OPINION AND AWARD
IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio Department of Rehabilitation and Corrections (Mansfield Correctional Institution)
-AND-
Ohio Civil Service Employees Association AFSCME Local 11

Appearing for Mansfield Correctional Institution
Buffy J. Andrews, Labor Relations Officer - NCCI
Scott Basquin, Warden's Assistant 2
John Kinkelp, Labor Counsel
Beth A. Lewis, Assistant Chief, Labor Relations
Ray Mussio, Labor Relations Specialist
Janet Tobin, Personnel Officer

Appearing for OCSEA
Jim Beverly, c/o Manci
Patricia Howell, OCSEA Staff Representative
Timothy Lawson, Civilian
Billy Stevens, Chapter 7010

CASE-SPECIFIC DATA
Grievance No.
Grievance No. 27-20 (04.20 03)

Hearing Held
October 28, 2004

Closing Arguments Given

Case Decided
November 28, 2004

Subject
Removal–Job Abandonment/AWOL

The Award
Grievance Denied

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Facts

This dispute involves the removal of Mr. Timothy Lawson ("the Grievant"). The parties to this dispute are the Ohio Department of Rehabilitation and Corrections (Mansfield Correctional Institution) ("the Agency") and the Ohio Civil Service Employees Association ("the Union").[1]

The essential facts in this case are largely undisputed. The Ohio Department of Rehabilitation and Corrections hired the Grievant on August 13, 1990[2] and the Agency removed him approximately fourteen years later on January 30, 2004, for Violation of Rule 3H, "Absent Without Proper Authorization," and Rule 4, "Job Abandonment, "[three] or more consecutive work days without *proper* notice.[3] During his tenure with the Agency, the Grievant's job performance met or exceeded expectations.[4] However, when he was terminated, the Grievant had two active disciplinary actions against him: A one-day fine imposed on March 17, 2003 for absence without proper authorization and excessive absence;[5] and a two-day fine to become effective for the pay period ending on January 10, 2004 for absence without proper authorization.[6] Although the Agency brought the charges in the instant dispute against the Grievant on December 31, 2003,[7] before the two-day fine was to be imposed, that fine is still considered active discipline, since nothing in the record indicates that it was ever grieved. Also, when he was removed, the Grievant had no available sick, vacation, or personal leave.[8]

The specific circumstances leading to the instant dispute were the Grievant's absences from work between November 18, 2003 and January 4, 2004. During that period, the Grievant was caring for and/or comforting his sixty-year-old mother, who suffered from two heart attacks, a stroke, and Parkinson's

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[1] Hereinafter referred to as the "Parties."
[2] Stipulated Fact.
[3] Joint Exhibit 4-7 (emphasis added).
[4] Stipulated Fact.
[5] Joint Exhibit 7.
[6] Joint Exhibit 8.
[7] Joint Exhibit 3-1.
[8] Stipulated Fact.

disease.[9]

Ms. Tobin alerted the Grievant that his FMLA hours were close to exhaustion and, subsequently, notified him that he had exhausted his FMLA hours. Shortly before and shortly after November 18, 2003, the Grievant twice telephoned the Agency's Personnel Officer, Ms. Janet Tobin, to discuss his condition and his mother's FMLA claim. During the first conversation, shortly before November 18, 2003, Ms. Tobin advised the Grievant that he was quickly exhausting his FMLA hours. When the Grievant contacted Ms. Tobin shortly after November 18, 2003 to update his mother's condition, Ms. Tobin told him that he had exhausted his FMLA hours and advised him to return to work. The Grievant said he did not know what he would do because his mother was in a nursing home and he needed to be at her side. Despite Ms. Tobin's advice, the Grievant did not return to work. Shortly after her last telephone conversation with the Grievant, Ms. Tobin formally notified him through a letter dated November 20, 2003 that his twelve weeks of FMLA, had been exhausted since November 18, 2003.[10] Ms. Tobin sent the letter via regular and certified mail to the Grievant's last known address. The certified letter was returned undelivered, but the letter sent to regular mail was not returned. Ms. Tobin made no further efforts to contact the Grievant. Evidence in the record indicates that the Grievant actually had eighty FMLA hours available on November 18, 2003. However, he exhausted those FMLA hours long before returning to work on January 6, 2004 and was officially AWOL after exhausting those eighty FMLA hours.

