#1915

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF PUBLIC SAFETY

AND

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

Grievant: Joseph Eichhorn

Case No. 15-00-(060113-0013)-01-14

Date of Hearing: December 18, 2006

Place of Hearing: OCSEA Office – Columbus, Ohio

APPEARANCES:

For the Union:
Advocate: William Anthony, Jr., OCSEA Staff Representative
2nd Chair: Gena M. Banks
Witnesses:
Grievant: Joseph Eichhorn

For the Employer:
Advocate: Mary L. Brown, Labor Relations Officer
2nd Chair: Krista Weida
Witnesses:
Jennifer Tipton, Management Analyst Supervisor
Larry Evans, Network Administrative Supervisor

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: January 25, 2007

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 Public Safety ("DPS") 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 the suspension for ten (10) days of the Grievant, Joseph Eichhorn ("Eichhorn") for violating the Ohio Department of Public Safety Work Rules 501.01(C)(3), leave without pay and (C)(2), notification of absence regarding conduct which occurred in October 2005.

The suspension of the Grievant occurred on or about December 12, 2005 and was appealed in accordance with Article 24 of the CBA. This matter was heard on December 18, 2006 and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing briefs were submitted by both parties on or about January 11, 2007.

BACKGROUND

Eichhorn was employed as a Network Administrator I in the Information Technology (IT) section and was part of the PC Technical Support unit. At the time of suspension, Eichhorn had been employed for twenty-four (24) years by the State of Ohio. Larry Evans ("Evans"), Manager IT/PC Support, was Eichhorn's immediate supervisor for three (3) years preceding the suspension.

Eichhorn was suspended for ten days for violating two (2) separate work rules: 501(C)(3), leave without pay and 501.01(C)(2), notification of absence. Regarding the leave without pay, on October 17, 18, 19 and 20, 2005, Eichhorn was off work on leave pursuant to the

Family and Medical Leave Act (FMLA) but all leave was exhausted prior to closure of the business day on October 20, 2005 placing him on a leave without pay, in violation of 501(C)(3). The failure to notify charge occurred on October 12, 2005. Eichhorn's scheduled time to begin work was 7:30 a.m. However, he did not call in to report off work until 8:08 a.m., making his notification more than one-half hour past his scheduled start time in violation of 501(C)(2).

Eichhorn does not dispute the fact that he had exhausted all of his entitled FMLA allotment on October 20, 2005 and no other leave was available, i.e., personal, compensatory, sick, vacation, placing him in a leave without pay status. The Association contends that Eichhorn had recently returned to work from an extended disability leave and made a mistake in determining the amount of FMLA leave that was available for use. The Employer suggests that Eichhorn's record as to FMLA certifications and use of leave was lengthy and infers that he should have been able to track his FMLA leave. (Employer Brief, pp. 2-4).

No factual dispute exists that Eichhorn failed to notify his supervisor of his absence until thirty minutes after the start of his shift on October 12, 2005. The Association contends that due to a medical condition, known to the Employer, mitigating circumstances made it impossible for Eichhorn to comply with Work Rule 501.01(C)(2). The Association contends that Work Rule 501.01(C)(2) was not violated, since an exception exists regarding emergency conditions that in this case precluded timely notification.

The Employer conducted separate Administrative Investigations ("AI") for each incident (Management Exhibits (MX) 1, 2) and allowed Eichhorn an opportunity to offer information as part of the AIs. Eichhorn prepared a written response which contained the supposition that if his disability leave was extended by the Department of Administrative Services ("DAS") he would have sufficient FMLA hours to cover October 20, 2005 as well. (MX 2, p. 9).

The Employer reviewed all of the reasons offered by the Association for each incident and his overall deportment record prior to issuing the ten-day suspension. Eichhorn's prior disciplines for attendance related incidents were the following: verbal warning (leave without pay); written reprimand (leave without pay); one-day fine (leave without pay); three-day fine (leave without pay) and five-day fine (leave without pay). The Employer contends that the discipline was progressive and in compliance with Article 24 of the CBA.

The Association seeks a reduction in the ten-day suspension and requests the arbitrator to consider the mitigating circumstances associated with each incident.

ISSUE

Was the Grievant disciplined for just cause? If not, what shall the remedy be?

RELEVANT PROVISIONS OF THE CBA AND DPS WORK 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).

