

ARBITRATION DECISION NO.:

6

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Oakwood Forensic Center

DATE OF ARBITRATION:

February 9, 1987

DATE OF DECISION:

February 20, 1987

GRIEVANT:

Mike Hickey

OCB GRIEVANCE NO.:

G-86-0508

ARBITRATOR:

Marvin J. Feldman

FOR THE UNION:

Daniel S. Smith

FOR THE EMPLOYER:

Cheryl J. Nester

KEY WORDS:

Absenteeism

EAP

Removal

Progressive Discipline

Sick Leave

ARTICLES:

Article 24 - Discipline

§24.01-Standard

§24.06-Prior

Disciplinary Actions

§24.08-Employee

Assistance Program

Article 25 - Grievance

Procedure

§25.07-Advance

Grievance Step Filing

Article 29 - Sick Leave

§29.01-Accrual

Article 31 - Leaves

Of Absence

§31.03-Authorization

For Leave

Article 43 - Duration

§43.05-Duration

of Agreement

FACTS:

The Grievant was employed as a Psychiatric Attendant at the Oakwood Forensic Center and received a notice of removal effective September 15, 1986. Grievant was removed for Neglect of Duty - Absenteeism.

The Grievant had been disciplined a number of times for excessive absenteeism. Grievant was disciplined each time for requesting sick time when there was none accumulated, or for failing to file a request for leave and for failing to provide a medical excuse. Grievant received a 3-day suspension in February, 1985, another 3-day suspension in April, 1985, a 5-day suspension in March, 1986, and a written reprimand in August, 1986 when he failed to offer a doctor's statement for leave.

It is obvious from these dates that some of the discipline was issued prior to the current contract with the state. The Arbitrator therefore looked at the current contract, the previous contract, and the applicable agency rules regarding absenteeism, progressive discipline, and leave requests.

The removal order came specifically for actions of the Grievant on April 20, 1986, April 21, 1986, May 19, 1986 and June 6, 1986. On the first three dates, Grievant requested leave (again, Grievant had no sick time accumulated) and it was denied. On June 6, 1986, it was alleged that the Grievant did not even submit a leave request and simply didn't report for work.

EMPLOYER'S POSITION:

It was management's position that the Grievant was discharged for just cause in compliance with progressive discipline. Further, management contended that the Grievant was aware of the policy for medical excuses when sick leave is used, yet failed to follow that policy. Grievant was also aware that his excessive absenteeism was seriously endangering his job. Management contended that since it was a continuing problem and previous discipline included 3 suspensions, and since EAP was not utilized by Grievant, discharge was the proper disciplinary action.

UNION'S POSITION:

The Union contended that discharge was not the proper disciplinary avenue. The Union argued that the absenteeism must be mitigated by the fact that Grievant was under severe emotional strain during the period in question and had been receiving psychological treatment. Additionally, the present contract is more liberal with respect to sick time allowed and progressive discipline than the old contract and the Agency rules. The Union argued that although some discipline may be warranted, removal is too harsh.

ARBITRATOR'S OPINION:

The Arbitrator, after hearing all the testimony and reviewing all the evidence, granted the grievance. He awarded the Grievant his job back but without back pay and placed Grievant at the last step of progressive discipline before removal. The Arbitrator also awarded the grievant full seniority rights and stipulated that the Grievant must "remand himself to the formal employee assistance program at the facility. . ."

The Arbitrator's award was based on a number of factors. Most importantly, the Arbitrator stressed that discharge was too severe because of the more relaxed atmosphere of the new Contract. It provides for 80 hours sick time rather than 56, and has a more liberalized progressive discipline scheme. He also considered the fact that the Grievant did not receive his denials of requests for leave until one to two months after the leave was actually requested and taken. Finally, he recognized the emotional strain of the employee as a factor. It should be noted, though, that the Arbitrator used strong language to warn against further unexcused absenteeism by the Grievant and ordered that the employee should avail himself of the employee assistance program.