Thinking that the Grievant had exhausted his FMLA hours on November 18, 2003, the Agency's Warden, Ms. Margaret Bradshaw, officially notified him of his situation in a letter dated November 26, 2003, which the Agency's Labor Relations Officer, Mr. Scott Basquin, actually sent. The letter stated:

> This letter is to inform you that you are being ordered to return to work by December 14, 2003. Failure to return to work by this date will be cause for possible disciplinary action.
>
> If there are any reasons or mitigating circumstances that prohibit you from returning to

[9] Joint Exhibit 6-1.
[10] Joint Exhibit 3-19.

> work by December 14, 2003[,] then you will need to provide documentation verification of such, to this office prior to December 14, 2003.
>
> This office will also accept your written resignation if you choose not to return to work. If you have any questions please contact this office at 419-526-2000 ext. 2000.[11]

Mr. Basquin sent the November 26 letter by regular and certified mail to the Grievant's last known address, but evidence in the record does not establish that either letter was returned undelivered.[12]

The Grievant essentially ignored the instructions in the November 26 letter. Instead of returning to work or giving either Ms. Tobin, Warden Bradshaw or Mr. Basquin documentation of mitigating circumstances that prevented his return to work, the Grievant contacted the Agency's Control Center on December 8, 12, and 14, 2003. On each of those days, the Grievant claimed FMLA leave to cover absences on those dates. After these dates, the Grievant contacted the Control Center approximately nine additional times, claiming either FMLA or other unavailable leave to cover his absences on December 15, 20, 22, 23, 28, 29, 30, and 31, 2003 as well as January 5, 2004.[13]

On December 11, 2003, the Agency imposed a two-day fine against the Grievant for being AWOL on June 22, 2003 and July 2, 8, 2003 and July 22-27, 2003, in violation of Rule 3H.[14] The fine was to become effective for the pay period ending January 10, 2004. Before the fine was actually imposed, however, the Agency fired the Grievant on January 30, 2004.

On December 12, 2003, Dr. Patricia Forman from the Moundbuilders Guidance Center faxed Ms. Tobin the following statement: "Mr. Lawson is under my care. He is released to return to work on Monday 12/15/03 without restriction. He has been under a great deal of stress, but this is resolving."[15]

On December 31, 2003, the Grievant was charged with violating Rule 3H (Being Absent Without Proper Authorization), Rule 6 (Insubordination), and Rule 4 (Job Abandonment).[16] Then on January 5, 2004,

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[11] Joint Exhibit 3-20.
[12] Joint Exhibits 3-24 & 3-25.
[13] *See* Appendix A for a complete enumeration of these dates, corresponding leave claims, and citations of Joint Exhibits, containing this information.
[14] Joint Exhibit 8.
[15] Joint Exhibits 5-1 & 5-2.
[16] Joint Exhibit 3-17.

without conducting a predisciplinary investigation,[17] Mr. Basquin scheduled a predisciplinary hearing for January 15, 2004,[18] and, on January 20, 2004, Warden Bradshaw recommended the Grievant's termination.[19] The predisciplinary hearing was held as scheduled on January 15, 2004.[20] Ms. Tobin, who was the Moving Officer, also served as the Predisciplinary Hearing Officer. She found no mitigating circumstances for the Grievant's absences and found just cause for disciplining him.[21]

Also, on January 15, 2004, the day of the predisciplinary hearing, the Grievant drafted the following correspondence for Warden Bradshaw:

> I was off of work from November 18, 2003 through January 4, 2004 to be by my mother's bedside. I then returned to work on January 5, 2004. On January 7, 2004 I received a packet that stated that by FMLA had expired. Due to my mother's illness and unexpected life expectancy, I am requesting an unpaid leave of absence for this time period.
>
> I understand that *my job is in jeopardy* but please try to understand the seriousness of my mother's health. She currently has had two heart attacks, a stroke, and Parkinson's disease at the age of sixty. Getting help from health care providers is hard due to them having no sympathy.[22]

