
In the Matter of the Arbitration

- between -

State of Ohio
Bureau of Workers' Compensation

- and -

Ohio Civil Service Employees Association,
Local No. 11

Arbitrator: John J. Murphy
Cincinnati, Ohio

Hearing: Columbus, Ohio; March 3, 2009

For the Union: Karen Vroman
OCSEA, Staff Representative
10041 Columbus Grove Road
Bluffton, Ohio 45817

Also Present: Carolyn Abron
Grievant
Gerry Fadell
Union Steward

For the Bureau: Rhonda Morris
Bureau of Workers Compensation
State of Ohio
30 West Spring Street, L28
Columbus, Ohio 43215

Also Present: Brian Walton
Director of Employee and Labor Relations
Bureau of Workers' Compensation
Dana Wolfe
Supervisor, Toledo Service Office
Bernadette Delgado
Service Office Manager
Toledo Service Office

FACTUAL BACKGROUND:

The Grievant was removed from her position as Clerk 3 on September 11, 2009. At the time of her removal, she had slightly more than ten years of service with the State of Ohio, the last seven of which were with the Bureau of Workers Compensation.

The removal was based upon events that occurred during July and August of 2008. The removal letter briefly summarized these events as follows:

Specifically, on Thursday, July 17, 2008, you called off sick. You failed to submit a PV (Physician's Verification) for this absence; therefore, you accrued eight (8) hours of unexcused absence. On Monday, July 23, management attempted to hold an investigatory interview with you. The Toledo SOM (Service Office Manager) called you to request your presence at this meeting. You hung up on him and failed to attend the meeting. When management was able to get you to the meeting, you were non-responsive to the questions. On August 14, 2008, you left a voicemail indicating that you would arrive at work at 10:30 a.m. You did not personally speak with a supervisor and did not arrive at work until 11:00 a.m. An investigatory interview was held on August 25, 2008 to address this last incident and you were non-responsive.

The removal letter connected this summary of events to the Bureau's disciplinary grid and alleged violations under three major topics: Insubordination, Attendance, and Failure of Good Behavior. The allegations under Insubordination related to the failure to submit a PV; the failure to attend the investigatory interview called by the SOM (Service Office Manager); the

failure to respond to the questions in the investigatory interviews on July 23 and August 25, 2008 together with the refusal of a direct order to respond to same; the failure to attend the investigatory meeting first called by the SOM on July 23. The allegation concerning failures in Attendance included the eight hour of unexcused absence on July 17 as a result of the failure to submit the PV and the improper call-off on August 14, 2008.

RELEVANT PROVISIONS OF DISCIPLINARY GRID,
BUREAU'S POLICY, AND CONTRACT PROVISIONS:

A.) Bureau's Disciplinary Grid

**INSUBORDINATION
Violation**

1st

2nd

3rd

4th

5th

a. Willful disobedience/ failure to carry out a direct order	Suspension/ removal	Removal			
. . .					
d. Interfering with, failing to cooperate with or providing false information in conjunction with an official investigation or inquiry	Determina- tion based upon severity of incident				

ATTENDANCE
Violation

1st

2nd

3rd

4th

5th

. . .					
h. Unexcused absence	Determina- tion based upon severity of incident				
i. Improper call off	Verbal	Written	Minor Suspension	Major Suspension	Removal

B.) Bureau's 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.

C.) Contract

ARTICLE 25 - GRIEVANCE PROCEDURE

25.01 - Process

. . .

G. It is the goal of the parties to resolve grievances at the earliest possible time in the lowest level of the grievance procedure . . .

STIPULATED ISSUE:

Was the Grievant Carolyn Abron removed for just cause? If not, what shall the remedy be?

OPINION:

For purposes of clarity, this Opinion will be divided into a discussion of what happened on July 17, 2008 and what happened on August 14, 2008. The events of those days and the subsequent events connected to those days will be analyzed to determine whether the Bureau sustained its burden of showing violations under the disciplinary grid. Finally, the assessment of removal as punishment in this case will be considered particularly in light of mitigatory considerations addressed by the Grievant and the Union in this case.

I. July 17, 2008

A.) What Happened?

For some time the Bureau has had a policy incident to the management of sick leave balances held by employees. While there had been some modifications over the years, none of these modifications are applicable to the facts in this case. In addition, the policy is shared with the Union, and employees receive a copy of this policy by Email at their workplace computer. Once the employee's sick leave balance falls below twenty hours, the employee "must submit to his or her immediate supervisor" a written verification of the sickness signed by the physician. The policy concludes, "the employee's failure to provide PV may result in disapproval of the leave request and subject the employee to disciplinary action."

