FMLA was on August 1, 2003, by Capt. Justice. The Grievant further indicated that the approved FMLA condition certified on July 7, 2003, was due to a stress/depression condition and she had been instructed to go home if "my stress" condition flared up at work. On August 1, 2003, she was not on the clock (or at roll call) when Lt. Fisher approached her regarding the Fog Alert assignment. She then called Capt. Justice and told him that she wanted FMLA leave because she was feeling sick.

Capt. Justice denied the Grievant's FMLA leave for August 1, 2003, without proper authority. This is supported by the fact that Ted Dyrdek ("Dyrdek"), Labor Relations Officer, had previously issued a memo to the staff at CRC on September 6, 2002, which indicated that if an "...employee is on Physician's Verification and call-off stating FMLA. We cannot require them to supply a physician statement for that absence." (UN Ex 1). Capt. Justice, Wingard, command staff and other office administrators were on the distribution list of Dyrdek's memo. (UN Ex 1). As a result, Capt. Justice was put on notice that his actions were without authority as undertaken against the Grievant.

Therefore, if the Grievant was not required to provide a physician verification on August 1, 2003, then the removal was not for just cause and DR&C violated Article 24.01 at the very least. The Union cites other contractual articles violated by DR&C's conduct; Article 24.03 – Supervisory intimidation and Article 31 – Leaves of Absence.

The Union seeks reinstatement, back pay and/or modification of the removal in this matter.

POSITION OF THE EMPLOYER

The DR&C submits that the Rule 3 violation carries a penalty of removal for the fourth offense. The Grievant's record regarding absenteeism violations prior to August 1, 2003, included a one (1) day, two (2) day and five (5) day fine in 2002 and 2003, all Rule 3 violations. The fourth violation occurred on August 1, 2003, and under the disciplinary grid, removal was the only option.

In addition to the actual violations cited above, the Grievant also received four corrective actions in 2002 and 2003 for Rule 3 violations. In December 2003, the Grievant received notice of suspected pattern of abuse for excessive absenteeism and the Grievant had been plated on physician's verification as of August 1, 2003.[2] The Grievant had an epidemic attendance problem for an extended period of time despite numerous corrective attempts to modify the Grievant's use and/or abuse of sick leave.

On August 1, 2003, the Grievant did not want to work the special duty Fog Alert and within minutes re-approached Lt. Fisher advising him of her illness. The Fog Alert duty, as testified by Capt. Justice, was undesirable and the Grievant did not want to work that post and used her certified FMLA leave as a pretext.

Capt. Justice further indicated that the Grievant would not have been assigned the exterior post, but rather the interior Fog Alert post, which would not require that she carry a firearm. According to Capt. Justice, the interior Fog Alert Post has been assigned to other CO's in the past and the Grievant was being treated similarly with her peers.

Capt. Justice further contends that an honest suspicion existed that the Grievant was using her July 7, 2003, FMLA certification as an excuse for not wanting to work. The DR&C points out that from July 9 through July 30, 2003, the Grievant missed eight

[2] Article 29.04 - Sick leave provides that DR&C can require a statement from a physician for all future uses until the employer has accrued a reasonable sick leave balance.

(8) days of work (claiming FMLA reasons on each occasion) and the Employer legitimately, was suspicious of her intermittent FMLA leave usage.

The DR&C admits that the Grievant should not have been credited with FMLA usage on August 1, 2003, but such mistake did not violate the provisions of the Act. Furthermore, the Grievant was required to bring a physician verification to justify the August 1, 2003, illness in accord with Article 29 of the CBA. DR&C poses that if the Grievant believed that she was not required to bring in a physician verification, why did she bring in a note from her chiropractor on August 6th? The physician verification requirement was stated to the Grievant very clearly by Capt. Justice, at the time she received a gate pass to go home on August 1, 2003.

The DR&C contends that it has a duty to investigate FMLA abuse and require the Grievant to demonstrate a need for leave on an intermittent basis and/or on a specific date. Based upon the prior absenteeism related violations of Rule 3, the DR&C had an honest suspicion if the Grievant was using FMLA properly on August 1, 2003.

The Grievant failed to establish that her August 1, 2003, absence was for any legitimate basis in accord with FMLA and she disobeyed a direct order to obtain a physician verification. As a result, the Grievant violated Rule 3 (F) resulting in the recommendation of removal.

BURDEN OF PROOF

It is well accepted in discharge and discipline related grievances, the Employer bears the evidentiary burden of proof. See, Elkouri & Elkouri – "How Arbitration Works" (5th Ed., 1997). The Arbitrator's task is to weigh the evidence and not be restricted by evidentiary labels (i.e. beyond reasonable doubt, preponderance of evidence, clear and

convincing, etc.) commonly used in the non-arbitable proceedings. See, Elwell- Parker Electric Co., 82 LA 331, 332 (Dworkin, 1984).

