

ARBITRATION DECISION NO.:

36

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Taxation

DATE OF ARBITRATION:

May 8, 1987

DATE OF DECISION:

July 27, 1987

GRIEVANT:

Michael Shannon

OCB GRIEVANCE NO.:

G-87-0478

ARBITRATOR:

Hyman Cohen, Esq.

FOR THE UNION:

John T. Porter, Esq.

FOR THE EMPLOYER:

Timothy D. Stauffer, Esq.

KEY WORDS:

Progressive Discipline
45 Day Limit
Prior Agency Leniency -
(Mitigation)
Just Cause
Medical Problems -
(Mitigation)

ARTICLES:

Article 24 - Discipline
§24.02-Progressive
Discipline
§24.05-Imposition
Of Discipline
Article 35 - Benefits

§35.02-Life
Insurance
§35.06-Disability
Leave

FACTS:

Grievant was an Examiner for the Department of Taxation assigned to work in a county courthouse during normal courthouse hours which were from 7:30 a.m. to 4:00 p.m. Due to a backlog of work, the Agency assigned another employee to the courthouse on a temporary basis. When a supervisor called to check on the work being done, the temporary employee informed the supervisor that the Grievant had been absent and/or tardy on numerous occasions. The supervisor maintained a log after that date listing the dates and times he attempted to contact the Grievant but was unable to reach Grievant. The supervisor contacted the Agency's enforcement unit, and the unit conducted surveillance of the Grievant for approximately two weeks. The total absences for an entire day or part of a day were eighteen for a two month period.

MANAGEMENT'S POSITION:

Grievant's absences were unrequested, and unauthorized, thereby constituting a gross neglect of duty. By accepting pay for days not worked, Grievant had worked a fraud upon the state. The fraudulent nature of the absences, the frequency of the absences, and the extended period of time over which the absences occurred, when viewed in light of all the circumstances, constituted just cause for discharge.

UNION'S POSITION:

Grievant's absences were due to extensive medical problems ranging from a fractured leg to tendonitis of the arm to congenital heart disease. The heart disease caused Grievant to have spells that required Grievant to "lay down and take it easy." The arm and leg problems were treated by therapy. Grievant notified the Supervisor on several occasions that he would be away from work for therapy. The Agency failed to follow progressive disciplinary procedures. The Agency did not attempt to correct Grievant's behavior by imposing a lesser penalty. The Union claimed that the Agency failed to meet the timelines requirements of Section 24.05 because they were aware of the Grievant's behavior at an early date. The Agency had been extremely lenient in supervision of the Grievant. The Supervisor did not visit in the field and did not require Grievant to file production reports even though all other examiners were required to file reports every two weeks. The Agency should have considered this a mitigating factor in its choice of penalties.

ARBITRATOR'S OPINION:

The Agency met the burden of showing just cause. Although most offenses require progressive discipline, deterrence of like conduct for some offenses is not likely in the absence of serious discipline for the first incident. Grievant worked independently and grossly abused the system. Any penalty less than discharge would not deter similar abuses elsewhere in the Agency. By accepting pay for days not worked, Grievant committed a fraud against the state. Discharge was commensurate with the severity of the offense, as required in Section 24.05. There were no mitigating factors. Grievant's behavioral problems were not a mitigating factor. Section 35.02 provides for extended medical disability leave, but Grievant chose not to take advantage of benefits agreed upon in the contract and to fashion his own system of medical leave. The Agency's laxity was not a mitigating factor. The laxity was not part of the evidentiary record in this case and the Arbitrator discusses it quite summarily. The Agency satisfied the timelines

requirement. Section 24.05 requires action by the Agency head as soon as reasonably possible but no more than 45 days after the pre-disciplinary hearing. The Agency notified the Grievant of the discharge 30 days after the disciplinary hearing. Section 24.02 requires the Agency to begin disciplinary proceedings in a timely manner. After learning of the absences, the Agency conducted a thorough investigation. Given the gravity of the offense and the extent of the investigation, the process was commenced in a timely manner.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration

-between-

OHIO DEPARTMENT OF TAXATION

-and-

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

GRIEVANT:

MICHAEL SHANNON

ARBITRATOR'S OPINION

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DATE OF THE HEARING:

May 8, 1987

PLACE OF THE HEARING:
Office of Collective Bargaining
375 South High Street
Columbus, Ohio

ARBITRATOR:
HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
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* * * * *

The hearing was held on May 8, 1987 at the Office of Collective Bargaining, 37 South High Street, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 10:20 a.m. and was concluded at 3:00 p.m. Post-hearing briefs were submitted on May 16, 1987.

