

#1972

In the Matter of the Arbitration

- between -

The Ohio Civil Service Employees
Association/AFSCME, Local 11

- and -

State of Ohio,
Department of Rehabilitation and
Correction, Oakwood Correctional
Facility

Arbitrator: John J. Murphy
Cincinnati, Ohio

Date and Place
of Hearing: Lima, Ohio; February 29, 2008

For the Employer: Chris Lambert
Ohio Department of Rehabilitation
and Correction
Bureau of Labor Relations
1050 Freeway Drive North
Columbus, Ohio 43229

Also Present: Kelly Mason
Nurse Executive
Oakwood Correctional Facility

Sherri Rodney-Kahle
Labor Relations Officer
Oakwood Correctional Facility

For the Union: James Hauenstein
Karen Vroman-Ells
Staff Representatives
OCSEA/AFSCME, Local 11
390 Worthington Road, Suite A
Westerville, Ohio 43085

Also Present: Lt. Gary Lewis
Oakwood Correctional Facility

Kim Osting
Union Steward, Allen Correctional Facility

William Lotz
Union Chapter Vice President
Oakwood Correctional Facility

FACTUAL BACKGROUND:

The Grievant, a Psychiatric Attendant, was removed from her position effective September 20, 2007, by notice from the Appointing Authority that stated the basis for the removal as follows:

Violating the Standards of Employee Conduct Rule(s) 3F. Failure to provide physician's verification when required; and 3H. Being absent without proper authorization. You are also in violation of the Last Chance Agreement that you signed on February 20, 2007.

Central to this case are the Physician's Verification Requirement and the Last Chance Agreement, both of which are described.

A.) Physician's Verification Requirement

The collective bargaining agreement provides in Article 29.04 that an Agency may, in its discretion, require an employee to provide a statement "from a physician, who has examined the employee" The contract further requires that the physician's statement be signed by the physician. The physician's verification "will be considered for approval only if the physician's verification is provided within three (3) days after returning to work." Lastly, should an agency find it necessary to require an employee to provide the physician's verification, the order of the agency "will be in writing using the 'Physician's Verification' form with a copy to the employee's personnel file."

The record shows that it was the practice of the Oakwood Correctional Facility to require a Physician's Verification whenever an employee's sick leave balance was below 24 hours. The Grievant fell below this threshold in her sick leave balance and she received and signed a written requirement on April 15, 2007 "to provide a statement, from a physician, who has examined you . . . for all future absences as a result of personal . . . illnesses or injuries." The requirement would remain in effect until the Grievant had achieved 32 hours in her sick leave balance.

The parties stipulated that there was no issue in this case as to whether the Grievant was properly under the Physician Verification Requirement by the Oakwood Correctional Facility (OCF). It was also undisputed that she continued to be under such a requirement in July and August of 2007--the dates related to this case.

B.) Last Chance Agreement

There was no issue as to the validity and application of the Physician Verification Requirement to the Grievant at the times relevant to this case. Similarly, there was no issue with respect to the validity and application of the last chance agreement applicable to the Grievant. The Union, Grievant and nurse-executive signed the Last Chance Agreement (LCA) on February 20, 2007, just two months prior to the effective date

of the Physician's Verification Requirement. The LCA stated that if the Grievant "has any violation" of the Employees Standards of Conduct concerning the Absenteeism Track in the Disciplinary Grid, then

The appropriate discipline will be TERMINATION from her position. The department needs only to prove that the (Grievant) violated the above rules in order for the termination to be imposed. (emphasis in text)

The LCA concluded with the statement: "the arbitrator shall have no authority to modify the discipline."

There is a connection between these two matters that is central to this case: the Physician's Verification Requirement and the LCA. The LCA limited the Grievant's exposure to termination for only certain violations of the Employee Standards of Conduct; those within in the absenteeism track of the disciplinary grid. The connection between the LCA and the Physician's Verification Requirement is found in Rule 3F of the absenteeism track of the disciplinary grid. This rule makes "Failure to provide physician's verification when required," an offense for which discipline applies in the disciplinary grid.

C.) The Fateful Day of July 24, 2007

On July 13, 2007, the Grievant signed and submitted a written Request for Leave for three hours on July 24, 2007 from the hours of noon to 3:00 p.m. She explained her request as: "Dr. Appointment." The Grievant's shift on July 24 was from

7:00 a.m. to 3:00 p.m., thereby making the leave applicable to only the last three hours of the shift. The request was recommended by her supervisor.

At 5:17 a.m. on July 24, 2007 the Grievant called off sick, and her supervisor, Lt. Lewis, recorded her request on a prescribed form. The form has a series of empty lines introduced by the phrase "Reason for Leave: ." Lt. Lewis wrote: "Flu/Cold."