On or about January 26, 2004, the decision to remove the Grievant became final with the Signature of Deputy Director of Institutions, Terry Collins, and the removal was to become effective on January 30, 2004.[23] Upon his removal, the Grievant was approximately 363 hours AWOL.[24]

On February 3, 2004, the Union filed Grievance No. 27-20 (04.20 03) ("Grievance"), challenging the Agency's decision to terminate the Grievant. On May 18, 2004, the Agency denied the Grievance at Step Three of the grievance procedure,[25] and on June 11, 2004, the Union waived mediation of the Grievance and requested it to be scheduled for arbitration.[26] On June 14, 2004, the Union again requested arbitration of the Grievance.[27]

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[17] Joint Exhibit 3-7.
[18] Joint Exhibit 3-7.
[19] Joint Exhibit 3-17.
[20] Joint Exhibit 3-3.
[21] Joint Exhibits 3-3 & 3-4.
[22] Joint Exhibit 6-1.
[23] Joint Exhibit 3-1.
[24] Joint Exhibit 3-3.
[25] Joint Exhibit 2-2.
[26] Joint Exhibit 2-4.
[27] Joint Exhibit 2-5.

The parties selected the Undersigned to hear the instant dispute. The hearing commenced at approximately 9:00 A.M. on October 28, 2004 at the Mansfield Correctional Institution. During the hearing, the Parties stipulated that there were no procedural objections in this dispute and that the dispute was properly before the Undersigned. The Agency and the Union were represented by their respective advocates, each of whom had a full and fair opportunity to produce testimonial and documentary evidence in support of their case. All witnesses were duly sworn and fully available for cross-examination. Similarly, all documents introduced into the arbitral record were available for relevant objections. The Union declined to present a case-in-chief and rested its case after the Agency completed its case-in-chief. The Parties elected to do closing arguments in lieu of Post-Hearing Briefs, and the arbitral record was officially closed at the end of the Union's closing argument on October 28, 2004.

II. Relevant Contractual Provisions

Although the Parties referenced the Collective-Bargaining Agreement as Joint Exhibit 1, neither side referenced any specific provision in their Contract. Nevertheless, the Union's arguments implicate the following provisions:

Article 24 - Discipline

24.01 - Standard

Disciplinary action shall not be imposed upon an employee except for just cause.

24.02 - Progressive Discipline

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

III. Summaries of the Parties' Arguments

A. Summary of the Agency's Arguments

1. The Grievant had exhausted his 480 hours of FMLA on November 18, 2003, and was approximately 363 hours AWOL.
2. By November 18, 2003, the Grievant had exhausted all of his paid leave.
3. On or about on November 20, 2003, Ms. Tobin drafted a letter and sent it to the Grievant by regular and certified mail, stating that his FMLA leave was exhausted.
4. In addition to the November 26 letter, the Grievant was twice notified by Ms. Tobin during their two telephone conversation that his FMLA leave was exhausted and instructed him to return to work.
5. The Grievant disobeyed direct orders either to return to work by December 12, 2003 or to present documentation of mitigating circumstances.
6. The Grievant's conduct constituted job abandonment under Rule 3H because he remained away from work for three or more days after the November 26 letter was sent and did not properly notify the Agency as instructed in that letter.
7. Irrespective of the Grievant's personal problems, he had a duty to contact the Agency as ordered.

7. When he was removed, the Grievant had two active disciplines in his personnel folder.
8. The Grievant's attendance problems unduly burdened the Agency, especially in light of tight budgets and staff shortages.

