#1957

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF WORKERS' COMPENSATION

AND

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

Grievant: Marie Dubose

Case No. 34-03-20061030-0076-01-09

Date of Hearing: November 6, 2007

Place of Hearing: OCSEA – Columbus, Ohio

APPEARANCES:

For the Union:
Advocate: Lynn Kemp, OCSEA Staff Representative
Witnesses:
Marie Dubose – Grievant
Trena Harrison

For the Employer:
Advocate: Ruth A. Rehak, Labor Relations Officer
2nd Chair: Buffy Andrews, Office of Collective Bargaining
Witnesses:
Victoria Bartel – Supervisor
Leslie Jenkins – FMLA Coordinator

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: December 20, 2007

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2006 through February 28, 2009, between the State of Ohio Department of Workers' Compensation ("BWC") 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 twenty (20) day suspension of the Grievant, Marie Dubose ("Dubose"), for violating the Ohio Department of Workers' Compensation Work Rule, Attendance (i) - improper call off.

The discipline of the Grievant occurred on October 18, 2006 and was appealed in accordance with Article 24 of the CBA. This matter was heard on November 6, 2007, and both parties had the opportunity to present evidence through witnesses and exhibits. Post-hearing oral arguments occurred at the hearing, and this matter is ready for resolution.

BACKGROUND

Dubose was employed as a Claims Service Specialist with BWC and worked at the Canton Service Center ("Canton"). Dubose had worked with the State of Ohio for twenty-three (23) years at the time of the incident. On August 22, 2006, Dubose failed to inform the Employer within thirty (30) minutes after her starting time of her inability to report to work contrary to the CBA.

Article 29.03 of the CBA provides the following:

> "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 . . ." CBA, Art. 29.03 (in part).

On August 22, 2006 at 10:15 a.m., Dubose called to inform Victoria Bartel ("Bartel"), her supervisor, that due to medication taken the previous night she had just awoke and wanted to call off from work. Dubose was certified for certain medical conditions recognized under the Family Medical Leave Act ("FMLA") and contends that her medical conditions coupled with the medications caused her to oversleep. Dubose also admits that she had prior attendance problems, but since her last attendance discipline 20 months ago, she has complied with the rules until this incident. Therefore, she asserts that the amount of discipline issued is punitive, not corrective.

The Union indicates that the prior discipline should not be used to justify the allegedly punitive nature of the 20 day suspension. The Union points out that almost 20 months had passed since Dubose's most recent discipline and that the disciplinary grid was intended to serve as a "guideline" to assist BWC. Consequently, the 20 day suspension should be overturned with appropriate back pay.

On the other hand, BWC contends that Dubose had an extensive disciplinary record, related to identical attendance offenses. As of August 22, 2006, the active discipline included: a 10 day suspension; 5 day fine; 3 day fine; and a 1 day suspension. The 20 day suspension, represented her second major discipline under BWC's disciplinary grid, and removal could have occurred.

ISSUE

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

RELEVANT PROVISIONS OF THE CBA AND BWC 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 377.02(1).

BWC WORK RULES

Memo 5.01 (in part)

It is the philosophy of the Bureau of Workers' Compensation to recognize the employees of the Bureau as our greatest resource . . . .

In the course of the employment relationship it may be necessary to discipline an employee for an infraction of a rule or policy. Should it become necessary supervisors are expected to recommend discipline that is fair and consistent and commensurate with the offense. Likewise, the principles of progressive discipline are to be observed. All discipline is to be administered in strict compliance with laws and rules that apply to the employee who has committed the offense, including the Ohio Revised Code, the collective bargaining agreements, and BWC policies and procedures . . . .

These guidelines are provided to aid managers and supervisors in administering employee discipline properly. They are guidelines only. It may be appropriate to provide greater or lesser levels of discipline in specific cases based upon specific situations . . . .

ATTENDANCE

VIOLATION	1st	2nd	3rd	4th	5th
i. improper call off	Verbal	Written	Minor Suspension	Major Suspension	Removal

Memo 9.01

CALL-OFF POLICY

Any employee who cannot report to work or will be more than thirty (30) minutes late on a day they are scheduled to work must contact their supervisor or designee within thirty (30) minutes after the scheduled beginning of their shift.

BWC employees employed in seven (7) day operations must call off at least ninety (90) minutes prior to the beginning of their scheduled shift.

