ARBITRATION DECISION NO.:
65

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Ohio Department of Aging

DATE OF ARBITRATION:
October 23, 1987

DATE OF DECISION:
December 2, 1987

GRIEVANT:
Lucille Stoughton

OCB GRIEVANCE NO.:
G-87-1028

ARBITRATOR:
Hyman Cohen

FOR THE UNION:
John T. Porter, Esq.

FOR THE EMPLOYER:
Egdillo Morales, OCB

KEY WORDS:
Just Cause
Neglect of Duty- Tardiness & Absenteeism
Mitigating Circumstances - Medical Problems
Back Pay

ARTICLES:
Article 24 – Discipline
§24.01 – Standard

FACTS:
May the Arbitrator modify termination of an employee when the State has proven all other elements of just cause but there are mitigating medical problems even though those problems were not disclosed until after the termination?

Grievant was a data entry operator for the Department of Aging for two years. Prior to that time, Grievant was a part-time employee. Grievant began to encounter numerous medical difficulties in the period after becoming a full-time employee. The Agency administered discipline progressively

up through a second suspension prior to termination. Grievant, preferring to keep the medical problems private, did not disclose the medical condition until after termination, although Grievant did state that Grievant was on medication which caused drowsiness.

MANAGEMENT'S POSITION:

Management contends that there was just cause for the termination because Grievant did not notify management of the mitigating medical circumstances until after the notice of termination had been issued. Management claimed that Grievant was progressively disciplined (verbal and written reprimands, two-day suspension and five-day suspension.)

UNION'S POSITION:

The Union claims that Grievant's medical problems were not present until Grievant changed from to full-time and that Grievant was a good worker except for those incidents which resulted from Grievant's medical problems. The medical problems existed before the termination and should have been considered in the disciplinary process.

ARBITRATOR'S OPINION:

In a climactic opinion, the Arbitrator described how Management had followed progressive discipline procedures and had shown exemplary forbearance with respect to Grievant's situation. But the Arbitrator also looked to the equities of the case. He balanced the Grievant's record of tardiness and absenteeism against Grievant's prior good work and physical condition. Management failed to prove just cause due to the existence of mitigating circumstances. Grievant's medical problems were so severe and extensive and so interfered with Grievant's job performance that the Arbitrator did not find just cause for termination and ordered reinstatement. Because the mitigating circumstances that precluded just cause were not known by Management at the time of termination, the Arbitrator denied back pay.

TEXT OF THE OPINION: * * *

OHIO DEPARTMENT OF AGING

ARBITRATOR'S OPINION

-and-

OCSEA/AFSCME, Local 11
Grievant: Lucille Stoughton
G-87-1028

FOR THE STATE:

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DATE OF THE HEARING: October 23, 1987

PLACE OF THE HEARING: Office of Collective Bargaining
State of Ohio
65 E. State Street
Columbus, Ohio

ARBITRATOR: HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. 0. Address
2565 Charney Road
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* * *

The hearing held on October 23, 1987 at the Office of Collective Bargaining, 65 E. State Street, Columbus, Ohio before HYMAN COHEN, Esq. the Impartial Arbitrator selected by the parties. The hearing began at 9:35 a.m. and was concluded at 1:00 p.m. * * *

After a predisciplinary hearing which was held on April 1, 1967 Lee Matson, Chief, Division of Senior Employment, Golden Buckeye Card/Silver Savers' Passport Programs, Ohio Department of Aging, the. "Department" recommended that Lucille Stoughton, the Grievant, be terminated. He set forth several reasons in support of his recommendation. Matson referred to the Grievant's failure to report to work on time on two (2) days and her unauthorized absence on three (3) days. These episodes occurred between March 17, 1987 and March 27, 1967. The Grievant had received discipline for repeated neglect of duty which included verbal rind written reprimands, a two (2) day suspension and a five (5) day suspension. Furthermore, the recommendation of termination by Matson indicated that the Grievant has received counseling from both the Department and the Union [Ohio Civil Service Employees Association, Local 11, AFSCME. The Grievant was terminated by the Department on or about April 9, 1987. Her grievance was submitted to the Department on April 29, 1967. After appealing the Department7s denial of the grievance through the various steps of the grievance procedure, the grievance was carried to arbitration