AWARD:

The grievance is sustained. The grievant is reinstated to his position without back pay but without loss of seniority. The grievant is placed on the last step prior to discharge of the progressive discipline section of the contract. The grievant shall remand himself to the formal employee assistance program upon receipt of this award.

TEXT OF THE OPINION:

**VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. G86-0508**

**STATE OF OHIO, DEPARTMENT
OF MENTAL HEALTH**

The Employer

-and-

**OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION,
LOCAL 11, AFSCME**

The Union

OPINION AND AWARD

APPEARANCES

For the Employer:

Cheryl J. Nester,
Assistant Attorney General
Ann Henry,
Personnel Director
Louise A. Sassi, Timekeeper
Alexander G. Thiry,
Administrative Assistant

Richard J. Baker,
Psychiatric Nurse Supervisor

For the Union:

Daniel S. Smith,
General Counsel
Mike Hickey, Grievant
Bob J. Rowland,
Staff Representative
Royce Martin, Jr.,
Staff Representative
Robert F. Meier, Supervisor

MARVIN J. FELDMAN

Attorney-Arbitrator
340 Western Reserve Building
1470 West Ninth Street
Cleveland, Ohio 44113
216/781-6100

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having been unable to resolve this matter prior to the arbitral hearing. The hearing in this cause was scheduled and conducted on February 9, 1987, at the Office of Collective Bargaining offices, Columbus, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and separated and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this Opinion and Award was thereafter rendered.

II. STATEMENT OF FACTS

It appears that the parties to the instant contract of collective bargaining executed the Agreement on August 13, 1986, effective for a three year period beginning July 1, 1986. See Section 43.05 of the contract which states as follows:

"§43.05 Duration of Agreement

This Agreement shall continue in force and effect for three (3) years from its effective date of July 1, 1986, and shall constitute the entire Agreement between the parties. All rights and duties of both parties are specifically expressed in this Agreement. This Agreement concludes the collective bargaining for its term, subject only to a desire by both parties to agree mutually to amend or supplement it at any time."

The grievant under letter of September 15, 1986, received the following notice of removal effective September 15, 1986:

"ORDER OF REMOVAL

Mr. Michael R. Hickey
4055 Stewart Rd.
Lima, Ohio 45801

This will notify you that you are removed from the position of Psychiatric Attendant.

The reason for this action is that you have been guilty of Neglect of Duty in the following particulars, to wit: that on or about 04/20/86, 04/21/86, 05/19/86, and 06/06/86 you were on unexcused absent time. Requests for Leave disapproved 04/20/86, 04/21/86 and 05/19/86; and no Leave Request form completed for 06/06/86. This is in violation of Oakwood Forensic Center Policy on Corrective Action and Leave of Absence without Pay. Following progressive discipline, you have received suspensions for same or similar offenses, as follows: 02/06/85 - three (3) days suspension for Neglect of Duty - Absenteeism (no report); 03/09/86 - five (5) days suspension for Neglect of Duty - Absenteeism. The Superintendent will inform you of the date of your removal.

If you wish to appeal this action, you must file a written grievance with the Agency Director within fourteen (14) days of notification of this action. To file the written grievance, send it to John Rauch, Manager, Labor Relations, Ohio Department of Mental Health, 30 East Broad Street, Columbus, Ohio 43215. You may also wish to consult with your union representative.

/s/Pamela Hyde, Director

Date: 9/15, 1986

Department of Mental Health"

To that event a protest was filed under date of September 19, 1986, and the following pertinent comments were made in that protest:

"What Resolution to This Grievance Are You Requesting? THAT THIS EMPLOYEE BE MADE WHOLE, EMPLOYEE BE REINSTATED AT OAKWOOD. REMOVAL BE DROPPED

What Specific Article(s) and Section(s) of the Labor Agreement do You Believe Have Been Violated? INCLUDING (sic) BUT NOT INCLUSIVE 'PREAMBLE,' ARTICLE 24.01, .06, .08, ARTICLE 25.07"

There were several contractual clauses stated in that particular protest as filed and they should be set out here, in full. Article 24.01 states as follows:

"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."

