#1057

State of Ohio and Ohio Civil Service Employees Association Labor Arbitration Proceeding

In the Matter of the Arbitration Between

The State of Ohio, Department of Developmental Disabilities

-And-

Ohio Civil Service Employees Association, Local 11, AFSCME

Grievant: Debbie Fore
Grievance No.: 24-11-20090506-0011-01-04

Arbitrator: David M. Pincus
Date: March 3, 2010

Appearances

For the Employer

Ernie Florkowski	Director of Human Resources
Lori Finch	Operations Director
	Human Capital Management
Laura Frazier	Analyst
Jessie Keyes	Human Resource Manager
Antoinette Walker	Labor Relations Specialist
	Advocate

For the Union

Debbie Fore	Grievant
Felicia Binder	Chapter President
Penny Lewis	Advocate

Introduction

This is a proceeding under Article 25- Grievance Procedure, Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration/ Mediation panels of the Agreement between the State of Ohio, Department of Developmental Disabilities, hereinafter referred to as the "Employer," and the Ohio Civil Service Employees Association, Local 11, AFSCME, hereinafter referred to as the "Union," for the period 2009-2012 (Joint Exhibit 1).

The arbitration hearing was held on December 9, 2009 at Southwest Ohio Developmental Center. At the arbitration hearing, the parties were given an opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the arbitration hearing, the Arbitrator asked the parties if they planned to submit post-hearing written closings. The parties declined this option and closed the hearing with verbal closings.

Joint Issue

Did the Grievant, Deborah Fore, violate her last chance agreement, which resulted in the removal from her position as a Therapeutic Program Worker? If not, what shall the remedy be?

Joint Stipulations

1. The Grievance is properly before the Arbitrator.
2. The Grievant began her employment as a permanent Therapeutic Program Worker on 06/01/98
3. The Grievant was removed on 05/01/09
4. The Grievant had the following discipline on file at the time of her removal:

   October, 2004- Verbal Reprimand (failure to follow policy- late call off)
   November, 2004- Written Reprimand (failure to follow policy- late call off)
   January 2005- Two (2) Day Working Suspension (AWOL; not in approved status, negative sick leave balance)
   May, 2005- Two (2) Day Working Suspension (AWOL; not in approved status, negative sick leave balance)
   March, 2006- Five (5) Day Working Suspension (AWOL; not in approved status, negative sick leave balance)
   November 2007- Last Chance Agreement (AWOL; made contact but not in an approved leave status)
5. The Grievant was absent without leave for 9.9 hours in pay period ending 2/28/09

6. The Contract between the State of Ohio and OCSEA 2009- 2012 is included as an exhibit by reference

Case History

Deborah Fore, the Grievant was a Therapeutic Program Worker (TPW) when she was removed on May 1, 1998. She realized approximately twelve years of service upon being separated from state employment.

Since October of 2004, the Grievant experienced a checkered attendance- related misconduct record. This situation got to its critical point during November of 2007 when she entered into a Last Chance Agreement (Joint Exhibit 4). It contains the following relevant particulars:

XXX

1. The parties agree that, if within two (2) years from the date of this agreement, the employee commits any violation of the Department of Mental Rehabilitation and Developmental Disabilities disciplinary grid or the (Center's) policies and procedures, the violation will result in the imposition of the removal being held in abeyance under this agreement...

2. Any grievance arising out of this disciplinary action shall have the scope of the arbitration of the grievance limited to the question of whether or not the grievant did indeed commit the subsequent act, which gave rise to the imposition of the removal. The Arbitrator shall have not authority to modify any disciplinary action received unless the Arbitrator finds that the grievant did not commit the acts leading to the discipline.

XXX

The incident that gave rise to the removal took place during February of 2009. On February 9, 10, 11, and 12 of 2009, the Grievant called-off properly, while noting she was ill. She, moreover, noted that her illness was not a qualified FMLA event (Joint Exhibits 8,9, and 10)

Upon returning to work, the Grievant per the Employer's policy submitted a doctor's excuse (Joint Exhibit 12) for her absences. The excuse slip was dated February 10, 2009 and acknowledged that the Grievant had an appointment on February 10, 2009. The physician, moreover, asked that the grievant be excused from work for the period of February 9, 2009 through February 12, 2009.