Call-offs are acceptable for two types of leave only: sick leave and emergency personal leave. For any call-off for which emergency personal leave is requested, documentation of the emergency **must** be submitted. If appropriate documentation is not submitted, the request for emergency personal leave will be disapproved, the absence will be considered unexcused and the employee may be subject to discipline, up to and including termination. Vacation and compensatory leave require approval prior to use and thus neither will be approved for call-offs. Any variance from this policy requires approval from Employee and Labor Relations.

All call-offs must be made by the employee. It is acceptable for someone other than the employee to call-off on the employee's behalf **only** when the employee is unable to make the call him or herself (e.g., due to inpatient hospitalization or a weather emergency).

All call-offs must be made to the employee's supervisor or designee. Any exceptions to this requirement must be made in advance in writing by the supervisor.

If a period of medical leave extends beyond one day, the employee and supervisor must establish a call-off schedule. Until a schedule has been established, the employee is required to call-off every day.

POSITION OF THE PARTIES

EMPLOYER'S POSITION

The Grievant, on August 22, 2006, notified Bartel forty-seven (47) minutes late of her inability to work that day. BWC's policy required the Grievant to call off within 30 minutes of the beginning of her shift.

The Grievant's start time was between 8:30 a.m. and 9:00 a.m., due to the flex time policy in effect at the Canton office. Bartel indicated that Dubose told her that due to medication taken, she had just woken up at 10:17 a.m. Bartel further recalled that Dubose indicated that the reason for the late call off was due to her FMLA condition.

The Grievant's current FMLA certification, dated July 28, 2006 (Joint Exhibit (JX) 15), was for bronchitis and irritable bowel syndrome. Leslie K. Jenkins ("Jenkins"), FMLA Manager, testified that none of the Grievant's certified FMLA medical conditions affected her ability to call off properly. Jenkins further added that the Grievant was expected to comply with BWC's policies and that FMLA rules do not exempt employees from complying. (Management Exhibit (MX) 1).

BWC acknowledges her status as a long-term employee, but her prior discipline record for attendance-related offenses is extensive. The attendance discipline includes the following:

1. 10-day suspension, February 7, 2005 (improper call off, unexcused absence);
2. 5-day fine, August 21, 2004 (improper call off, unexcused absence);
3. 3-day fine, July 24, 2004 (improper call off, unexcused absence, insubordination);
4. 1-day suspension, July 31, 2003 (improper call off, unexcused absence).

Moreover, the Grievant participated in the Employee Assistance Program ("EAP") in 2003 regarding her attendance and received several prior counselings in 2001 directing her to comply with the call off procedures. The 20 day suspension aligns with the parties' notion of progressive discipline and " . . . shows leniency towards the Grievant, as the discipline grid actually calls for removal after a 4th offense of this type . . . . " (Management Opening Statement, p. 2). In other words, BWC was not attempting to be punitive – since removal could have occurred.

Therefore, just cause was met, and the grievance should be denied in its entirety.

UNION'S POSITION

The Grievant worked for twenty-three (23) years with BWC, and although current attendance-related disciplines were on file, she had " . . . realized a 20 month period without

discipline for a late call prior to August 22, 2006." (Union Opening Statement, p. 3). The August 22, 2006 incident was an exception, and the Grievent, recognizing her attendance problems, had implemented various techniques to make sure she complied with the call off policy.

The Grievant testified that she had three (3) alarm clocks and that her sister would call her every morning to make sure she was up. The Grievant further added that her supervisor(s) were aware over the years of her inability to wake up on time and of her FMLA conditions.

On August 22, 2006, the Grievant was taking medications that inhibited her from awaking timely on occasions. The Employer was informed of the various medications the Grievant was taking during the investigatory interviews and the predisciplinary meetings regarding this grievance. The Grievant testified that she suffered leg cramps and took over-the-counter medications to relieve the pain, and to enable her to sleep on the night of August 21, 2006. Recognizing that certain medications caused her to sleep longer than she needed, the Grievant used the methods cited above to help her wake up. Unfortunately, on August 22, 2006 her wake up techniques were unsuccessful.

The Grievant further admits that her current FMLA certification did not include sleep apnea or any other condition that is related to drowsiness or sleepiness. However, since 2003, the Grievant has been a patient of the Center for Sleep Disorders because of her inability to obtain a refreshing night of sleep. (Union Exhibit (UX) 2). BWC ignored the medical evidence even though the evidence indicates that certain medications precluded the Grievant from complying with the call off process on August 22, 2006. Therefore, under Article 29.03, her medical circumstances precluded her ability to properly call off and BWC failed to consider these factors in assessing discipline.