DPS WORK RULES

RULE 501.01(C)(2)

Notification of Absence – Employees who are unable to report for work, and who are not on a previously approved day of vacation, sick leave, personal leave, compensatory leave, disability leave, leave of absence or leave without pay or other pre-approved leave, shall be responsible for notifying their immediate supervisor or other individual designated by the supervisor that they will be unable to report for work. Unless otherwise instructed by the supervisor, notification will be made on a daily basis no later than one-half hour after the scheduled reporting time or as soon as possible if emergency conditions prevent such notification. The daily notification requirement may be waived by the supervisor for employees who are hospitalized, on approved disability leave or on long term sick leave. Employees shall notify their supervisor whenever their health status changes or when there is a change in the date of return to work. Verification of medical or emergency circumstances may be required.

RULE 501.01(C)(3)

Leave Without Pay – Any employee who is absent without approved leave is in leave without pay status. Being in leave without pay status will subject the employee to discipline for excessive absence.

RULE 501.01(C)(10) EMPLOYEE DISCIPLINE (IN PART)

NOTE: The Ohio Department of Public Safety expects its employees to maintain a standard of conduct that is consistent with the mission, goals and objectives of the Department. Employee actions that adversely affect their duties and compromise or impair the ability of the Department to carry out its mission, goals and objectives will be subject to the disciplinary process.

The Department of Public Safety follows a disciplinary procedure which attempts corrective action through a progression of steps designed to help the employee modify unacceptable behavior or job performance before more extreme disciplinary action is taken. The progressive disciplinary process, depending upon the nature of misconduct, might involve a series of steps including verbal or written reprimands, suspensions of varying lengths, and/or demotion or removal, in accordance with the applicable labor agreement.

The steps of progressive discipline shall generally be followed. However, more serious discipline or a combination of disciplinary actions may be imposed at any point if the infraction or violation merits the more severe action. The employer, at its discretion, is also free to impose less severe discipline in situations which so warrant.

POSITION OF THE PARTIES

THE EMPLOYER'S POSITION

The Employer is not contesting that Eichhorn had approved FMLA forms on file or that the medical certification(s) regarding his condition are at issue. (JX 4). The Employer points out that the primary medical condition certified relates to migraine headaches, and other FMLA conditions which were certified included anxiety and panic. Regardless of Eichhorn's medical condition, the effect of the medication upon Eichhorn's ability to notify the employer is the issue.

None of Eichhorn's current FMLA forms contain specific warnings regarding the affects of the medication upon his ability to notify the employer in a timely manner. The Grievant testified that for at least ten (10) years he has been taking the medication, so not only was he aware of the affects but also, it was Eichhorn's responsibility to submit proper FMLA forms to put the Employer on notice. Each FMLA form contains the following language regarding supplementation: "New documentation or certifications will need to be submitted if your condition should change." (JX 4).

The record is void of any corroborative evidence, but only contains Eichhorn's testimony that his medication made him forgetful and unable to speak during his panic attack on October 12, 2005. Also, the Grievant's credibility is further challenged due to inconsistent positions contained on his leave form (MX 1, p. 6) and the question and answer responses provided during the AI. (MX 1, p. 3). On the leave form, Eichhorn contends he received treatment from Mt. Carmel Hospital for a migraine; however, on the Q & A the reason that prohibited proper notification was due to his inability to talk or remember time as a result of his panic attacks.

The lengthy disciplinary record coupled with Eichhorn's failure to correct this conduct warrants the ten-day suspension. Moreover, leave without pay for FMLA violations has occurred on four (4) other occasions where discipline was issued, to no avail.

The Employer has followed the principles of progressive discipline at all times. The Grievant simply has refused to correct his behavior; and although a long term employee, mitigation is simply inappropriate. The separate AIs failed to disclose any evidence to indicate that Eichhorn did not violate Rules 501.01(C)(2) or (C)(3).

POSITION OF THE UNION

The Grievant testified that due to a series of personal tragedies that commenced in 2002 he experienced emotional traumas resulting in depression, anxiety and panic attacks.

The Grievant had a panic attack the morning of October 12, 2005 and due to the severity of the condition he was unable to call in within thirty minutes of shift start. The Grievant testified that he took one or two doses of medication that resulted in various side effects including speech problems and drowsiness. (Association Brief, p. 2).