FACTUAL DISCUSSION

At the time that the Grievant terminated, was terminated as, a data entry operator in the Department. In that position the Grievant placed information from an application into a computer. **1**

She answered telephones, met with clients and received "data". As a data entry operator she was a full time classified employee for two (2) years prior to her discharge. Before that time she had worked as a part time employee for the Department's Senior Community Services Employment Program. She worked twenty (20) hours a week performing clerical work. In her part-time position she located close to Matson's office. She also handled occasional assignments for Matson. When she was discharged the Grievant sixty-five (65) years old. She has been employed with the Department since 1962.

The events which immediately precipitated the Grievant's discharge began on r1arch 17, 1967 when the Grievant did riot call in and reported to work at 8:25 a.m. which was twenty-five (25) minutes after her reporting time of 6:00 a.m. On March 18 she was again tardy by twenty (20) minutes and did not call in. On March 23, 1987 the
Grievant called in and said she was ill. Her absence on March 23, was unauthorized. Patricia L. Claar, the Grievant's immediate supervisor, said that when the Grievant filled out the sick leave form she indicated that she wanted vacation time on March 23. Claar added that she did not know the total days of her sick leave at the time. On
March 26, 1987 the Grievant did not call in but reported for work at 9:00 a.m. which was one (1) hour after her reporting time. Finally, on March 27 the Grievant called in and said she would be late and reported to work at 9:00 a.m.

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The Grievant testified that on March 17 she was "probably late" because she "had to spend time to pick up a prescription". The following day, on March 18, as a result of a bus strike the Grievant said she got a ride with a neighbor. The Grievant said that she missed some days due to illness and March 23, 1967 could tie one (1) of the days she missed. Furthermore, on March 27 she recalled calling in.

War indicated that for a period of time before the Grievant's termination she (Claar) discussed her work performance with her. She called the Grievant into her office several times to discuss her tardiness, and her failure to call in. She counseled with her "at least" four (4) times. During these occasions, Claar said that she "would ask her to get to work earlier" and that "she would have to try harder to be on time". In response to Claar's inquiry as to whether she had problems, the Grievant would say that she did not have problems. On various occasions, the Grievant would indicate to Claar that she "did not feel good the night before" or "overslept". On one (1) occasion Claar said that the Grievant fell asleep at the Video Display Terminal (VDT) and Claar suggested that she see a doctor because she might have problems.

Prior to the Grievant's termination, Matson spoke to the Grievant about her absenteeism and tardiness. The discussion took place on January 22. 1967 at which time, Matson told her that she **3**

"failed to be at her job" and "something had to be done or else discipline" would be imposed. Matson informed her that the Department had followed the progressive disciplinary policy and she had two (2) disciplinary suspensions; and should she fail to report to work or properly call in, in the future, it would result in termination. Matson also suggested that the Grievant enroll in the Employee Assistant Program (EAP). He said to her that he would contact someone from the program who would offer her assistance. According to Matson the Grievant was receptive and he provided her with the name of an EAP person".

Matson informed Milo, the Union Steward, about the Grievant's problems and that management was willing to help. In that connection, the EAP was the program to help her. At the predisciplinary hearing, Milo stated that She had intentions of participating in the EAR Matson said that he did not hear about the Grievant's illness until January 22, 1987, at which time he was informed that she was under an doctor's care and under medication which made her drowsy. He indicated that during the early fall, of 1986 he "heard from others" that the Grievant was dozing off at the 'Video Display Terminal (VDT)). At about that time he saw the Grievant at the VDT "doze off". He indicated that it happened more than once a day and on more than one (1) occasion. Matson indicated that there was a decline in the quantity and quality of the Grievant's work about

two (2) years ago or at the time that she became a full time employee.