The Grievant did not appear for work during her entire shift on July 24. On July 25, she signed and submitted a second Request for Leave for eight hours from 7:00 a.m. to 3:00 p.m. on the preceding day, July 24, 2007. As explanation for the leave request, the Grievant wrote: "Dr. Verification Attached."

Attached to the second request for leave was a form from Creative Counseling Solutions entitled "Excuse Slip." The form certified that the Grievant "had an appointment at this office for professional attention on: Date: 7/24/07 Time: 1:00 p.m."

On August 4, 2007 the Warden approved the leave from noon to 3:00 p.m. but disapproved the leave from 7:00 a.m. to 11:59 a.m. because "no Physician's Verification for this time frame."

While the record is unclear on this matter, it appears that the Employer did communicate with the Grievant on August 7 that the Physician's Verification was inadequate to support the

second request for leave for the eight hours. The record does show, however, the Grievant did submit on August 9, 2007 a statement by a physician from Luke Medical Center dated August 7, 2007 noting that the Grievant "should be off work" on July 24, 2007. The statement contained a printed phrase: "the above (Grievant) was treated in the office:" There followed a box which was left unchecked by the physician.

STIPULATED ISSUE:

Did the employer appropriately terminate the grievant for violation of her Last Chance Agreement signed on February 20, 2007? If not, did the employer have just cause to remove the grievant? If not, what shall the remedy be?

OPINION:

The following deals with central matters about which the parties differed in their opening arguments and/or closing briefs. They included whether the alleged violation of Rule 3H was an independent charge; the duty, if any, by the employer to investigate the first physician's statement submitted on July 25; the practice, if any, of submitting only one physician's statement for each leave, and the suggested unfairness of the employer's requiring two such statements.

A.) Rule 3H as an Independent Charge

The Union argued that there was no independent or separate violation of Rule 3H because the analysis of such a violation is

tied directly to the violation of 3F. The Union's position is reasonable and the alleged violation of Rule 3H cannot be, in and of itself, a violation of a rule relating to the Absenteeism track under the Last Chance Agreement.

Rule 3H makes "being absent without prior authorization" an offense for which discipline is applied. As the Labor Relations Officer of the agency testified, the violation of Rule 3H in this case was based upon the disapproval of five hours for time off relative to the Grievant's second Request for Leave seeking a leave of eight hours. This disapproval occurred on August 4, 2007 after the absence of the five hours had already occurred. The Grievant would have had no opportunity to correct her behavior on July 24 to conform with the Employer's decision made after July 24 to disapprove five hours of her leave.

The allegation of the violation of Rule 3H is entirely dependent upon the Employer's disapproval of a portion of the Grievant's request for an eight hour leave, and this disapproval turned on the Employer's appraisal of the physician's statement submitted with the request for leave. This entire case, therefore, turns the propriety of the Employer's treatment of the physician's verification. If the Employer was correct in approving three hours and disapproving five hours, then the Grievant would have failed "to provide physician's verification when required"--a violation under Rule 3F.

B.) Investigating the Physician's Statement
Submitted on July 25

In referring to "her original physician's verification," the Union asserted that this was tied to an overall treatment plan and

The State could have, at any time, investigated more thoroughly and contacted Ms. O'Dell's providers to seek clarification of her conditions but instead chose not to do so. (Union opening statement at 2).

There is no such duty by the agency to conduct an investigation upon the submission of a physician's verification by an employee. If there were a basis for this process of verifying illnesses or injuries to employees, it would be found in the contract between the parties. What is required is set out in the contract. The duty is upon an employee, and the employee is under a duty to provide a statement:

- 1.) From a physician who has examined the employee;
- 2.) From a physician who has signed the statement.

Finally, it is the employee who has the duty to provide the statement within three days after returning to work.

The agency's form used in this case involving the Grievant conforms to the requirements of the contract, and neither the form signed by the Grievant nor the contract imposes any duty upon the agency to conduct a further investigation after the employee submits the statement.

C.) The Matter of Providing Multiple Physician's
Verifications for the Same Leave

The core of this case is the Union's assertion that the prescheduled medical appointment on the afternoon of July 24 was for the same condition for which the Grievant called off for her entire shift early in the morning of July 24. In such cases, according to the Union, the practice at the Department of Rehabilitation and Correction is to never require multiple physician's verifications. In this case, the agency requested the Grievant to present multiple verifications and this placed the Grievant in a "catch 22" of trying to obtain a second Physician's Verification." (Union post-hearing brief at 3 and 4).

The record simply does not show that the reason for the prescheduled appointment was "for the same condition that led her to call off her shift." (Id. at 2).

The Grievant did not testify, and the absence of this testimony leaves open the reason for the prescheduled appointment. We do know, however, from the physician's statement submitted by the Grievant on July 25 with her request for eight hours of leave that the appointment was with Creative Counseling Solutions, and that it was at 1:00 p.m. This is the record that the agency faced in deciding whether this

physician's statement supported the leave request for eight hours.