Regarding Memo 5.01, the Union points out that the attendance policy and the disciplinary grid are intended as "guidelines", reserving discretion for management to apply greater or lesser levels of discipline. BWC also failed to apply the contractual language in conjunction with the language in Memo 5.01, thereby precluding a finding of "just cause."

The 20 day suspension should be removed with the appropriate back pay.

DISCUSSION AND CONCLUSIONS

Based upon the sworn testimony at the hearing, joint stipulations and exhibits presented at the hearing, the grievance is denied. My reasons are as follows:

The failure of the Grievant to timely call off on August 22, 2006 by 47 minutes is not in dispute, nor is the past disciplinary record which contains various interventions and four separate but similar related infractions that resulted in discipline. Likewise, BWC's evidence was uncontested that a 5th offense of this nature under the disciplinary grid called for removal. As pointed out by the Union, to relieve the Grievant of her contractual obligation under Art. 29.03 of the CBA, circumstances must exist which precluded her ability to comply. In other words, unplanned events outside of the control of the Grievant intervened to prevent the proper call off. Each case must be decided on its own facts in assessing if the totality of the circumstances precluded the notification. For the reasons contained below, the facts fail to support a finding that "circumstances" precluded proper notification.

The Grievant maintained that over-the-counter medication taken for severe leg cramps caused her to oversleep on August 22nd. Her FMLA certifications also provided notice to BWC of her medical conditions which included the taking of medications that caused her to oversleep. The BWC counters that the most recent FMLA certification dated August 3, 2006 was for bronchial asthma/irritable bowel syndrome. Consequently, BWC was unaware that her inability

to call off was a symptom of her FMLA conditions. Jenkins testified that the Grievant's FMLA certification was recent and fails to indicate any medical condition that affected her ability to call off properly. Moreover, as Jenkins testified, it's the employee's responsibility to keep BWC updated on all medical conditions that impact their work. I agree. The record is void of any medical justification that the reason for her late call off was due to bronchitis and/or irritable bowel syndrome. Such medical documentation was crucial to Grievant's defense – but non-existent. Therefore, the evidence does not allow an inference or a finding that Grievant's medical condition(s) made it beyond her control to call off properly on August 22, 2006.

The 20 day suspension, albeit a long period of time, represents the second major suspension received by the Grievant. On February 7, 2005, the Grievant received a 10 day suspension for improper call off/unexcused absence. In accordance with Work Rule: Attendance (i), the August 22, 2006 call off should have caused the removal of the Grievant. BWC determined that a second major suspension was appropriate as opposed to removal. The Union contends that the grid is a guideline and that BWC has discretion to provide greater and/or lesser discipline based upon each situation. The Union believes the Grievant's health issues on August 22nd were the reason she violated the call off policy and Art. 29.03 afforded BWC additional discretion in determining discipline was not warranted.

A review of the Grievant's disciplinary record suggests the Employer used its discretion in not removing the Grievant from public service. BWC exercised discretion under Art. 29.03 and the Work Rules when it determined removal should not occur and instead imposed the suspension. Given the choice of removal versus suspension, BWC acted properly. Simply, "just cause" existed and no standards were violated in disciplining the Grievant.

The Union artfully raised several issues for mitigation purposes to lessen or remove the discipline. As indicated earlier, the 20 day suspension is part of a progressive disciplinary record for the same offense and cannot be considered in isolation. BWC beginning in 2003 and continuing thereafter, instituted discipline to correct Grievant's behavior. During the period of July 2003 until August 2006, Grievant was suspended for 10 days; received a 5 day and a 3 day fine; received a 1 day working suspension; written orders regarding proper call off; and entered into an Employee Assistance Program ("EAP") concerning, in part, the call off issue. The Grievant as a long term employee, was aware that her conduct was unacceptable, and BWC was unwilling to tolerate instances of future violations.

The record is undisputed that the Grievant received increasing levels of discipline, including economic penalties, to impress upon her the significance of her non-compliance with the attendance procedures. Unfortunately, the Grievant did not change her conduct sufficiently to comply. The absence of attendance infractions since her last discipline indicates that the Grievant can correct her behavior. The August 22, 2006 incident will hopefully serve as the "wake up" call to the Grievant. If not, further discipline will result.

Based on the record as a whole, the discipline issued was for good cause, and the grievance is denied in its entirety.

Dated: December 20, 2007

Dwight A. Washington, Esq.
Arbitrator