The Grievant indicated that she worked for one and one-half 0 1/2) years in her position as a data entry operator. After that period of time she got ill and she did not want the office to know about her illness. Her blood sugar went LIP to 3 Count of 400 and as a result of the medication that her doctors prescribed, she would nod at work, While working on the computer her eyes would get red and she had acknowledged that she had anemia Her doctor gave her medication to clear up the nodding and the blurring. She indicated that her blood sugar went down in two (2) weeks after taking medication.

DISCUSSION

The question to be resolved by the Arbitrator is whether the Grievant was discharged for just cause; if not, what is the remedy to be awarded?

The Department has proved by clear and convincing evidence that the Grievant has committed the offense of neglect of duty. The evidence warrants the conclusion that the Grievant was tardy on both March 17 and 16, 1967. Moreover, the Grievant absent on March 23 and March 26, 1987. Both of these absences were unauthorized and on March 27 she was tardy. The Grievant's tardiness and unauthorized absences have boon part of a continuing pattern of poor attendance and failing to notify the Department of her tardiness. Such conduct

has continued for a substantial period of time going back, to a period before October 10, 1966.

It is undisputed that the Grievant has received progressive discipline for her repeated offenses of neglect of duty including poor attendance and tardiness. Such progressive discipline include verbal and written reprimands, a two (2) days and five (5) day disciplinary suspensions. Furthermore, the Grievant has been counseled by both the Department and the Union concerning her conduct. Having established that the Grievant has committed the offenses in question, I turn to consider the remedy, if any, to be awarded.

REMEDY

In determining the remedy to be awarded there are several factors which must be considered. Before filling the position of data entry operator, she was a part-time employee for the Senior Community Service Employment Program Matson acknowledged that she did "good work" for the Program. She performed clerical functions and utilized the telephone. As Matson acknowledged the Grievant underwent a change of behavior and attitude when she was hired as a full time employee and filled the job of data entry operator. It must be understood that the plaintiff is sixty-five (65) years old. Subsequent to working as a full time employee, Matson and Claar indicated that the Grievant frequently utilized her sick leave time, and vacations. The quantity and quality of her work declined. Matson

stated that there was a change in the Grievant's attitude, especially given her dozing off at the VDT which occurred several times. The medical document dated April 8, 1967, submitted in support of the Grievant's application for disability leave indicates that the Grievant suffers from diabetes Mellitus, essential hypertension, anemia, obesity, ideopathic edema, and anxiety neurosis. She also suffers from low back pain which makes it difficult for [the Grievant] to sit for long periods Of time as her job requires. The document also indicates that the anemia causes severe fatigue and episodes of falling asleep on the job. Moreover, the document states that her fluctuating blood sugar levels aggravated the above conditions as well as causing blurred vision. There was no testimony or documentation to indicate that these conditions existed when the Grievant began to receive discipline for neglect of duty. However, it is undisputed that the Grievant was a satisfactory worker as a part-time employee prior to filling the position of entry data operator. It is important to point out that the Grievant terminated for the offenses in March 1967 which was subsequent to the Gnevdnt'3 first consultation with a doctor on January 5, 1967. Accordingly, I have concluded that the Grievant's medical condition was a factor in her excessive absenteeism and tardiness from work.

Having concluded that the Grievant's medical condition was a major factor causing her to be absent and tardy from work, it is

puzzling that the Grievant did not inform the Department of her various medical problems. She refused to do so because she wished to keep such matters "private". The Grievant added that she "did not want the office to know about her medical problems". It was not until January 22, 1987 that Matson was first informed that the Grievant had some medical problems. He indicated that the Grievant did not elaborate on those problems in any detail; she told him that she was “under medication and it made her drowsy".