* * * * *

On January 9, 1987 Joanne Limbach, Tax Commissioner, for the State of Ohio Department of Taxation notified MICHAEL SHANNON, the Grievant that he was "being removed from employment" with the Department effective January 17, 1987. The letter went on to state as follows:

"The reasons for the removal are unrequested, unreported and unauthorized absences. Specifically, a co-worker states you were absent the entire days of August 5, 8, 15, 21, 26, 28 and 29 and September 4 1986. Additionally, your supervisor was unable to locate you at your work location as of 9:00 a.m. on September 5 and 9:25 a.m. on September 10, 1986 nor did you report back to him on those dates. Agency representatives observed you reporting late to your work location on September 15 (9:18 a.m.) and September 16, 1986 (3:31 a.m.). Agency representatives observed you at places other than your work location though you did not report off work until 2:30 p.m. for the balance of the day of September 17, 1986. Agency representatives observed you reporting late to your work location on September 18, 1986 (8:25 a.m.). Your supervisor was unable to locate you at your work location the morning of September 30, 1986 nor did you report back to him on that date and agency representatives observed you at home the most of that day. Agency representatives observed you reporting late to your work location on October 3, 1986 (11:44 a.m.). Your supervisor discovered your absence for the entire day of October 7, 1986 though you had only requested four (4) hours absence. Also, your supervisor was unable to locate you at your work location at 9:45 a.m. on October 8, 1986 and did locate you at home at 10:10 a.m. that same day. Further, you accepted wages for all these absences while using accrued leave hours cover only two (2) hours on September 17 and four (4) hours on October 7 as arranged in advance (as noted earlier) and an additional four (4) hours on October 8, 1986 after you were challenged by your supervisor."

The discharge of the Grievant, led to the filing of a grievance which was carried into arbitration under the Agreement between the State of Ohio, the "State" and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, the "Union".

At the time that he was discharged, the Grievant was employed as an Examiner for the Tax Equalization Division, of the Ohio Department of Taxation. As an Examiner, the Grievant was primarily responsible for the following duties: examines "fee forms" for "correctness and completeness", verifies "conveyance fees and permissive tax paid, examines Recorder's documents to verify mortgages and property liens; cross checks valuations and provides new valuations when County is reappraised or updated." There are also several related duties which are carried out by an Examiner.

An Examiner in the Tax Equalization Division performs a good deal of his work in the courthouse, where records involving real estate transactions are kept. As a result the job description for an Examiner indicates that his "normal working hours" are "7:30 a.m. to 4:30 p.m. or Courthouse hours."

At the time of the events giving rise to the grievance the Grievant was assigned to the Summit County Auditor's Office, Real Estate Transfers Section. Due to the "number of sales" of property in Summit County, Charles M. Goeller, Tax Equalization Supervisor, on or about July 31, 1986 assigned Louis W. Hutras, an Examiner to work with the Grievant. Hutras said that he was initially assigned to help the Grievant get caught up with the work load. They performed their duties in the Summit County Courthouse located in Akron, Ohio. Their work station was a table located in the County Courthouse. It should be noted that the assignment of Hutras to the Courthouse was for the period of August 4, 1986 until September 5, 1986.

On September 4, 1986, Goeller telephoned Hutras at the Courthouse to ask him how the job was progressing due to the volume of sales in the County. Hutras stated to Goeller that "if he had help it would progress smoothly". Hutras added that since he had not been assigned to work with the Grievant, he [the Grievant] had not been at work for nine (9) days. During the Department's investigation of the Grievant's absence from work, Hutras signed a statement in October, 1986 in which he indicated that to his knowledge, the Grievant did not report to work at the Summit County Courthouse on August 5, 8, 15, 21, 26, 28, 29 and September 2, 4, 1986. Goeller acknowledged that the Grievant requested and obtained leave for September 2. As a result of Hutras' "report" on the Grievant's unreported absences, Goeller contacted Carole Mahaffey, the Administrator for the Tax Equalization Division and informed her of what he had been told by Hutras. Mahaffey recommended that Goeller get in touch with the Department's Enforcement Unit to undertake an investigation of the Grievant's absence from work.