B. Summary of the Union's Arguments

1. The Agency failed to prove that the Grievant abandoned his job. Job abandonment is a term of art and is defined as a voluntary quit. The Grievant properly notified the Agency after the November 26 letter by regularly contacting the Agency's Control Center as required under the Collective-Bargaining Agreement. Therefore, the Grievant manifested continued interest in his job.
   A. The letter of November 26, 2003 is improper because the Grievant could not add to his FMLA certification. The proper action by the Agency would have been to request the Grievant to recertify his FMLA. Furthermore, the proper charge would have been Failure to Supply Documentation of Absence when Required, a violation of Rule 3E. This charge would not have resulted in the Grievant's removal.
2. Before December 31, 2003, the Grievant made five call-offs to the Control Center. Specifically, he called off twice after the November 26 letter and once on the December 14 deadline. In each call-off, he specified why he needed to be absent from work.
3. There were several procedural problems
   a. The Agency failed to consider mitigating circumstances or to conduct an investigatory interview before the predisciplinary hearing. These omissions were likely due to Ms. Tobin's serving as both Moving Officer and Predisciplinary Hearing Officer.
   b. FMLA certification is a standard mitigating circumstance for calling off in a no-leave status.
   c. At the predisciplinary hearing, Management failed to specify AWOL dates or calculated FMLA use, information that the Union requested before, during, and after the predisciplinary hearing.
   d. Ms. Tobin's charges against the Grievant–AWOL, job abandonment–and her statement in the November 20 letter were premature, since the Grievant had eighty hours of FMLA leave available for the pay period ending November 29, 2003. Therefore, Ms. Tobin incorrectly concluded that his FMLA was exhausted as of November 18, 2003. The Agency did not catch the eighty hours of FMLA because payroll is delayed two weeks.
   e. The Agency failed to make every reasonable effort to contact the Grievant. The Agency never attempted to telephone the Grievant and failed to request the Union to assist in contacting him.
4. The letter dated December 11, 2003, containing AWOL charges for absences in June and July 2003 should fail because the notice of charges was unreasonably tardy. The Agency waited until approximately six months to assert these charges probably in an effort to establish progressive discipline in preparation to fire the Grievant.
5. Furthermore, the Agency fired the Grievant for Job Abandonment before imposing the two-day fine, which was to become effective for the pay period ending January 10, 2004. Therefore, the two-day fine was not progressive discipline because it never had a chance to correct the Grievant's behavior.
6. Dr. Forman's medical release is insufficient in several respects. First, the Grievant did not provide it. Second, it is not evident that the Grievant was aware of either the job release or the correspondence. Third, since the job release included no dates of care, it should have been unacceptable by the institution.
7. The Union requests that the Arbitrator: remove the discipline; order back pay, including holiday pay, regular pay, lost overtime, and post-leave accruals. Finally, make the Union and the Grievant whole by paying union dues for the Grievant.

IV. The Issue

The Parties stipulated to the following issue: "Did the Department of Rehabilitation and Corrections remove the Grievant for just cause?"

V. Discussion and Analysis

A. Evidentiary Standard

Because this is a disciplinary dispute, the Agency has the burden of proof or persuasion with respect to its charges against the Grievant. Thus, the Agency must adduce *preponderant* evidence in the arbitral record as a whole, showing *more likely than not* that: (1) The Grievant violated Rules 3H and 4. Doubts with respect to these charges shall be resolved against the Agency. Similarly, the Union has the same burden of persuasion (preponderant evidence) with respect to its allegations and affirmative defenses. Doubts with respect to those allegations or affirmative defenses shall be resolved against the Union.

B. Whether the Grievant Abandoned His Job

Rule 4 states that "Job Abandonment" occurs where an employee is absent "[three] or more consecutive workdays without *proper* notice."[\28] The pith of the job-abandonment issue is not whether the Grievant was absent from work for three consecutive days–clearly he was–but whether he afforded the Agency *proper* notice of the circumstances surrounding his absences. Ultimately, the issue is whether the notice or lack thereof forms a basis for drawing inferences about the Grievant's intent and desire to keep his job. In other words, based on the evidence in the record, including the Grievant's notice, whether the Agency justifiably concluded that the Grievant no longer desired to remain employed with Mansfield Correctional Institution. Under cross-examination, Mr. Basquin conceded that, the Collective-Bargaining Agreement requires employees to notify the Agency's Control Center of their impending absences. However, Mr. Basquin also insisted that, under the circumstances of this case, the proper response for the Grievant would have been to comply with the orders in the November 26 letter. In effect, the Agency argues that given the Grievant's absence from work between November 18, 2003 and January 6, 2004, Warden Bradshaw was entitled to issue

[\28] Joint Exhibit 4-7 (emphasis added).

the November 26 letter, which essentially deprived the Grievant of the right to use the contractually prescribed method of notification.