Not only did the Grievant fail to disclose her medical condition to the Department, she refused to participate in EAP, although Matson suggested that she do so on January 22, 1987. At that time, the Grievant told Matson that she would participate in EAP and Matson gave her the name of a person in EAP who could be of assistance to her. The Grievant indicated her willingness to participate in EAP, but did not do so until after her termination. Indeed, Milo recommended that the Grievant seek assistance from EAP. It is undisputed that the first time that the Grievant made contact with the EAP was after the pre-disciplinary hearing was held on April 1, 1987, at which time the Grievant had her initial consultation under the program. Milo indicated that he tried to talk the Grievant into participating in EAP but "management, continued with it's termination".

There is, no question but that the Grievant was informed about the services of EAP, at least as early as January 22, 1987 when

Matson advised her to utilize its services. The Grievant had enough time to take advantage of EAP, but she failed to do so until after the pre-disciplinary hearing.

I turn to consider the matter involving leave without pay. Milo indicated that the Grievant was granted leave without pay "on a number of occasions". There is some question as to whether the Grievant requested leave without pay on March 27, 1967. The Grievant said she applied for leave without pay from Claar and asked her to fill out the form. The Grievant said to Claar that she was too sick. According to the Grievant, Claar said she could not give her a leave of absence and by the Grievant's account, Claar refused to take the form. Claar said that she did not remember the Grievant asking for leave without pay on March 27 or any other time. Matson was aware that the Grievant applied for leave without pay in March, 1987. Matson indicated that the Grievant never spoke to him about requesting a leave without pay but he had turned down her request for leave. Milo indicated that the Grievant told him that she requested leave without pay from Matson. I have inferred that the Grievant, in fact, requested leave without pay on March 27, 1987 from Claar which was rejected by Matson.

There is also the question of disability pay which must be considered. Hilo indicated that two (2) or three (3) months before the Grievant's termination, he knew that the Grievant "was consulting a

doctor." He also "knew that she was taking medication" but he "did not know" the nature of the medication. Milo also said that he was aware of the Grievant's medical problem" and he added that he "was not as aware until after her termination". In any event, the Grievant did not apply for disability leave until after she was terminated. In light of her termination from the Department on April 10, 1987, the Grievant was determined "not eligible to receive disability benefits".

Finally, there is undisputed testimony from Emma Jean Reed who testified that Claar said that she will "ride her [the Grievant's] ass until she would be glad to quit". Despite this statement by Claar, the Grievant's record of absenteeism, tardiness and her failure to call the Department concerning her absenteeism and tardiness stands by

itself. Claar's statement in no way diminishes the unsatisfactory record of the Grievant. As I have already established, the Department has proved that the Grievant committed the offense of neglect of duty.

In light of the evidence of the received, the Department has exercised extraordinary restraint, forebearance and patience in their treatment of the Grievant. The Department unaware of the extent of the Grievant's medical problems. For reasons that relate to privacy or pride, the grievant did not divulge the nature of her medical problems to the Department. Had She done so, the Department might have acted differently, To be sure, the Department is no to be

faulted in their treatment of the Grievant.

Balanced against the Grievant's record is the fact that she is sixty-five (65) years old. Moreover, it was not until she became a full time Data Entry Operator that she began to suffer from medical problems. Prior to that time, as a part-time employee for Senior Community Service Employment Program, she was considered a "good" employee by Matson. The Grievant has been victimized by her own pride. The equities support the conclusion that she be given another opportunity with the warning that it is a last chance. Since her doctor indicates that she can resume her "regular occupation" on April 1, 1986, she is to be reinstated on that date. However, in light of the Department's lack of fault in its dealings with the Grievant, she is not entitled to back pay.

The Department failed to prove that the Grievant was terminated for just cause. The Grievant is to be reinstated to her “regular occupation" on April 1, 1968, based upon her doctor's instructions.

AWARD

The Department failed to prove that the Grievant was terminated for just cause.
The Grievant is to be reinstated to her "regular occupation" on

April 1, 1988, based on her doctor's instructions.

Dated: December 21, 1987
Cuyahoga County
Cleveland, Ohio

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Impartial Arbitrator
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