It is undisputed that the Grievant was placed under this policy by written notice to the Grievant signed by her and her supervisor, D. P. Wolfe on February 8, 2008. The written notice was entitled "PHYSICIAN'S VERIFICATION AND DIRECT ORDER." Immediately above the Grievant's handwritten signature with date there appeared the following paragraph:

You are hereby given a direct order to comply with this Request for Physician Verification. Failure to follow this direct order will be a direct violation of the BWC Work Rules, and you will be subject to discipline.

On July 17, 2008 the Grievant telephoned one of her supervisors and requested eight hours of sick time. In one of her conversations with the supervisor on that date, the supervisor reported to the Grievant that he had reviewed all of her available balances. His written record of their conversation included the following: "I told her that a doctor note was also needed, she understood."

There is a conflict in the testimony as to whether a physician's verification was produced by the Grievant to the supervisor. The Grievant testified that she had initially forgotten to obtain verification from her physician at her visit to the physician on July 17th. She further stated that she returned to the doctor's office a couple of days later, obtained the verification and left it in her supervisor's mailbox upside

down during the week of July 17. Her supervisor, D. Wolfe, testified that she never received such a verification.

Based upon the Grievant's responses to cross examination and written documentations issued by D. Wolfe dated July 18 and 22, 2008, the conflict concerning production of the verification is resolved against the Grievant. The record includes an Email sent by D. Wolfe and acknowledged by the Grievant to have been received on July 18--the day after the absence for sickness of the Grievant. The pertinent parts of the Email remind the Grievant to produce verification and tells the Grievant how to produce it.

This is to remind you that you are required to give me your PV documentation for your absence of 7-17-2008. Please obtain this documentation by 7-22-2008 and give directly to me.^{1/}

The record also includes an Email by D. Wolfe to her manager in the early evening (6:21 p.m.) on Tuesday, July 22, noting in writing that she had not received the PV from the Grievant that had been required for the absence on July 17, 2008. This Email as well as the reminder to the Grievant on

^{1/} The Bureau's policy requires production of the PV within three working days after the employee returned to work. The Grievant returned on Friday, July 18--the date at which she received the Email of reminder by her supervisor. Tuesday, July 22, 2008, would be the third working day after her return to work.

July 18 were prepared and sent by D. Wolfe contemporaneously with the date of the sickness and the period within which the verification was to be produced. Hence, we are not left merely with conflicting oral testimony at the arbitration hearing. In addition, the Grievant was shown the Emailed reminder by her supervisor on July 18 that states precisely how the Grievant was to produce the verification. The agreement was to "give (the verification) directly to me (the supervisor)." The Grievant in cross examination acknowledged receipt of this Email and further acknowledged that she did not so produce the verification. She explained that she produced the verification in the way she had done so in the past, not as directed in the Email.

There is a third event that occurred on July 23 that is connected to the Grievant's absence of July 17. Without denial by the Grievant, the supervisor testified that the Grievant was directed to attend an investigatory interview at noon. The direction was by telephone and the Grievant responded by hanging up the phone. The record also shows that she entered her work time at her computer at her work station as absent from noon to 12:45 p.m. for lunch.

The investigatory interview was held at approximately 3:30 p.m. on July 23. Despite an order to respond to questions, the Grievant was nonresponsive, looking out the window, checking her cell phone, and dealing with her purse. None of this testimony

on the record was denied by the Grievant. Indeed, the Grievant acknowledged that she was not responsive, but she offered an explanation which is considered later in this Opinion concerning mitigatory matters.

B.) Disciplinary Considerations
Incident to July 17

We begin with the question of whether the failure to produce the Physician's Verification of sickness on July 17 was a "willful . . . failure to carry out a direct order"--one of the four forms of insubordination in the Bureau's disciplinary grid. We are not dealing with the classic example of this form of insubordination--a written or oral order to perform a task and an immediate failure by the employee to comply upon receipt of the order. In this case we have the Bureau's policy presented to the employee that states that her failure to produce the PV may result in disapproval of the leave request and disciplinary action, but does not state that the Grievant is under a direct order to do so with the violation constituting insubordination. This problem is somewhat cured by the form provided to the Grievant when her sick leave fell below required minimum. That form is partly entitled a "DIRECT ORDER" and the paragraph immediately above her signature does state that production of the PV is a direct order and failure to follow this direct order will result in discipline.

The question is whether this written declaration by the Bureau of a direct order to produce the PV issued and signed by the Grievant in February of 2008 is sufficient to impress upon the Grievant that the lack of a Physician's Verification for a sickness in July of 2008 is insubordination. Is it sufficient to impress the Grievant that the July absence without the verification is more than simply an unexcused absence; rather it is insubordination.