The evidence in this matter will be weighed and analyzed in light of the DR&C's burden to prove that the Grievant was guilty of wrongdoing. Due to the seriousness of the matter and the Article 24 requirement of "just cause", the evidence must be sufficient to convince this Arbitrator of (the Grievant's) guilt. See, J.R. Simple Co. and Teamsters, Local 670, 130 LA 865 (Tilbury, 1984).

DISCUSSION AND CONCLUSIONS

After careful consideration of this matter, including all of the testimony and evidence of both parties, I find that the grievance is granted in part, and denied in part. My reasons are as follows:

The Grievant, a long-term employee with over fourteen (14) years of experience, is clearly accountable for her conduct relating to the numerous Rule 3 violations and/or corrective actions preceding August 1, 2003. The Grievant has been disciplined on three (3) occasions for absenteeism violations under Rule 3 and probably, a fourth violation will occur to justify removal under the disciplinary grid, but the facts of this case did not convince this Arbitrator that the Employer met its evidentiary burden of 'just cause' under Rule 24 of the CBA.

Physician Verification Request

Both parties admitted that Capt. Fisher requested that a physician verification be submitted by the Grievant regarding the August 1, 2003, absence. It is also undisputed that on August 6th, the Grievant presented a chiropractor statement for an office visit that occurred on August 5, 2003.

The DR&C contends the chiropractor's statement is unrelated to her certified FMLA leave condition, i.e., stress/depression, and therefore her August 1, 2003, absence violates Rule 3 (F). Query, if the chiropractor's statement is unrelated to her certified FMLA condition, why did DR&C approve her FMLA on August 4th and 5th? The Employer also contends that Capt. Justice had the authority to deny the Grievant's FMLA request and require that she provide a physician statement to verify her illness on August 1, 2003. I disagree.

The Grievant was absent on August 1st, 4th and 5th. No evidence was introduced by the Employer to suggest that the illness, which commenced on August 1st, did not continue through August 5th. If the Grievant was sick for three (3) workdays, but only saw a physician on the last day (August 5th), the record is silent as why August 4th was not treated as a Rule 3 (F) violation as well. The record indicates that the Grievant complied with the 90-minute notification on August 4, 2003, by requesting FMLA leave in a timely manner (UN Ex 2, p.17), which was approved with no requirement of a physician verification. The record indicates that on August 4, 2004, the Grievant's telephone call was the only requirement necessary to invoke FMLA on August 4th. The same process applied to Grievant's August 5th FMLA leave request as well. (UN Ex 2, p.18).

The Grievant testified since July 7, 2003, on eight (8) other occasions, she only had to call to request FMLA leave and 'no' additional stipulation, i.e., physician verification, was required. The predicate that a physician verification be supplied under these facts are troublesome for several reasons: (1) the Grievant had an approved FMLA certified condition, (2) the DR&C, through Dyrdek, provided clarification to the staff as to when physician verification is required and (3) was the physician verification required of the Grievant because she verbally sought FMLA leave at the job site as opposed to using the telephone to initiate the request.

Dyrdek's memorandum is helpful in providing background information directly applicable to the Grievant's situation. Simply, the memorandum provides that if an employee is FMLA certified and calls off stating FMLA, then no physician statement for that absence can be required. Applying the plain meaning of the memo, I find no distinction between an employee using a telephone outside the institution or stating the call off verbally, while at the institution. Capt. Justice testified that he was familiar with Dyrdek's September 6, 2002, memo, but that the memorandum was not applicable since the Grievant was not calling off because she was physically at DR&C at the time she requested FMLA leave. I disagree and have applied the memorandum as a guide consistent with its intent regarding the term "call off". Notification of an employee's FMLA leave is required, however, this Arbitrator will not adopt a narrow interpretation that restricts call off only to calls made outside of the institution.

Additionally, Wingard, who credibly testified that in the past, FMLA certified, physician verification was not required from an employee. Wingard also stated that HR, not supervisors, decide if additional medical verification is required. The record is silent as to Capt. Justice's authority to deny FMLA leave without assistance from HR.