On the other hand, without presenting any independent evidence to support its position, the Union argues, in closing, that the November 26 letter was improper or unauthorized. To support that position, the Union offers two other contentions. First, the Grievant could not extend his FMLA certification, and, instead of sending the November 26 letter, the proper response from the Agency would have been to request the Grievant to recertify his FMLA. Because the Union introduced no evidence (only closing argument) to support this position, the Arbitrator has no basis for evaluating its strength or persuasiveness. Consequently, doubts are resolved against the Union on this issue, and its position is unsubstantiated.

Second, the Union seems to argue in the alternative that, in any event, the proper charge would have been a Rule 3E violation, "Failure to Supply Documentation of Absence when Required."[29] On its face, Rule 3E would seem to apply, but that fact does not preclude the Agency from applying another Rule, since, ultimately the Agency must prove what it alleges and has discretion to apply any of the rules set forth in its Penalty Table.[30]

Third, the Union insists that the letters of November 20, 2003 and November 26, 2003 were premature and, thus, improper or unauthorized. This contention was established, though only to a certain point, through the Union's cross-examination of Ms. Tobin and Mr. Basquin. During its cross-examination of Ms. Tobin, the Union established that the November 20 and November 26 letters prematurely concluded that the Grievant had exhausted his FMLA leave for the pay period ending November 18, 2003. In fact, Ms. Tobin explicitly conceded that on November 18, 2003, the Grievant still had approximately eighty hours of unused FMLA leave.

Furthermore, under cross-examination, Mr. Basquin admitted that by notifying the Agency's Control

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[29] Joint Exhibit 4-7.
[30] Joint Exhibit 4.

Center of his absences, the Grievant used the contractually prescribed call-off procedure. The Agency neither directly challenged nor contradicted Mr. Basquin's admission. Indeed, in her predisciplinary opinion, Ms. Tobin stated that "Lawson [the Grievant] did continue to call off work through the Control Center *as required*. . . ."[31] Based on Ms. Tobin's and Mr. Basquin's statements and testimony, the Arbitrator assumes (no specific contractual provision was cited) that for a while the Grievant followed the contractual procedure in calling-off. Furthermore, one can reasonably assume that the Grievant was entitled to use the contractually approved method of calling off as long as he had available leave. Between November 18, 2003 and December 14, 2003, the Grievant called-off to the Control Center on December 8, 12, and 14, 2003. Those call-offs were presumptively valid under the Collective-Bargaining Agreement. As long as the Grievant had valid leave, it is not clear that Warden Bradshaw lacked contractual authority to issue the November 20 and November 26 letters.

Because the Grievant remained in this positive position only for a while, he is not completely exonerated under Rule 4. First, although the Grievant had approximately eighty hours of FMLA leave available on November 18, 2003, he clearly exhausted those hours by not reporting for work over the next two weeks, ending on or about December 14, 2003. In fact, he did not report to work until approximately January 6, 2004. After December 14, 2003, the Grievant had no available leave of any type. In short, he was clearly AWOL from December 14, 2003 until January 6, 2004, approximately seventeen working days. Based on this holding, the Arbitrator hereby sustains the accompanying AWOL charge against the Grievant under Rule 3H.[32]

Based on the foregoing analysis, even if Warden Bradshaw lacked authority to issue the November 20 and November 26 letters, she was authorized to issue similar letters from about December 14, 2003. Still, one might argue, though the Union does not, that since the November 26 letter was premature, Warden

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[31] Joint Exhibit 3-4 (emphasis added).
[32] Joint Exhibit 3-1.