If there is any concern about the absence of notice to the Grievant and caution to the Grievant concerning compliance with direct orders, it is cured by entries into this record of what transpired about two weeks prior to the July 17 absence. On July 2, 2008, the Grievant was the subject of a Settlement of Disciplinary Action.^{2/}

The Grievant suffered a 15-day working suspension with pay from Monday, July 14, 2008, ending on August 1, 2008. This suspension was suffered by the Grievant because of a finding that she was insubordinate based upon a "willful failure to

^{2/} The parties agreed at the arbitration hearing that such settlements are entered into under the authority mutually granted to the parties in their contract under Article 25.1 (G). The parties also agreed that such settlements are not grievable.

carry out a direct order." The factual basis for this order was as follows:

Specifically, on Tuesday, June 10, 2008, you were asked to attend a meeting to discuss your Work Action Plan. During the course of the meeting you became argumentative, stood up and attempted to leave. Your supervisor gave you a directive to "sit down and finish the meeting." You failed to respond affirmatively. Your supervisor informed you were being insubordinate but you still left the meeting.

The record shows that the Grievant was informed both in writing and orally that she would be disciplined for any future event of insubordination. The written notice of the 15-day suspension was dated July 11 and ended with this sentence: "Continued behavior of this type will result in further discipline up to and including removal." Moreover, unrebutted testimony revealed that the Grievant engaged in a discussion with her supervisors on July 2 concerning the settlement. The Grievant asked what would happen to her if she refused the direct order again. The Grievant was told that removal would occur if she did so. The written notice in February signed by the Grievant clearly characterized the failure to produce the PV as an act of insubordination, as a failure to comply with a direct order. This must be combined with the July communications to the Grievant concerning the eminence of removal for failure to comply with the direct order. The consequence is that the Grievant must be found to have

understood that her failure to produce the Physician's Verification within three working days from her absence on July 17 did constitute a willful failure to carry out a direct order.

A second event of willful failure to carry out a direct order occurred on July 23. After being told by her supervisor to attend an investigatory meeting at noon, the Grievant hung up the telephone and left for lunch. There is nothing else to be said about that event.

The Grievant acknowledged that she refused to respond to questions during the investigatory interview that in fact occurred late in the afternoon of July 23. In fact, the record includes a list of 24 questions to which there is related in monotonous repetition "no response." Subject to any mitigatory concern, this is clearly the fourth form of insubordination as "failing to cooperate with . . . an official investigation."

The question is whether the lack of responsiveness, in addition, constitutes a failure to carry out a direct order because the Grievant was ordered by her supervisor to answer the questions in the investigatory interview. Can her lack of responsiveness at the investigatory interview constitute two separate, distinct forms of insubordination as set forth in the Bureau's disciplinary grid? The answer is in the negative.

The Bureau's disciplinary grid manifests a choice by the Bureau to impose a duty upon the Grievant to respond at the

investigation. The failure of that duty is encased in a separate distinct fourth form under the general heading "insubordination." For a first offense, this failure to cooperate results in discipline to be determined "based upon severity of incident."

This is the full determination by the Bureau of the scope of an employee's duty to respond to questions in an investigation. The employee has this duty to cooperate under the disciplinary grid when he or she is called to the investigation. It is not a duty that independently arises because a supervisor says you must answer the question during the investigation. This is not to say that a supervisor cannot make an independent direct order during the course of an investigation. However, that direct order must relate to behavior by the Grievant other than simply refusing to respond to the questions. An example of such is included in this record when the Grievant refused an order to sit down and finish a meeting, leading to a 15-day working suspension with pay.

The consequence of this analysis is that the refusal of the Grievant to answer the questions in the investigatory interview does constitute a form of insubordination in that she "failed to cooperate . . . with an official investigation." However, it does not constitute an independent violation of the first form of insubordination as a "failure to carry out a direct order."

II. August 14, 2008

A.) What Happened?

The day began with a voicemail left by the Grievant to one of the supervisors stating that she would be in to her work station by 10:30 a.m. The Grievant arrived at 11:15 a.m., and stated that she extended her absence from 10:30 a.m. to take her 45-minute lunch period. The Grievant acknowledged that she did not have prior approval to extend her absence to 11:15.

There then followed an investigatory interview on August 25 on the subject of the Grievant's improper call-off on August 14. The Grievant attended the interview. A record of the interview showed a written list of fourteen questions including an inquiry about the Grievant's current position with the Bureau and another about how long she had worked for the Bureau. The written record shows again a monotonous repetition of "no response" by the Grievant.