GOELLER'S LOG

Goeller, who is located in Columbus, Ohio contacted Dennis Corrigan, Internal Auditor, Department of Taxation, who, in turn, requested him to maintain a log listing the dates that he tried to get in touch with the Grievant but could not reach him. Goeller's log, in relevant part, sets forth the following:

September 5--Called the Grievant at the Courthouse at 9:00 a.m. and he "had not arrived". He left word with the receptionist to leave a message to call his office but the Grievant never returned the call.

September 10--Called the Courthouse but the Grievant had not arrived as of 9:25 a.m. He left a message for the Grievant to call his office in Columbus but no return call was received.

September 15--Received a call from the Enforcement Unit who told him that Clarence Albanese who had been keeping surveillance on the Grievant's home, called in to indicate that the Grievant left his residence for the Courthouse at "approx. 9:15 a.m."

September 16--Received a call from the Enforcement Unit and was told that Albanese called in

to state that the Grievant left his residence at 8:21 a.m. and arrived at the Courthouse at 8:31 a.m.

September 17--The Grievant called in at about 2:30 p.m. to state that he was going to U.P.S. to ship forms to Columbus, after which he "was going to the doctor's office".

September 22--The Grievant called in about 11:10 a.m. to state that he was going to the doctor's office at 1:00 p.m. He indicated that he would be going to the doctor for two (2) more days that week in addition to two (2) days each week for the next four (4) weeks.

September 23--Contacted the Auditor's Office at the Courthouse at 10:20 a.m. but the Grievant had not arrived. The Grievant did not return Goeller's call, although a message was left for him to do so.

September 24--Called the Grievant at 10:10 a.m. but the Grievant had not arrived at the Courthouse. The Grievant did not call Goeller's office, although a message was left for him to do so.

September 25--The Grievant called in at 7:30 a.m. to state that he would be in therapy that morning.

September 26--The Grievant called in at 7:30 a.m. to indicate that he would be off for four (4) hours vacation leave on September 29, October 2, 7 and 9. He also stated that he was off four (4) hours each day on September 23, 24 and 25.

September 30--Called the Courthouse for the Grievant but the receptionist stated that he was in therapy until noon. The Grievant told Goeller on September 25 that he would be in therapy on September 29 and October 2. Goeller did not receive a "return call" from the Grievant.

October 1--The Grievant called the office at approximately 8:22 a.m. He indicated that he did not return his call on September 30 because he was in therapy. Goeller told the Grievant that when his schedule was prepared on or before September 29, the Grievant requested and received four (4) hours vacation during the mornings of September 29 and October 2. Corrigan had a copy of the Grievant's schedule which corresponded with Goeller's recollection.

October 8--Called the Courthouse at 9:45 a.m. but the Grievant was not in. The receptionist stated that the Grievant was not in on Tuesday either." Goeller left a message for the Grievant to return his call "ASAP". Pursuant to Corrigan's instructions, Goeller called the Grievant at home at 10:10 a.m. and asked why he was not at work. The Grievant replied that he "overslept". Goeller asked the Grievant why he did not go to work on October 7 and he replied that he was in therapy. Goeller then asked the Grievant why he did not report to work at the office after therapy but "he gave no reason".

SURVEILLANCE OF THE GRIEVANT

Pursuant to Goeller's telephone call to the Enforcement Unit on September 12, 1986 surveillance was exercised by several investigators from September 15 through October 3, 1986, with the exception of September 19 and the week of September 22, 1986. Richard Noss was one (1) of the investigators, furnished testimony at the hearing. He exercised surveillance, on each of the nine (9) dogs. The log of the Enforcement Unit, in relevant part, contains the following:

September 15--At 8:58 a.m. the Grievant left his residence and entered the Deed Transfer Section of the Ohio Building at 9:18 a.m. He returned to his vehicle at 4:01 p.m.

September 16--The Grievant left his residence at 8:21 a.m. and entered the Summit County Building at 8:31 a.m. At 3:45 p.m. the Grievant left the Building and got into his automobile.