Bradshaw should have reissued that letter on or about December 14, 2003. The difficulty with this position, however, is that, under the common law of the shop, if the orders in the November 26 letter were improper, the Grievant should have obeyed them and then grieved, unless, of course, the orders somehow reasonably imperiled his health or safety. But nothing in the arbitral record suggests that the orders jeopardized his well-being. Thus, the Grievant had neither a contractual nor any other right to ignore the Warden's orders, despite their presumptive lack of authority under the Contract. Those orders were compelling upon the Grievant because they were never properly challenged through the Parties' negotiated grievance procedure.

Nor is there reason to conclude that the Warden's orders did not retain their compulsion with respect to the Grievant. Therefore, on December 14, 2003, the Grievant was still obliged to obey the orders in the letter of November 26, 2003. Yet, he continued to follow the contractually prescribed notification procedure, even though he had exhausted all of his leave. After December 14, 2003, it is doubtful whether the Grievant retained the right to wrap himself in the contractual notification procedure, since it is decidedly unclear whether that procedure, whatever its specific provisions, was intended to cover employees who have exhausted all of their leave and are clearly AWOL. From approximately December 14, 2003, the Agency had no duty to recognize the Grievant's telephone call-offs to the Control Center because the Grievant had no demonstrated right to continue using that mode of notification. In other words, the Grievant's notification was improper from approximately December 14, 2003 until he returned to work on or about January 6, 2004, approximately seventeen working days. Yet, under Rule 4, he is reasonably deemed to have abandoned his job, after failing to report to work for only three consecutive days without *proper* notification.

The inescapable conclusion under this analysis is that the Grievant's conduct satisfies the two necessary conditions for "Job Abandonment" under Rule 4.

Finally, this conclusion remains valid even assuming, arguendo, that the prematurity of the Warden's November 26 letter *permanently* deprived it of all authoritative force regarding the Grievant. Under that assumption, Rule 4 still constitutes a basis for reasonably concluding that the Grievant abandoned his job

because his conduct satisfies the two preconditions for applying that Rule. And nothing in Rule 4 or in the arbitral record requires the Agency to order the Grievant to return to work or otherwise to justify his continued absences. On its face, Rule 4 may be implemented solely upon satisfaction of its two preconditions. Based on the foregoing analysis and evidence, the Arbitrator concludes that the Grievant at least constructively or implicitly abandoned his job by not properly notifying either Ms. Tobin, Mr. Basquin, or Warden Bradshaw from approximately December 14, 2003 to January 6, 2004.

Finally, the Union argues that "abandonment" is a term of art, which requires that employees voluntarily terminate their employment. The Arbitrator agrees to a point. However, one must not allow the "voluntary" nature of abandonment to override the fact that employees may either *explicitly* or *implicitly* (constructively) abandon their employment. Abandonment is implicit where an employee's intent to abandon his employment is reasonably inferred from his conduct. On its face, Rule 4 permits inferences about an employee's intent to abandon his employment based on the propriety of the employee's notice. An employee who, for whatever reason, gives improper notice and misses three consecutive work days effectively abandons his employment. Of course, what constitutes "Proper notice" is to some extent flexible, insofar as it depends on the surrounding circumstances. In the instant case, on or about December 14, 2003, "Proper notice" became synonymous with the Warden's orders in the November 26 letter. As of December 14, 2003, the Grievant had an unmitigated duty to notify the Agency about his absences. Doubts about the validity of his absences or his intent to abandon his employment are properly resolved against him and not the Agency.

Based on the scant evidence in the record about the condition of the Grievant's mother, his condition and that of his child, one could reasonably conclude that the Grievant made either a conscious or an unconscious decision to focus on health related problems and to place his job on the "back burner." Arguably, that is not an irrational decision in this case.