Section 24.06 states as follows:

"§24.06 - Prior Disciplinary Actions

All records relating to oral and/or written reprimands will cease to have any force and effect and will be removed from an employee's personnel file twelve (12) months after the date of the oral and/or written reprimand if there has been no other discipline imposed during the past twelve (12) months.

Records of other disciplinary action will be removed from an employee's file under the same conditions as oral/written reprimands after twenty-four (24) months if there has been no other discipline imposed during the past twenty-four (24) months.

This provision shall be applied to records placed in an employee's file prior to the effective date of this Agreement."

Section 24.08 states as follows:

"§24.08 - Employee Assistance Program

In cases where disciplinary action is contemplated and the affected employee elects to participate in an Employee Assistance Program, the disciplinary action may be delayed until completion of the program. Upon successful completion of the program, the Employer will give serious consideration to modifying the contemplated disciplinary action."

Section 25.07 having to do with advance grievance step filing need not be set out in full. The employer's answer at Step 3 denying the protest, which answer is dated October 21, 1986, states as follows:

"Step 3 Answer:

Grievance Hearing was convened on October 17, 1986 at Oakwood Forensic Center. Mr. Hickey was represented by Mr. James Ladden, OCSEA/AFSCME Local President. Based upon the facts presented, it is my finding that Mr. Hickey did not adhere to hospital policy and was in fact absent from work without approved leave. The hospital has been consistent in the application of progressive discipline and has attempted to work with the employee to address both his health and personal problems. A suggestion to contact the Employee Assistance Program at an earlier conference was recommended by the hospital.

The employee was aware of hospital policy regarding leave without pay and continued to violate said policy. I do not find grounds to substantiate the grievance and my findings support the action of the hospital.

/s/George P. Gintoli
Assistant Deputy Director

10-21-86

Date"

It is noted that the protest as filed and the answer as filed, were filed under the terms of the contract. It is also noted that the triggering events did not transpire during the course of the contract. Thus, we have a situation in which the first contract gives to the parties the right to adjudicate grievances under it, not only for those events that occur entirely during the term of the

contract, but for those events that occurred prior to the contract. The dates, therefore, should be kept well in mind when the reader becomes involved.

At the time of the instant events which triggered the dismissal order, there were in place at the facility certain rules which are necessary for the understanding of this particular case. One such rule was found in Policy P-21 and that rule, in pertinent part, states as follows:

"Employees are responsible for knowing the number of sick leave hours they own."

Under the same policy there existed another rule about authorized leave of absence without pay. That rule in the same policy states as follows:

"If this same employee has no accumulated sick, compensatory or personal leave time to cover his absence, he may request an authorized leave of absence without pay, only the Superintendent may approve leaves of absence without pay. Also, the Superintendent may request the employee to furnish a satisfactory written, signed statement to justify the use of sick leave/absent time. If professional medical attention is required by the employee or member of the employee's immediate family, a certificate from a licensed physician, stating the nature of the condition may be required by the Superintendent to justify the use of sick leave/absent time. Falsification of either the signed statement or a physician's certificate shall be grounds for disciplinary action which may include dismissal."

The hospital policy as to "leave of absence without pay" also contained a rule 7 in that regard and that rule states as follows:

"7. In the case of extended leave of absence for illness or injury, an employee wishing to return to work must have authorization from a licensed physician and approval of the Appointing Authority."

It might be noted that Section 24.08 of the agreement entitled, "Employee Assistance Program," refers to a program of a state employer, known as EAP. There was one in place at the facility at which the grievant was employed and the evidence fails to reveal any grievant participation in the plan. There does appear to be evidence, however, that the grievant participated in some psychological consulting with a professional outside of the plan. The grievant participated in that particular situation because of some domestic problems. Those problems, of course, had an effect upon the grievant at the time of the instant events, but they are not necessary to discuss for the purpose of this particular matter.