September 17--The Grievant's vehicle was observed in his garage at his residence at 7:30 a.m. At 12:20 p.m. the Grievant left his residence and drove to a bank after which he went to U.P.S. At 1:10 p.m. the Grievant was observed at a V.F.W. Talmadge Post 1070 and at 2:21 p.m.

he was observed leaving. "A beeper call from Columbus" indicated that the Grievant had called in and requested sick leave from 2:30 p.m. to 4:30 p.m. to see his doctor.

September 18--The Grievant left his residence at 8:08 and arrived at the office at 8:25 a.m. He left the County building and entered his vehicle at 3:56 p.m.

September 29--At 10:10 a.m. the Grievant was not at his residence. At 10:15 a.m. the parking lot at "work was checked" but the investigators were "unable to locate" the Grievant. At 11:20 a.m. they checked the "work parking lot" again, and the Grievant was at work. At 4:00 p.m. the Grievant returned to the parking lot.

September 30--At 7:30 a.m. the Grievant's residence was checked and the Grievant "was not there". At 7:35 a.m. the work lot was checked and the investigators were unable to locate the Grievant. At 9:15 a.m. the Grievant was "at his residence and surveillance held".

One of the investigators called the office in Columbus, Ohio and was told that Goeller had left a message. The message stated that Goeller had called the Summit County Auditor's Office and was told by the receptionist that the Grievant told her during the previous day that he was having therapy during the morning of September 30. "An undercover call was made to the Grievant's residence at 9:15 a.m. "and a male believed to be [the Grievant] answered. The Grievant had not left his residence by 4.00 p.m."

October 1--The Grievant was at his residence at 7:30 a.m. At 8:00 a.m. he left and arrived at his office at 8:10 a.m. The Grievant did not leave the Courthouse until 3:58 p.m.

October 2--The Grievant left his residence at 10:30 a.m. and returned at 11:30 a.m. At 12:10 p.m. he left his residence and arrived at the office parking lot at 12:28 p.m. He left the building at 3:58 p.m.

October 3--At 9:56 a.m. the Grievant was at his residence. At 11:30 a.m. he left his residence and arrived at the County garage at 11:44 a.m. At 4:00 p.m. the Grievant entered his vehicle.

It should be pointed out that the Summit County Courthouse hours are from 7:30 a.m. to 4:00 p.m., which under the job description for the position of Examiner are the normal working hours for the Grievant.

An investigatory interview was conducted with the Grievant on November 7, 1986. On November 18, 1986, a request for discipline was sent to the Personnel Office. A pre-discipline meeting was then held on December 10, 1986 after which the Grievant was notified by Joanne Limbach, Tax Commissioner, that he was removed from employment, "effective close of business, January 17, 1987" due to "unrequested, unreported and unauthorized absences".

DISCUSSION

Based upon the evidence in the record, the Grievant was absent from work on days, or part of days when such absences were unrequested, unreported and unauthorized. I have concluded that the Grievant was absent the entire days of August 5, 8, 15, 21, 26, 28, 29, and September 4, 1986. This conclusion is based upon the testimony of Hutras, a bargaining unit employee who was assigned to work with the Grievant from August 4, 1986 until September 5, 1986. The Grievant acknowledged that on these eight (8) separate days in August, 1986 he did not request leave. He acknowledged that he was paid by the State for the eight (8) days in August. He testified that the only day between August 5 and September 4 that he could recall on which he did not work was August 5. He acknowledged that he did not request leave for August 5.

I find the testimony of Hutras credible and trustworthy. He shared the same work station, namely, a table located in the Summit County Courthouse. Hutras kept a calendar "in the pantry" of his home that he and his wife used. He made the mark of "x" on days that the Grievant did not show up at work. He did this in order to protect himself, since the only reason that he was assigned to perform duties as an Examiner at the Summit County Courthouse was to help the

Grievant with his work load.

Based upon the investigation undertaken by the Enforcement Unit of the Department, the logs kept by Goeller and the investigators, and the testimony of Goeller and Noss, leads me to conclude that the Grievant was absent from work on various days, and segments of days beginning with September 5 through October 8, 1986. As the record demonstrates, on September 5 Goeller called the Grievant at the Courthouse at 9:00 a.m. but he had not yet arrived at work. Although he left a message with the receptionist for the Grievant to call his office, "no return call was received by Goeller on that day". According to the Grievant, he testified that he thought he "was on time"- "around 8:00 a.m. on September 5". He "did not recall" a message left for him on that day.