We are left, therefore, only with a subsequent letter from Creative Counseling Solutions dated on August 30, 2007--over a month after the Grievant submitted her leave request for eight hours with the physician's statement from Creative Counseling Solutions. The letter notes that her appointment was for an "initial diagnostic evaluation." The Grievant "continued to have significant anxiety and depression" despite prescribed medication and outpatient psychotherapy. The letter records the results of the appointment. There was a change in the prescribed medication and a recommendation to continue the psychotherapy.

Finally, the letter spoke about the physician's statement supplied by CCS to the Grievant to support her request for an eight hour leave on July 24. The letter noted that the Grievant had not been an established patient of CCS. The letter made it clear that CCS could not provide an excuse for the entire shift absence requested by the Grievant as her leave.

"We provided an excuse for the appointment time, but . . . we could not provide an excuse for the entire day."

The propriety of the Employer's appraisal of the adequacy of the physician's statement should be judged on the basis of the statement presented by the employee. The Grievant in this

case had the duty to provide such a statement. That statement clearly does not cover the number of hours requested by the Grievant. Moreover, the statement does comport with the request for leave that had been filed by the Grievant on July 13--a request that sought leave for only three hours for an appointment with a doctor. While the Employer's decision concerning the physician's statement should be judged on the basis of the statement presented by the employee, the additional information in this record from the letter of August 30 by CCS also supports the Employer's decision to disapprove five hours of the requested eight hour leave.

We turn for the second time to whether the prescheduled medical appointment was for the same condition for which the Grievant called off her entire shift. The question now is why did she call off her entire shift. Again, we have no testimony by the Grievant.

The record does include signed statements of answers by the Grievant to questions presented to her during the investigation by the agency. In the Grievant's handwriting, she stated that, "I do remember telling Lt. Lewis I had a doctor's appointment later in the day." She also stated: "I do not remember telling Lt. Lewis that I had the flu/cold when I called in." Lt. Lewis unequivocally testified that he was told by the Grievant that the reason for calling for the entire shift was "flu/cold."

Without the testimony of the Grievant, the Union accepted the notation in the form written by Lt. Lewis. The Union then equated "flu/cold" to diarrhea and upset stomach. There is nothing in the record to support this equation. Further, no support can be found in any testimony by the Grievant.

Finally, we turn to the matter of multiple physician verifications. The Union claimed that the Grievant was forced to attempt to find additional such verification. There was no testimony by anyone in the agency concerning a communication that requested additional verifications, and there was no testimony by the Grievant on this matter either. We do have a statement, however, from the Employer in its opening statement that, "the Grievant was informed on August 7, 2007 by the OCF Personnel Office that the statement she provided was not adequate to verify the absence."

The record does not support the finding that the Employer "demanded" a second physician's verification. The physician's verification submitted by the Grievant on its face supported only a leave for three hours, and the record is sufficient to show that the Employer did note this inadequacy to the Grievant on August 7.

The Grievant's response was to submit a second physician's verification by Luke Medical Center. Again, on its face it does

not comply with the contractual requirement that the statement be by a physician who has examined the Grievant.

The Grievant in this case submitted a request for a leave on July 13 for three hours for a doctor's appointment on July 24. As the facts show, however, the Grievant then submitted a second request for an eight hour leave for the entire shift on July 24. This request was made early in the morning by telephone to her supervisor on July 24. The labor relations officer testified that it is normal in the event of a change in circumstances to submit a new request for a leave. Therefore, assuming that the Grievant did experience a change in her physical health mandating an eight hour leave, it would be quite normal for the Grievant to do what she did in this case--submit a second request for a leave. The rub in this case, however, comes from the fact that the Grievant should have submitted a physician's statement on the new request--the second request for an eight hour leave. The Grievant did not do so, but, instead, submitted the physician's statement that comported entirely with her initial request for a leave on July 13 for three hours.

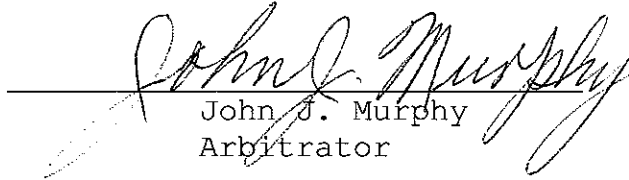
Based on this record, the Grievant failed to provide physician's verification when required--an offense under Rule 3F of the Absenteeism Track set forth in the disciplinary grid. This constitutes a breach by her of her Last Chance Agreement.

Under the Agreement, proof of this violation as found in this record, requires that "termination to be imposed." Furthermore, under the Agreement, the arbitrator does not have any authority to modify this discipline.

AWARD:

The grievance is denied.

Date: March 31, 2008


John J. Murphy
Arbitrator