Also in place was a hospital policy concerning corrective action. That hospital policy had a definition of progressive disciplinary action and that progressive disciplinary action paragraph states as follows:

"1. Progressive Disciplinary Action: Is defined as a series of disciplinary actions beginning with the least severe measure appropriate to the rule of conduct violated, and increasing in severity with repeated improper conduct. The series is identified in 'steps', as follows:

First Violation = Step 1 - documented oral counseling (documentation maintained by immediate supervisor).

Second Violation = Step 2 - Written Reprimand

Third Violation = Step 3 - Written Reprimand

Fourth Violation = Step 4 - Minor Suspension (1-3 days)

Fifth Violation = Step 5 - Moderate Suspension (4-10 days)

Sixth Violation = Step 6 - Major Suspension (11 or more days) or Removal"

It might be noted that there is a progressive discipline plan under the terms of the contract which is somewhat different than the progressive discipline plan revealed in the hospital policy at the time the instant matter occurred. It might also be noted that the number of allowed accumulated sick hours of leave prior to contract was fifty-six hours per year and under the terms of the contract the amount is eighty hours per year. The evidence further reveals that on February 4, 1985, the grievant was given a three day suspension for the following activity:

"It has been determined after review of all available evidence surrounding your Neglect of Duty - Absent No Report charge, that you will be given three (3) days suspension (two days for absent no reports on 1/4, 1/6 and 1/7/85; and one day suspension being invoked since you violated policy within the 90-day period, as specified in hearing of December 12, 1984)."

On April 2, 1985, the grievant was given an additional three day suspension for the following activity:

"The reason for this action is that you have been guilty of Neglect of Duty--Absenteeism in the following particulars, to wit: that on or about February 25, 1985, you were absent from duty and did not report. You have received previous disciplinary actions for the same or similar offense; namely; 10/28/81 - oral counseling for absenteeism; 4/5/82 - written reprimand for abuse of sick leave in pattern; 5/11/82 - written reprimand for abuse of absent time (no report); 7/15/82 - oral counseling for sick/absent time; 7/31/79--3 days suspension for Neglect of Duty absenteeism & excessive use of sick leave; 10/28/82 - 1 day suspension for Neglect of Duty - Absenteeism; 12/12/84 - 1 day suspension, suspended, to be invoked if further violation of Neglect of Duty--absenteeism (no report) in 90-day period; 2/6/85 - 3 days suspension for Neglect of Duty - absenteeism (no report). Your suspension from duty is for April 2, 3, and 4, 1985."

On or about March 3, 1986, the grievant received a five day suspension for the same activity and it reveals as follows:

"After consideration of all the facts and circumstances surrounding your charge of Neglect of Duty and/or Failure of Good Behavior (AWOL on January 22, 1986), I have determined you shall receive five (5) days suspension.

Your attendance problems are seriously endangering your ability to remain employed at Oakwood Forensic Center."

It might be noted that the grievant also was involved in an activity of June, 1985, whereby he received a reprimand of July 8, 1985, and by way of a portion of that reprimand, it indicates as follows:

"Mr. Hickey is apparently out of sick time, and whenever he is off due to an illness he is going to have to show a Doctor excuse to avoid a counseling."

Thus, all of those events were for sick time request for which there was no sick time or for which the grievant refused to file a request for leave or for which a medical excuse was not offered. The employer therefore stated that in all of those events a medical excuse would be necessary, all of which is reflected in the rules as indicated herein.

The triggering events in this instant and particular incident involves a series of items in which

the grievant was concerned. The grievant filed a request for leave on April 20 for April 21 and April 22, 1986, when he had no sick leave left. The grievant requested leave on May 19, 1986, and at that time he had no sick time left. In June of 1986 the grievant took leave and never filed a request. The grievant denies the failure of filing and indicates that he did file it but produced no photocopy nor any record at the facility of such filing.