C. Consideration of Relevant Mitigative Circumstances

As a general proposition, no charge of misconduct is immune to consideration of mitigative

circumstances,[33] and so it is with "Job Abandonment" under Rule 4. Although Rule 4 does not explicitly provide for consideration of mitigative circumstances, they are fully applicable to the enforcement of that rule. As a result, the issue here is whether Ms. Tobin failed to consider relevant mitigative circumstances at the Grievant's predisciplinary hearing on January 15, 2004. Although the Arbitrator stoutly disagrees with Ms. Tobin's conclusion that there were *no mitigating circumstances* in this case, evidence in the arbitral record does not adequately describe the mitigating circumstances surrounding the Grievant's ordeal. For example, nothing in the record explains: (1) Whether the Grievant was the only family member available to care for his mother; (2) How long her physicians expected her to live; (3) What was the status of her health in light of the three maladies she suffered; and (4), What other circumstances in the Grievant's life went awry because of his mother's illness. Absent this type of evidence, the Arbitrator has nothing to analyze and cannot simply assume or surmise details about the weight of the circumstances surrounding the Grievant's absences.

In light of this situation and based on the ensuing discussion, the Arbitrator cannot hold that Ms. Tobin's decision would have been different had she weighed the scant, generalized circumstances available in this case.[34] The primary problem here is that until January 15, 2004 the record contains only casual references about circumstances surrounding the Grievant's absences. The Arbitrator is, therefore, unclear about the extent of Ms. Tobin's actual or constructive knowledge about the Grievant's mitigative circumstances at the predisciplinary hearing. Evidence in the arbitral record reveals that between November 18, 2003 and January 15, 2004, the Grievant offered only cryptic reasons for his absences when he called off at the Control Center.[35] In addition, during one of his telephone conversations with Ms. Tobin shortly before or after

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[33] For example, it is conceivable that there could be mitigating circumstances surrounding an employee's decision to strike his supervisor. One mitigating circumstance for such conduct is self-defense, where the supervisor clearly initiated the incident by physically attacking the employee.

[34] Again, however, the Arbitrator stresses in the strongest possible terms that it is one matter to conclude that the weight of relevant mitigating circumstances in this case do not warrant penalty reduction; but it is quite another to conclude that there were no mitigating circumstances to consider. Such a conclusion, on its face, unjustifiably ignores how much a deathly ill parent can impact a child's life. The problem in this case is hardly the absence of mitigating circumstances; instead, it is the absence of sufficient detail about those circumstances.

[35] *See* Joint Exhibits 3-11 through 3-16 and Appendix A.

November 18, 2003, he vaguely referenced his mother's illness and expressed indecision about his future actions. Finally, on January 15, 2004, the day of the predisciplinary hearing, the Grievant drafted a letter to Warden Bradshaw, expressing in some detail the status of his mother's health and his difficulties with insensitive health providers. Under the circumstances, however, the January 15 letter was too little and too late. It was drafted on the day of the predisciplinary hearing, and there is no indication that Ms. Tobin was aware of that letter when she issued her predisicplinary opinion.[36]

Nor does the record reveal whether either the Grievant or the Union *adequately* informed Ms. Tobin of relevant mitigative circumstances during the predisciplinary hearing.[37] Under these circumstances, the Arbitrator lacks evidence to judge whether Ms. Tobin ignored relevant mitigative circumstances.

And as pointed out above, the same lack of detailed evidence in the arbitral record precludes the Arbitrator from reasonably weighing the effect of the mother's illness on the Grievant's conduct during the period in question and whether her illness justifies penalty modification.

D. Sufficiency of Dr. Forman's Work Release

The Union also argues that the statement that Dr. Forman faxed to Ms. Tobin on December 12, 2003 is "insufficient." In support of that argument, the Union points out that the Grievant did not provide Dr. Forman's work release. Nor, according to the Union, was the Grievant aware that Dr. Forman would transmit the work release to Ms. Tobin. Finally, the Union contends that the work release is improper because it contained no dates of care. The difficulty with the Union's argument on this issue is that the Union offers only the argument without any supporting evidence that cites either contractual language or past practice regarding acceptable criteria for evaluating the sufficiency of physicians' work releases. Mere argument does not establish such facts.