B.) Disciplinary Considerations
Incident to August 14

The Grievant acknowledged that she was aware of the Bureau's call-off policy that requires contact with the supervisor. Moreover, the record shows that it is inconsistent with this policy to extend a call-off period of time by a lunch break without prior approval. There is no doubt that the action of the Grievant on August 14 constituted a violation of the

disciplinary grid dealing with the call-off procedure under the topic "Attendance."

It is sufficient to state that the Grievant's lack of responsiveness during the investigatory interview constitutes a violation of the fourth form of insubordination. The Grievant failed to cooperate with an official investigation.

The above analysis results in several conclusions. First, the Bureau had just cause to discipline the Grievant for a willful failure to carry out a direct order and her failure to produce the Physician's Verification incident to the July 17 absence. This also constituted an unexcused absence on July 17 thereby violating one of the forms of attendance in the disciplinary grid. The Bureau also had just cause to discipline the Grievant for the improper call-off on August 14. Lastly, the Grievant's refusal to answer any question in the investigatory interviews of July 17 and August 25 constitutes separate violations of the fourth form of insubordination in that the Grievant failed to cooperate with an official investigation.

III. Mitigatory Concerns

Based upon the language of the disciplinary grid, the above findings clearly justify the Bureau's decision to adopt removal as the sanction for the discipline for which the Bureau had just cause. Removal is by the text of the grid the sanction for the second event of insubordination by willfully failing to carry out a direct order. Two such examples occurred on the facts of this case, and there was a predicate example of a failure to carry out a direct order early in June of 2008. This earlier example already led to a 15-day suspension with pay. This should be combined with the two examples of insubordination in the form of failure to cooperate with an official investigation that occurred on the facts of this case on July 23 and August 25, 2008. The question is: is there anything in this record that mitigates against removal?

The Union and the Grievant offered two mitigatory concerns. The first claims that the Grievant was placed under microscopic review of her work. "Her work, heretofore satisfactory, was subjected to criticism . . ." "(The Grievant) claims her every move in the workplace under a microscope."

The record does not support this concern. The Grievant's annual performance reviews for 2006, 2007, and the one ending June of 2008 were made part of the record. These reviews constituted a systematic examination by her supervisors of her

duties performed as a Clerk 3. Each one of them reached the conclusion of "satisfactory" with respect to the Grievant's performance of her work. The last such review was concluded on June 6, 2008--just a month prior to the events that were subject to this grievance.

The problem for the Grievant in this case was not in the performance of her work duties. It was not the careless or neglectful performance of her duties at the workplace that led to any charge under the topic of insubordination. This case concerned behavior of the Grievant separate from the actual performance of her duties as a Clerk 3.

The second concern is summarized in this claim about the Grievant: "She was under assault from every direction." As the Grievant noted, she appeared to be in a "spiral of discipline." It was implied that the supervisors were universally committed to find any transgressions by the Grievant that were cognizable under the disciplinary code. The record has substantial information to the contrary.

In the midst of all of these travails visited upon the Grievant, a new service office manager arrived at the Toledo service office on July 28, 2008, D. Delgado. She decided to introduce herself to all of the employees within her first two weeks of office. She did not know the Grievant or about the

Grievant prior to taking office but had been told about the Grievant's disciplinary problems.

She invited the Grievant to her office and noted that she was a new manager. She testified that she told the Grievant "I can't stop what is in motion, but this is in support of a fresh start."

The Grievant testified that the meeting was pleasant. Delgado reported that the Grievant was friendly with good eye contact and that the Grievant knew this was a new start. The meeting lasted 10 to 15 minutes and included the following comments by Delgado:

It's up to you. We are at a point you could lose your job. I don't want that to happen. I don't know you and I have no history about you.

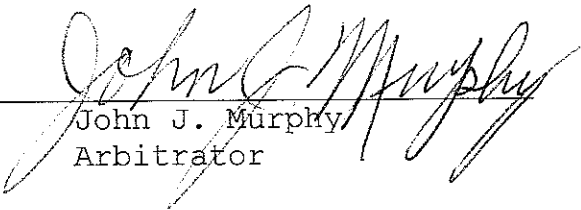
The record shows that the Grievant did not accept the invitation of the newly arrived service office manager. Indeed, the problem with the August 14 call-off occurred and the Grievant persisted in refusing to respond to questions in the August 25 investigatory meeting during which Delgado was present as one of the supervisors.

Since neither of the mitigatory concerns are founded or established in this record, neither cause a reassessment of the Bureau's decision to remove the Grievant in this case.

AWARD:

The grievance is denied.

Date: March 14, 2009


John J. Murphy
Arbitrator