The rule at the facility found in the sign-in, sign-out and call-in procedure authority reveals in pertinent part the following:

"All related attendance and timekeeping paper work such as requests for leave (ADM-4258) and authorizations for overtime (DMH-P-15) must be initiated and processed on a timely basis. All such paperwork is to be submitted through the current channels of employee-supervisor-Superintendent for all necessary approvals."

Thereafter on or about June 20, 1986, the grievant received the following disciplinary action:

"Neglect of Duty - Sleeping or being unalert on duty. You were observed to be sleeping or unalert on May 27, 1986; June 16, 1986; and June 19, 1986. This is a major offense of hospital policy - corrective action."

A check of his attendance records were made at the time of the sleeping incident and it was found that the grievant's leave for April and May were denied although the grievant was "off" and that the grievant was "off" in June without, according to the institution, ever filing a request for leave, administrative form 4258. Thereafter the sleeping on duty charge was dismissed but the matter proceeded to discharge on charges of unexcused absenteeism and a letter of August 25, 1986, to the grievant revealed that. That letter states as follows:

"DATE: August 25, 1986
TO: Michael Hickey
FROM: Barbara D. Peterson, Superintendent
SUBJECT: Recommendation for Discipline

On this date, recommendation for discipline was forwarded to Pamela S. Hyde, Director, Department of Mental Health for charges of unexcused absenteeism. The charge of sleeping or unalert on duty is being dismissed due to insufficient evidence."

The grievant states that he never found out about the denial of sick leave in April until some time in June or July and that he did not find out about the denial of leave in May and June until the same late date. In that regard the notice of hearing of dismissal was the basis for the grievant's ability to learn of the events of denial. It is noted that the notice of hearing is dated June 25, 1986, and the notice revealed the following:

"This is based on the following information: On or about 5/27/86; 6/16/86 and 6/19/86 you were observed to be sleeping and/or unalert while on duty; on or about 4/20, 4/21, 5/19 and 6/6/86 you were on unexcused absent time (request for leave disapproved 4/20, 4/21, 5/19; no slip for 6/6/86."

Thus, the grievant found out about his sick leave denial, according to his testimony some two months after the request was made in one instance, one month in another instance and several weeks in another instance. It might be noted that under the new contract under Section 31.03 the

following is found:

"§31.03 - Authorization for Leave

Authorization for or denial of a leave of absence shall be promptly furnished to the employee in writing by the Agency designee."

The grievant appeared at hearing as it was rescheduled for all of the events with the sleeping charge having been dropped. The matter went forward upon the grievant's neglect of duty charges as it related to his absenteeism and the grievant indicated that he was sick and that he needed medical care and that that was the reason for the sick leave requests. The grievant did not provide any information at the time of hearing other than a sparse statement from a treating physician which revealed the following:

"First seen for auto injury by Dr. Baker on 2/22/85. Seen again 3/4/86 for rt. shoulder

James E. Baker, M.D.
718 W. Market St.
Lima, Ohio 45801"

That statement was meager indeed in that it merely provided two office visit indications, one in 1985 and one in 1986. The employer thereafter forwarded to the grievant a request for a release of full information from Dr. Baker, from a Dr. Thomas Hustak, a psychologist, and from a Dr. Sites, also a psychologist. The grievant refused to sign and return the request for releases but did supply to the employer another sparse statement from Dr. Baker, a full report on the psychological testing that the grievant received from Sites and nothing from Dr. Hustak. The grievant indicated and stated that Dr. Hustak was no longer available.

That in sum and substance are the facts this particular matter. They involve two separate sets of rules. They involve pre-contract effective date rules and post-contract effective date rules and a long line of absentee events of the grievant.

It was upon all of these facts that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

It might be noted that under the terms of Article 29 of the new contract that the following sentence appears in Section 29.01:

"After employees have used all of their accrued sick leave, they may choose to use accrued vacation, compensatory time or personal days or may be granted leave without pay."