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[36] Joint Exhibit 3-4.
[37] Joint Exhibits 3-3 through 3-4.

E. Propriety of the Two-Day Fine as Active Discipline

Here the Union maintains that the letter dated December 11, 2003, charging the Grievant with being AWOL on June 22, 2003, July 2, 8, 2003, and July 22-27, 2003 was unreasonably tardy on its face. Clearly, Article 24.02 of the Collective-Bargaining Agreement, addressing Progressive discipline, requires that "Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article."[38] Normally the Arbitrator would agree with the Union in this respect. Under the circumstances of this case, however, several considerations militate against the Union's position. First, nothing in the Record addresses the circumstances surrounding the arguably tardy imposition of the two-day fine. Second, assuming, arguendo, that the discipline is tardy, nothing in the record indicates that the Union filed a timely grievance, challenging the untimeliness of the two-day fine. Third, even if the Union had timely challenged the imposition of the two-day fine, that issue is not properly before the Arbitrator in this case.

VI. The Penalty Decision

Preponderant evidence in the arbitral record establishes that between November 18, 2003 and January 6, 2004, the Grievant effectively abandoned his job by not reporting to work for three consecutive days without giving proper notice as required in the Warden's letter of November 26, 2003. Consequently, some measure of discipline is indicated. To determine the proper quantum of discipline, the Arbitrator will assess both mitigating and aggravating factors. However, the Agency's penalty will not be disturbed unless the balance of aggravative and mitigative factors reveals his removal to be unreasonable, arbitrary, capricious, discriminatory, or an abuse of discretion.

A. Aggravative Factors

The major aggravative factor is simply that after December 14, 2003 the Grievant remained in an almost chronic AWOL status without properly notifying the Agency. Another aggravative factor is that the Agency,

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[38] Joint Exhibit 1, at 72.

is a maximum security prison, is operating under budget cuts and staff shortages. Therefore, the Agency very well could have encountered undue hardships because of the Grievant's unauthorized absences. Indeed, unrebutted testimony in the arbitral record establishes that fact.

B. Mitigative Factors

The major mitigative circumstances this case are the Grievant's approximately fourteen years of tenure with the Department of Rehabilitation and Corrections as well as his record of job performance, which consistently met or exceeded expectations.[39] This balance of mitigative and aggravative factors does not establish that the Agency's decision to remove the Grievant was either unreasonable, arbitrary, capricious, discriminatory, or an abuse of discretion. Therefore, it is with considerable regret that the Arbitrator must sustain the removal of a fourteen-year employee with a satisfactory work record because he showed the proper concern for an ailing parent but too little concern for his employment. Still, how could he have acted otherwise? Presumably, there is considerable risk that he will lose his mother if in fact he has not already lost her. Now, he has also lost his job apparently though not clearly because his dedication to his mother disrupted his attendance.

VII. The Award

For all of the foregoing reasons, the Grievance is hereby **DENIED** in its entirety.

[39] Stipulated Fact.

APPENDIX A

Grievant's Attendance Record for Relevant Period		
Dates of Call-Offs	***Leave Claimed (Reasons Given)***	***Corresponding Exhibits***
12/08/03	FMLA/Parent	**Joint Exhibit 3-15**
12/12/03	FMLA	**Joint Exhibit 3-15**
12/14/03	FMLA	**Joint Exhibit 3-16**
12/15/03	Illness/FMLA	**Joint Exhibit 3-16**
12/20/03	Illness/FMLA	**Joint Exhibit 3-13**
12/22/03	Parent/FMLA	**Joint Exhibit 3-14**
12/23/03	Illness/Son/Daughter	**Joint Exhibit 3-14**
12/28/03	Illness	**Joint Exhibit 3-11**
12/29/03	FMLA	**Joint Exhibit 3-12**
12/30/03	Illness	**Joint Exhibit 3-12**
12/31/03	FMLA	**Joint Exhibit 3-13**
1/5/04	FMLA	**Joint Exhibit 3-11**

Robert Brookins

Robert Brookins, Professor of Law, Labor Arbitrator, J.D. Ph.D.