On February 13, 2009, the Grievant submitted a Request For Leave form (Joint Exhibit 11) where she requested 24 hours of leave. The leave categories requested were: Sick, Vacation, Personal, and Compensatory. It should be noted the three later categories were requested in lieu of sick leave.

The Grievant's request was processed and paid pending the Superintendent's approval. The Center's sick leave policy and procedure states in pertinent part:

XXX

5.0 Procedures

5.1 The use of leave without pay and leave in lieu of sick leave may be authorized by the Superintendent or her designee. This leave will not be approved, normally unless:

5.11 Requested in conjunction with benefit e.g. disability leave, workers' compensation occupational leave (OIL); and/ or

5.12 The absence qualifies and has been certified as meeting the criteria for FMLA...

XXX

(Joint Exhibit 18, Pg. 2)

As such, the policy herein cited allows the Superintendant to grant leave in lieu of sick leave for any absence if sections 5.11 and/or 5.12 criteria are met.

It should be noted the Superintendent denied the Grievant's "in lieu of portion" of her sick leave request. As such, the Grievant requested more sick

leave then she had available. The Grievant, had realized a negative sick leave balance of 9.9 hours for the pay period ending February 28, 2009, which placed her in an unauthorized status.

On March 9, 2009, the Grievant submitted a FMLA Certification Form (Joint Exhibit 15) for anxiety and stress. An entry on the form indicated the condition commenced on February 20, 2009 and the probable duration of the condition was unknown.

On or about March 26, 2009, the Grievant realized that her FMLA certification did not cover her absences in February of 2009. She, again, contacted her physician on March 30, 2009. The physicians note (Joint Exhibit 13) asked that the dates of March 9-12, 2009 be included under her FMLA.

On April 2, 2009 a pre-disciplinary hearing was held regarding the disputed matter. The Grievant was informed that her most recently submitted physicians note (Joint Exhibit 13) did not cover the absences in dispute. The Grievant requested an opportunity to submit revised documentation for further consideration. She was grated this opportunity.

On or about April 2, 2009, the Grievant solicited a clarifying physician's note (Joint Exhibit 14). This note asked the Employer to disregard her pervious declaration (Joint Exhibit 13) by including February 9-12, 2009 under FMLA and not the previously identified March, 2009 dates.

On April 17, 2009, the Grievant was removed from the position of Therapeutic Program Worker effective May 1, 2009. It contained the following relevant particulars:

XXX

The reason for this action is that you have been guilty of AWOL- made contact but not in an approved leave status for one workday or more, for the period ending 2/28/09 and violation of Last Chance Agreement...

XXX

(Joint Exhibit 3)

On May 8, 2009, the Grievant challenged the removal decision by filing a grievance. The Statement of Facts contained the following relevant particulars:

XXX

Debbie called in on 2-9-09- 2-12-09 for sick (sic) she did not claim FMLA- later that month she got a FMLA and it was approved on March 9. This was due to stress- her daughter was having serious problems- the doctor also gave here a not for the days of 2-9-09 FMLA papers. To be included with 2-20-09 FMLA papers. Her RFL she checked other leaves just not in right box. Union feels management should let her use in lieu of time to cover this.

XXX

(Joint Exhibit 1)

The parties were unable to resolve the dispute in subsequent portions of the grievance procedure. Neither party raised neither procedural nor substantive arbitrability issues. As such, the grievance is properly before the Arbitrator.

The Merits of the Case

The Employer's Position

The Employer opined it had just cause to remove the Grievant. The Grievant clearly violated the Last Chance Agreement (Joint Exhibit 4) by engaging in attendance-related misconduct.

She did not have sufficient sick leave available to cover the dates identified on the request for leave form. As such, the Grievant experienced a negative sick leave balance of 9.9 hours.

Per the attendance policy (Joint Exhibit 18), the Superintendant may authorize leave in lieu of sick leave when the absence is FMLA qualified. Here, the absences did not meet this threshold requirement.

Lori Finch, the FMLA coordinator, provided expert testimony regarding the application of FMLA criteria to the incident in dispute. Finch concluded the FMLA exception, which allows the application of in lieu of sick leave balances, was not appropriate in this instance. FMLA benefits were not available to the Grievant. She failed to provide the Employer with sufficient information at a critical juncture during the process. The Grievant did not indicated or request FMLA until April 2, 2009. This untimely request could not be applied to the request for leave for February 9, 10, and 11 of 2009.