On September 10, Goeller called the Grievant at the Courthouse at 9:25 a.m. but the Grievant had not yet arrived at work. He left a message for the Grievant to return his call, but no such call was received by Goeller. The Grievant said that he did not recall receiving a telephone message on that day.

On September 15 and 16, investigators observed the Grievant reporting late to his work location at the Courthouse. On September 15 the Grievant was observed at 9:18 a.m. entering the County building; on September 16, he was observed entering the building at 8:31 a.m.

Goeller said that he did not receive a telephone call of late arrival on September 15. If he is not available to receive telephone calls, the procedure to be followed by an Examiner was to call his secretary, who keeps "phone logs". Goeller said that the Grievant did not request leave for September 15. Furthermore, on September 16, the Grievant did not report his "late arrival". The Grievant said that he "did not recall if [he] arrived on time on September 15 and 16".

On September 17, the State's investigators observed the Grievant at places other than his work location. However, he first called in at 2:30 p.m. and requested sick leave for the rest of the day.

The Grievant acknowledged that he did not go to the office on September 17. He indicated that he worked that day at his home. His work involved counting the number of forms, after which he packed them into boxes. He taped the boxes and went to UPS so that the boxes containing the forms would be sent to Columbus, Ohio. The Grievant said that he then went to lunch, after which he had a doctor's appointment. He advised the Columbus office of his appointment with the doctor and informed the office that he had been to UPS.

Goeller testified that there was no Department policy which permits employees to work at home rather than at their assigned work station in the Courthouse. Such a policy exists only "in the event of bad weather" rising to the level of an "emergency". Goeller did not give the Grievant permission to work at home, rather than at the Courthouse. Moreover, Hutras indicated that he "was aware of the policy" forbidding working at home instead of the assigned work station. Thus, the evidence warrants the conclusion that on September 17, the Grievant's absence from work was unrequested, unreported and unauthorized.

On September 18 the Department's investigators observed the Grievant reporting to work late, at 8:25 a.m. The Grievant said that he "did not recall when [he] got to work on that day."

On September 30, Goeller was unable to locate the Grievant's vehicle at the "work lot". Moreover, Goeller called the Courthouse to talk to the Grievant and the receptionist told him that the Grievant was in therapy until noon. On September 25, the Grievant told Goeller he would be in therapy on September 29 and October 2. In any event, Goeller did not hear from the Grievant on September 30. It should be noted that the Department's investigators indicated that on September 30 the Grievant was at his residence from about 9:15 a.m. until at least 4:00 p.m.

It is undisputed that Department investigators observed the Grievant reporting to work at 11:44 a.m. on October 3. On October 8 Goeller was informed by the receptionist at the Courthouse that the Grievant was not at work during the previous day, October 7. Goeller has given the Grievant permission to be absent for four (4) hours for therapy. Moreover, on October 8 the Grievant was

not at the Courthouse at 9:45 a.m. When Goeller called the Grievant's home at 10:10 a.m., the Grievant answered the telephone and indicated that he had "overslept". When the Grievant was asked why he did not report to work after his therapy ended on October 7, "he gave no reason".

The Grievant could recall "one (1) or two (2) days" of the eighteen (18) days in August, September and early October, 1986 when he was either late or did not report to work. Thus, he testified that between August 5 and September 4, the only day that he could "recall" being absent was August 5; he also indicated that he did "not recall" whether, or if he arrived at work on time on most of the days in September which were among the eighteen (18) days set forth in the January 9, 1987 letter of termination. I am persuaded that the State's evidence, namely the testimony of Goeller, Hutras and Noss, supported by the telephone logs and logs of the investigators which was precise, and detailed, was trustworthy and credible.

The Grievant indicates that he did not keep a record on his absences from work. As opposed to the State's evidence, the Grievant frequently stated in response to questions about most of the eighteen (18) occasions set forth in the termination letter, that he failed to "recall" arriving at work on time or in his own words, he testified "I think I arrived on time." I find the Grievant's testimony on his recollection of days on which he was absent from work quite simply, unconvincing.