As part of the AI investigation, Eichhorn submitted a written statement on October 24, 2005 to Larry Evans ("Evans") detailing why he was unable to call until 8:08 a.m. (Union Exhibit (UN EX) 2). During the AI, the Association contends that Evans misled Eichhorn to believe that the reasons provided were sufficient as verification to satisfy the extenuating circumstances criteria. The Association also questions Evans' motives, when the leave request form for the October 11 and 12 dates was not questioned until October 24, 2005 as part of the AI. Evans had numerous opportunities prior to October 24, 2005 to put Eichhorn on notice that concerns existed regarding his failure to timely notify the Employer. As a result of Evans'

behavior, the Grievant was harmed because the Employer failed to consider the effects of the medication or that Evans was out to get him. (Association Brief, p. 3).

The Association directs the Arbitrator's attention to Eichhorn's FMLA forms which indicates that his condition was chronic, could cause unpredictable absences and his medication would cause him to call in late on occasions. (JX 4, pp. 3, 7, 12 and 17). The testimony of Jennifer Tipton ("Tipton"), Management Analyst Supervisor, is instructive on the issue of the lack of quality of information required by the FMLA form. Tipton testified that the form does not ask whether the medical condition will cause an employee to call in late and not every medical provider would put such data on the form. Simply, the Employer had notice of Eichhorn's serious medical condition – including the possibility of late call ins, but this information was ignored during the AI process and the issuance of discipline.

Regarding the leave without pay violation, the Association contends that Eichhorn being uncertain of the quantity of FMLA on the books, sought clarification via email to Evans on November 29, 2005. (UN EX 3). Eichhorn was under the misapprehension that he would receive additional FMLA hours due to him being on approved disability leave that had recently concluded. Eichhorn was wrong and additional FMLA hours were credited back to the Grievant placing him in a leave without pay status. The Association urges the Arbitrator to give due consideration that Eichhorn made an honest mistake, and at best tracking of FMLA hours/use is complicated.

Finally, the Employer does not have a disciplinary grid but utilizes the concept of progressive discipline under Rule 501.01(C)(10). The Employer has the authority and reserves the right to impose less severe discipline, which is applicable in this matter. The progression from a five-day fine to a ten-day suspension is punitive, not progressive. Moreover, as a long

term employee with good service until the past couple of years, further warrants a reduction of the discipline.

DISCUSSIONS AND CONCLUSIONS

Based upon the sworn testimony at the hearing, exhibits of both parties and the post hearing statements, the grievance is denied. My reasons are as follows:

DPS disciplined Eichhorn for two (2) separate reasons: (1) leave without pay on October 20, 2005; and (2) failure to notify within one-half hour of start time his absence on October 12, 2005.

I. LEAVE WITHOUT PAY

The Grievant admitted that he had no leave on the books to cover his complete absence from October 17th through 20th, 2005, including FMLA. The Grievant on November 29, 2005 sought clarification from Evans (UN EX 3) regarding his FMLA leave balance, wherein Evans replied: "I cannot give you an exact figure on FMLA usage . . . [Y]ou will need to talk to somebody in HR in order to get an estimate." (UN EX 3). Therefore, over five weeks had lapsed since Eichhorn's leave without pay status was at issue with no clarification. The Employer's position is clear and unambiguous in that each employee is responsible to track all leave balances. Tipton credibly testified that employees are required to maintain appropriate leave balances and when an employee has a negative leave balance it is due to the employee's failure to properly monitor their balances. No evidence was offered by the Association to indicate culpability by the Employer on this issue.

The Association seeks leniency, because the Grievant was under a false misconception that when he returned to work from his disability leave in late September 2005, some FMLA

hours would be restored. Tipton testified that disability and FMLA leave balances run concurrently, not independently. Eichhorn testified that for at least ten (10) years he had at least one FMLA medical condition on file. Eichhorn's long history of FMLA use, plus four prior disciplines specifically involving the exact issue fails to convince this Arbitrator that this conduct was an honest mistake.