Clearly, the Grievant's attempt to apply FMLA was a mere pretext. She used an FMLA claim to circumvent policy, and procedure and to avoid a disciplinary outcome.

The Union's Position

The Employer did not have cause to remove the Grievant. She did not violate the Last Chance Agreement (Joint Exhibit 4) since her leave request should have been approved.

The Grievant followed all required protocols. Upon her return to work she submitted a Request for Leave form (Joint Exhibit 11) and a doctor's slip (Joint

Exhibit 12). She realized that she did not have sufficient sick leave to cover the absences so she requested other time in lieu of sick leave. She, moreover acknowledged she erred by failing to designate the appropriate FMLA category on the Request for Leave Form (Joint Exhibit 11). The Grievant was never queried about her FMLA status nor whether her absences were FMLA qualified. Section 825.303 deals with employee notice requirements for unforeseeable FMLA leave (Union Exhibit 2). It states:

XXX

When an employee seeks leave for the first time for a FMLA-qualifying reason, the employee need not expressly assert rights under the FMLA. When an employee seeks leave due to a qualifying reason...The employer will be expected to obtain any additional required information through informal means. An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying...

Here, the Grievant, herself, provided the Employer with an approved certification of FMLA condition form (Joint Exhibit 15) once advised to do so by her Union Steward. As such, the Employer never complied with expectations and responsibilities contained in Section 825.303.

The Union acknowledged certain clerical errors on the second doctor's slip (Joint Exhibit 13) and on the Physicians FMLA Certification Form (Joint Exhibit 15) confused the situation regarding the FMLA qualifying dates. The confusion was eliminated and coverage established with the submission of the last physician's slip (Joint Exhibit 14) dated April 2, 2009. It stated:

XXX

Please disregard previous note the new dates to be included under FMLA are Feb 9, 10, 11, and 12 not March.

XXX

Based on the previous review of the record, the Employer misapplied pertinent FMLA requirements. If it had applied them properly, its own policy (Joint Exhibit 18, Pg 2) allowed the application of the in lieu of exception since the absence qualified as certified under FMLA. In fact, a subsequent Request for Leave submission dated February 24, 2009 (Union Exhibit 2) was approved under similar circumstances.

The Arbitrator' Opinion and Award

From the evidence and testimony introduced at the hearing, a complete impartial review of the record including pertinent contract provisions and the Last Chance Agreement (Joint Exhibit 4), it is this Arbitrator's opinion that the Grievant did violate the Last Chance Agreement (Joint Exhibit 4), and thus, her removal was proper. She made contact but was not in an approved leave status because she requested more sick leave then she had available. The Employer properly applied its in lieu of policy since the absences did not qualify as certified under FMLA.

Section 31.06 requires compliance with all provisions of the Family and Medicinal Leave Act. In this instance, all relevant requirements were adhered to by the Employer. Based on the record the Union misinterpreted Section 825.303. Granted, this disputed involved an unforeseeable FMLA leave situation. The Grievant was not seeking leave for the first time for a FMLA-qualifying reason. Lori Finch, the Human Capital Management Analyst, testified the Grievant had previously filed FMLA paperwork for identical maladies. The Employer, as such,

had previously provided the Grievant FMLA-protected leave. Under these circumstances, the Grtievant was required to reference the qualifying reason for leave or the need for FMLA leave. This section specifically warns all employees that calling in "sick" without additional information do not trigger an employer's obligations.

Failed notification requirements were supported by the record. None of the Grievant's Call/ Report-off Forms (Joint Exhibits 8, 9, and 10) designated the absences as FMLA related. Also, the Grievant's Request for Leave Form (Joint Exhibit 11) has a similar defect. Oversights and clerical errors do not substitute for documented notification requirements. The Grievant admitted to these "errors" and failed to provide any meaningful justifications.

Notice was eventually provided when the Grievant submitted a Physician Certification (Joint Exhibit 15) on March 9, 2009. This document was again defective because it did not cover the dates in question. The physician noted the condition commenced on February 20, 2009. While the Request for Leave form (Joint Exhibit 11) requested coverage for February 9- February 12, 2009. An attempt to revise the FMLA-related dates by submitting an additional physicians document (Joint Exhibit 14) on April 2, 2009 appears tardy and suspicious; an obvious attempt to thwart the Employer's sick leave process.

Award

The grievance is denied.

Chagrin Falls, Ohio

Dr. David M. Pincus
Arbitrator