The Grievant's record during the period in question displayed an extraordinary indifference to the interest of the State and generally, to his job. It is beyond dispute that among the fundamental obligations of employment is that the employee report to work on his schedule, unless there is a reasonable excuse for not doing so. As Arbitrator Harry Shulman stated in an unpublished decision in Ford Motor Co., (Opinion A-13,1943).

"Employment is not merely a privilege for the employee to report to work whenever the spirit moves him. He cannot expect to be absent without notice and for no good reason, whenever he desires, any more than he expects the employer to lay him off for no good reason and at any time. The extensive provisions of the Agreement on leaves of absence themselves imply an obligation on the part of the employee to report for work. And the obligation is implicit also in his individual employment relation."

The evidence is clear and convincing that the Grievant neglected his duty by being absent from work, for an entire day or part of a day on eighteen (18) different occasions in August, September and early October, 1986. These absences were unrequested, unreported and unauthorized. Moreover, the Grievant compounded his serious misdeeds by accepting compensation from the State for the absences in question.

The Grievant was aware of the State's policy concerning "absence from work". Accordingly, on March 17, 1983 he signed a document indicating that he had "been advised who [he] should notify in the event of [his] absence from work." The State's policy on notification of absence, is provided in a "Personnel Procedure Memo". In the memo, an employee is required to notify his immediate supervisor within one-half (1/2) hour after the scheduled reporting time. Clearly, the Grievant did not comply with the requirements of this policy.

DEFENSES

The Grievant fractured his "leg by the knee" and developed tendonitis of the arm towards the end of July, 1986. He took off ten (10) work days between July 14 through July 25, 1986 and used up eighty (80) hours of sick leave. Moreover, the Grievant suffers from congenital heart disease which has caused him to miss work. He testified that he has incidents quite often--once or twice a week", when he has spells. He said that on these occasions, he cannot work and he has "to lay

down and take it easy". The Grievant has been hospitalized twice due to heart disease.

If he was absent from work for an entire day, the Grievant said it was because he was "low on sick leave", which in turn was due to his medical history, especially the eighty (80) hours of sick leave that he had taken in July, 1986. The Grievant's absences from work cannot be justified because he was "low on sick leave". It must be underscored that his absences from work were consistently unrequested, unreported and unauthorized. Furthermore, he received pay for his absences. Indeed, by his absences, he deceived the State into reasonable believing that he was at work. Such conduct constitutes a serious offense, and is inexcusable. This is especially so, given the lack of direct supervision over the Grievant and the requisite trust which must exist in the employment relationship.

Article 35, Sections 35.02 and 35.06 of the Agreement provides for extended medical disability leave. However, the Grievant failed to take advantage of such agreed upon benefits and instead attempted to take advantage of the State by not working and getting paid for not working.

The Union contends that the Department of Taxation had not established a progressive disciplinary policy at the time of the events which led to the discharge of the Grievant. It should be noted that progressive discipline is a well established concept in the field of labor management relations and is set forth in Section 24.02. The theory requires an employer to withhold the final penalty of discharge from an errant employee until it has been established that the employee is not likely to respond to a lesser penalty. As stated in *St. Joe Minerals Corp.*, 70 LA 1110, (Robert, 1978):

"* * Most industrial offenses require the application of progressive and corrective discipline before the ultimate penalty of discharge will lie. The amount of progressive and corrective discipline used in an effort to try to rehabilitate the offending employee will vary according to circumstances and the seriousness of the offense. Some offenses, however, are regarded as "industrial felonies" for which a penalty of discharge will lie for a first offense, barring mitigating circumstances. In such offenses considerations of the Company's need for serious discipline to deter others from like conduct and consideration that it is unreasonable to require the employer to continue the employment relationship after the commission for such an offense outweigh requiring that employee to seek to rehabilitate the offending employee. * *"

The Grievant committed an extremely serious offense amounting to fraud against the State. It is unreasonable to require the State to continue the employment relationship after the commission of such a serious offense. The dishonest nature of the offense, which was repeated over several months seriously impairs the employment relationship and does not outweigh requiring the State to make an effort to rehabilitate the Grievant.

Furthermore, in *Social Security Administration*, 81 LA 459, (Cox, 1983) the Arbitrator stated that:

"The principles of progressive discipline do not require a lock step approach. Gravity of the offense determines the initial step". At pages 460-461.