Thus, it appears that under the terms of the contract the events that led up to the discipline in this particular matter may not have occurred. That is true because the individual involved would have been automatically granted accrued vacation, compensatory time or personal day or leave without pay. Apparently then the exact events that triggered the discipline in this particular matter under the terms of the activity of the parties prior to contract was different than the events that could have occurred in the instant case under the terms of the contract. It is difficult indeed to adjudicate a difference that has arisen between the parties under two sets of rules when a decision making has occurred under the second set of rules and the events that triggered that decision making occurred under the first set of rules. That was kept in mind when the decision in this matter was made.

There is no doubt in my mind that the grievant was involved in a series of absentee events contrary to the known policies of the facility. His activity of absenteeism is revealed very strongly in the record and his request for leave seems somewhat clouded by his reasons. The grievant indicated residual injuries from an auto accident and yet the treating physician for that accident only revealed two office visits over a period of a year. Yet, the grievant requested leave in April and May of 1986 for injuries to his shoulder and claimed that his treating physician, a Dr. Baker, realized the need for that absentee event. The record does not belie the truth of the grievant's testimony in that regard. Further, there is a clear indication that the grievant knew of the policies for medical excuses when sick leave is used and yet the grievant refused to follow that policy. Further, it appears from the record that the grievant knew that he had to watch his own accumulation of sick leave and yet the grievant requested time off on sick leave basis presumably knowing that he had over used his time in that regard.

There is a defense made by the union on behalf of the grievant that this would never have been discovered but for an event of sleeping on duty that had allegedly occurred which event was later dismissed in favor of the absentee situation. That is a spurious defense. An individual may have triggered two events of discharge, one having been discovered and the other not. If either one would sustain the dischargeable event than such dischargeable event is proper.

The parties did stipulate to an issue in this particular matter and that stipulation reveals the following:

"STATEMENT OF ISSUE

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

/s/Daniel S. Smith 2/9/87

FOR UNION

/s/Cheryl J. Nester 2/9/87

FOR EMPLOYER"

It appears that the union also raised the defense that the grievant was under severe emotional strain during much of the period. From the evidence revealed in this particular cause, that may be so. From all of this review of file as it transpired prior to contract and as the rules are revealed as changed subsequent to the contract and because of the expansion and easier treatments in the contract, I am inclined to answer the issue in favor of the union in this particular case. While it may be that the grievant would have been discharged for just cause prior to contract, I cannot hold the same to be true when the contract under which this matter is brought has more liberal terms. More liberal terms are an expansion of sick leave time from fifty-six to eighty hours; the expansion of time off if sick time is used; the need for promptly first furnishing an employee an immediate answer to a request; and the general relaxed atmosphere of the contract as it is read relative to the prior stringent rules.

Thus, under the facts of this case and solely because of the relaxed atmosphere of the agreement as it relates to the prior rules, the grievant is entitled to some relief. Let this award not reflect, however, that the grievant may dance his own tune of absenteeism anytime he decides he needs time off. There is an employee assistance program and while the grievant did not participate under the employee assistance officer at the facility, he did participate in some regard to answer his emotional needs at the time those needs had to be answered. The grievant should now avail himself of the employee assistance program as it is formally set up in the contract and as

the rules of the facility dictate. The grievant should also realize that scheduled work cannot be set aside because a whim of absenteeism occurs in the grievant's mind. The scheduled work hours must be adhered to and while the contract between the parties reflects a liberalized atmosphere, that does not mean that the grievant may flaunt this decision as his license to take time off at his whim. For all of these reasons the following award is made.

IV. AWARD

The grievant is reinstated to his position at his facility in the same grade without back pay but without loss of seniority. The grievant is placed on the last step prior to discharge of the progressive discipline section of the contract. The grievant shall remand himself to the formal employee assistance program at the facility upon receipt of this award.

MARVIN J FELDMAN, Arbitrator

Made and entered
at Cleveland, Ohio,
this 20th day of
February, 1987.