At the hearing and in it's post-hearing brief, DR&C contends that the Grievant did not want to work the Fog Alert post and used her FMLA condition as a pretext to go home. Capt. Justice, in an attempt to differentiate between interior and exterior assignments, testified that Lt. Fisher assigned the Grievant to an interior post, which did not require firearm certification. The Grievant testified that Lt. Fisher informed her that she was going to be assigned an exterior post, but due to her lack of firearm certification, she could not be assigned to an armed post. In resolving the conflict whether the Grievant was motivated by the assignment to allege an illness, once again, the facts do not support DR&C's position. Lt. Fisher's incident report dated August 1, 2003, states in part, "…. Officer Rhodes was given a direct order by myself, Lt. Fisher, to work Exterior

Post, Zone 2 during a Fog Alert..." (JX 4, p.19) (Emphasis added). If the Grievant could not work the armed exterior post, the assignment proffered by Lt. Fisher on August 1, 2003, does not provide the motivation alleged by the employer. The record is clear that the Grievant was assigned to an armed post by Lt. Fisher, thereby dissipating the motivation theory of the Employer.

I find that physician verification, by past practice and policy, has not been required of employees who are FMLA certified. The Grievant made a request for the August 1, 2003, absence to be treated as FMLA leave, which was denied by Capt. Justice. Capt. Justice, and DR&C have legitimate concerns about the Grievant's absenteeism, but the Employer overstepped its boundaries in requiring a physician verification under these facts, and the weight of the evidence does not support a violation of Rule 3 (F).

In the past, the invocation of FMLA is generally over the telephone if an employee has adequate notice. However, to suggest that a "serious health condition" is determined only at the time a work shift commences would be illusory at best. Finally, the Employer's position that an employee can only invoke FMLA call off over the telephone in advance of their workday fails to account for the uncertainty related to serious health conditions that occurs while an employee is at work.

FMLA

The Employer in its' post-hearing brief argues that it can seek information to investigate FMLA abuse where there's reasonable suspicion. Additionally, even though FMLA allows for intermittent leave, DR&C could investigate and verify whether or not the leave qualifies for FMLA or not including leave for a specific date. I agree with the DR&C's position that reasonable requests for leave verification, even for a single day, may be appropriate under FMLA when a pattern of intermittent absences occur. As

pointed out by Christina Wendell, Attorney with DR&C, an Employer can investigate FMLA abuse if there is reasonable suspicion and require verification from an employee. If FMLA leave was granted to the Grievant on August 1, 2003, DR&C certainly reserves the right to require additional verification under Manns v. Arvin/Meritor Inc., 291F. Supp. 2d 655 (N.D. Oh. Nov. 3, 2003). However, FMLA was denied by Capt. Justice on August 1, 2003, making the appropriateness of the physician verification an issue, not whether or not the employer has the ability to require additional verification, even for a single day under FMLA.

Moreover, if the Employer believed that the eight (8) days the Grievant claimed for FMLA leave prior to August 1, 2003, constituted abuse, the Employer has a remedy under Manns v. Arvin/Meritor Inc., supra, to seek additional verification.

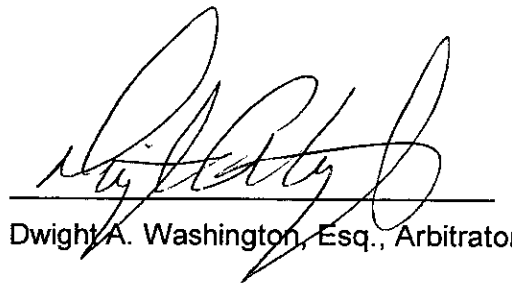
At the end of the day, the burden rests with DR&C to establish a violation of Rule 3 (F) and the record as a whole fails to support wrongdoing to support removal. As alleged earlier, I believe the Grievant, if she doesn't correct her attendance, will continuously place her employment at the doorstep of removal.

Finally, based upon a confusing, but good faith attempt to navigate between the FMLA provisions and practicality to staff its workforce, I find that Capt. Justice did not act in malice in denying the August 1, 2003, FMLA request, but clearly failed to follow proper protocol. However, to ensure consistency, the involvement of the HR department in denial of certified FMLA leave, seems logical. Based on my earlier conclusion that the Employer did not meet its burden of proof regarding Rule 3 (F) violation, reinstatement of the Grievant is appropriate. However, no back pay and/or any other economic benefit is awarded.

AWARD

The grievance is granted in part, denied in part. The Grievant was not removed for just cause. The Grievant shall be reinstated within fourteen (14) days of this award, with no back pay or economic benefit. The Grievant shall be entitled to her service and/or institutional seniority rights. The Arbitrator shall retain jurisdiction for a period of sixty (60) days to resolve any dispute that may cause arise in the implementation of this award.

Respectfully submitted this 25th day of August 2004.



Dwight A. Washington, Esq., Arbitrator