It is enough to state that the gravity of the offense committed on eighteen (18) different occasions warrants the "initial step" of discharge.

An essential component of progressive discipline has been agreed to by the parties in Article 24, Section 24.05 which provides that:

"Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment."

In other words, it is axiomatic that the degree of penalty should be in keeping with the seriousness of the offense.” *Capital Airlines*, 25 LA 13, 16 (Stowe, 1955). The State's decision to discharge the Grievant was “reasonable and commensurate” with the offense. Moreover, as the State indicates, the decision protects the interests of the State, its reputation and its obligations to the taxpayers. Furthermore, the consistent actions of the Grievant, from August through the early part of October, 1986, call into question the Grievant's integrity and judgment in a position where there is no direct supervision of the employee in the performance of his duties.

In light of the number of times that the Grievant committed this serious offense, the State's decision should not be disturbed.

Turning to another consideration, Article 24, Section 24.05 requires the “Agency Head” to “make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting”. I have concluded that the State complied with these requirements. Upon receiving a statement from Hutras, a bargaining unit employee, the Department undertook an investigation to substantiate the statements by Hutras. The investigation was concluded in mid-October, 1986, and an investigatory interview was held with the Grievant on November 7, 1986. On November 18, 1986, a request for discipline was sent to the Personnel Office. The pre-discipline meeting was held on December 10, 1986 and less than forty-five (45) days thereafter, the termination letter was sent to the Grievant.

It should be pointed out that given the serious nature of the statements by Hutras, the State properly conducted a thorough investigation, which included surveillance of the Grievant's residence and his whereabouts between roughly 7:30 a.m. and 4:30 p.m. for a two (2) week period. Such an investigation tends to diminish the likelihood of an impulsive and arbitrary decision.

After establishing the facts from its thorough investigation, I have concluded that the State made its decision of discharge “as soon as reasonable possible but no more than forty-five (45) days after the conclusion of the discipline meeting.”

In addition Section 24.02 requires that “an Arbitrator deciding a discipline grievance must consider the timeliness of the employer's decision to begin the disciplinary process”. Whether the disciplinary process begins with the investigators interview which was held on November 7, 1986 or the pre-discipline meeting held on December 10, 1986, given the gravity of the offense, and the elaborate investigation undertaken by the State, warrants the conclusion that the disciplinary process was commenced by the State in a timely manner. Thus, the State complied with Section 24.02.

The Union points to a flaw in the Department's system of recording leave for its employees in the field. Goeller indicated that prior to August, 1986 he forgot to record sick leave in one (1) instance.” The evidentiary record in this case does not indicate that Goeller forgot to record sick leave. Although the system of recording leave was changed in November, 1985, there is nothing in the record to indicate that mistakes in the recording of leave in any way was relevant to the Grievant's absence from work between August and early October, 1986.

The Union indicates that for several years, Goeller never visited the Grievant in the field, while he was under his supervision. Furthermore, for over a year and a half (between April, 1985 and October, 1986), Goeller did not require the Grievant to file production reports. All other examiners are required to submit such reports once every two (2) weeks. Moreover, Goeller indicated on a performance evaluation in January, 1985 that the Grievant “is well liked by his counties but has a problem with calling in when he is off on leave”. He indicated that he did not discipline the Grievant at the time because he felt that his discussion with him “would clear up the problem”.

It may very well be that management was lax in several respects. However, the laxity of management does not in any way constitute a mitigating factor in this case. That Goeller did not visit the Grievant in the field and did not require production reports were not factors in the evidentiary record of this case. With regard to Goeller's performance evaluation of the Grievant, the instant record contains for more serious misconduct than the Grievant merely having a problem with calling in when he is off on leave".

The Grievant was employed by the State for twelve (12) years, eight (8) of which were spent in the Department of Taxation. The evidence indicates that he was a satisfactory employee. I have carefully considered the Grievant's record, but I am constrained to conclude that the deceptive and frequent actions by the Grievant in accepting pay for work which was not performed outweighs his prior satisfactory service. Accordingly, the State proved by clear and convincing evidence that the Grievant was discharged for just cause.

THE AWARD

In light of the aforementioned considerations, the grievance is denied.

Dated: July 27, 1987
Cuyahoga County
Cleveland, Ohio

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