From April 2003 until October 2005, Eichhorn's deportment record indicates the following (JX 3):

1. May 29, 2005: Five-day fine for being absent without leave – FMLA hours were exhausted.

2. April 18, 2004: Three-day fine for being absent without leave – FMLA hours were exhausted.

3. March 21, 2004: One-day fine for being absent without leave – FMLA hours were exhausted.

4. February 13, 2004: WR for being absent without leave – FMLA hours were exhausted.

5. April 4, 2003: Verbal reprimand absent without leave – no leave balances to cover absence.

During that period of time (2002-2005) Eichhorn further testified that he had as many as four (4) qualifying medical conditions for FMLA approved leave. Problematic to Eichhorn and regardless of the medical condition all of his attendance discipline was for the same reason:[1] absent without leave of pay. "This Arbitrator cannot ignore such a lengthy and significant disciplinary record, especially when it involves a pattern of similar or related offenses regarding absenteeism." Ohio Department of Rehabilitation and Correction and SCOPE/OEA, Arbitration Slip. Op. 27-25(1-28-97)1206-06-10 (Pincus, D. 1998). I agree.

[1] In addition to the attendance related discipline, the Grievant was also disciplined on September 9, 2004 (one-day – negligence) and March 24, 2006 (ten-day – untruthfulness). (JX 3).

The record is supported by credible evidence, given the Grievant's significant disciplinary record regarding FMLA leave balances, that the Employer acted reasonably by finding a violation of Rule 501.01(C)(3). The Association failed to provide sufficient evidence for a finding that extenuating circumstances existed to mitigate a violation of Rule 501.01(C)(3).

II. NOTIFICATION OF ABSENCE

In the early morning hours of October 12, 2005 a severe panic attack required medication that prevented Eichhorn from complying with the notification procedures, according to the Association. The Grievant testified that for at least two years he had experienced panic attacks and the condition became progressively worse.[2] (JX 4(D)).

On October 12, 2005 the medication and his medical condition were the reasons for the late notification which constitutes extenuating circumstances to lessen the discipline. I disagree.

While acknowledging the Grievant had valid medical conditions for FMLA purposes, the Employer correctly points out that if his condition prevented proper notification the FMLA form should have been annotated accordingly. A review of each of the four (4) medical conditions certified for FMLA purposes fails to contain the support advocated by the Association. (JX 4, (A), (B), (C), (D)). In other words, if taking medication to address his medical conditions resulted in forgetfulness of time, speech problems, memory issues and/or drowsiness such data was required to be on at least one of the FMLA forms. Also, the FMLA form is not interminable but seeks supplementation via "new documentation or clarification . . . **if** the condition should change." (JX 4, (A)) (emphasis added). The record is silent on any documentation relating to Eichhorn's inability to follow proper notification in case of an absence. Given Eichhorn's long

[2] On August 5, 2005, the medical conditions certified for FMLA were: panic attacks, increased irritability, increased headaches, major depression and generalized anxiety.

history of having at least one FMLA certified condition, it was his responsibility to provide **any** documentation if his condition changed.[3]

The deportment record indicates a lengthy but unsuccessful attempt to correct Eichhorn's conduct. The Association believes the discipline was punitive because the Employer progressed from a five-day fine to a ten-day suspension. I disagree. The application of progressive discipline requires that the penalty is increased if the behavior fails to change. The imposition of discipline to Eichhorn has been reasonable and fair in an effort to correct his conduct. This Arbitrator could not ignore the repeated attendance related absences and the refusal of Eichhorn to change his behavior. I find that the Employer applied the principles of progressive discipline in this case, and no evidence indicates that the Employer's conduct was arbitrary, unreasonable or capricious.

Finally, in applying the concept of mitigation especially to a long term employee, the quality of service must be weighed as well. Eichhorn engaged in repeated violations of the work rules and seemingly made no effort to modify his conduct, despite the progressive nature of each discipline. The Arbitrator analyzed the plethora of reasons for mitigation and finds that the personal challenges that Eichhorn faced and all other reasons, independently or cumulatively, fails to provide sufficient evidence to mitigate the discipline. I find that the circumstances on October 12, 2005 were not extenuating warranting mitigation, and the discipline was issued for just cause.

[3] Eichhorn testified that for at least ten (10) years he had a medical condition recognized for FMLA purposes. Therefore, although Eichhorn experienced some family-emotional issues in 2003 and 2004, he was familiar with the FMLA process.

AWARD

The grievance is denied.

Respectfully submitted this 25th day of January, 2007.

Dwight A. Washington, Esq., Arbitrator