ARBITRATION PROCEEDINGS

In the matter of arbitration between:	)	No. 34-17-(10-03-26)-0016-01-09
	)	
THE STATE OF OHIO, BUREAU OF WORKERS COMPENSATION	)	Gr. Ingrid Jonas-Perry
and	)	Hearing: October 12, 2010
	)	at Westerville, Ohio
THE OHIO CIVIL SERVICE EMPLOYEESS ASSOCIATION, AFSCME LOCAL 11, AFL-CIO	)	Date of Award:
	)	October 30, 2010

OPINION AND AWARD

Appearances:

Mitchell B. Goldberg, Arbitrator

For the Employer:

Rhonda G. Morris,	BWC/CRO
Winnie Warren,	Lima Service Office Manager
Karie Heitmeyer,	Team Leader, Lima Service Office
Lynn Benny,	Team Leader, Lima Service Office
Ryan Sarni,	OCB-LRS
Brian Walton,	Director, Labor Relations, BWC

For the Union:

James Hauenstein,	OCSEA Staff Representative
Mona L. Weiss,	Steward
Ingrid Jonas-Perry,	Grievant
Diane Watterson,	Team Leader, Lima Service Officer
Craig Martin,	Steward

I. Introduction and Background.

The parties selected the undersigned as the arbitrator of this grievance from the panel

of arbitrators established under Section 25.05 of the effective collective bargaining agreement ("CBA"). The subject grievance was filed in accordance with the grievance procedure in the CBA and went to arbitration in Step Five.

Ingrid Jonas-Perry ("Grievant") was employed as a Claims Assistant in the Lima Ohio BWC Service Office. She filed a grievance on March 19, 2010 alleging that she was "unjustly" terminated from her employment. The Bureau terminated the Grievant on March 12, 2010 stating: "You are being charged under BWC Disciplinary Policy and Grid: Attendance (c) Unexcused absence/Using more leave than available (AWOL); and Insubordination (a) Refusal to carry out a direct order/work assignment."

The Bureau denied the grievance throughout each step and the matter proceeded to arbitration on October 12, 2010 at the Union's offices in Westerville, Ohio. The parties presented testimonial evidence and submitted documentary exhibits. There was no record of the proceedings other than the arbitrator's notes. Witnesses were examined and cross-examined. Post-hearing briefs were filed after all of the evidence was received. The parties stipulated that all procedural and substantive requirements of the grievance/arbitration procedure were complied with, and that the issue is properly before the arbitrator for a final and binding decision.

The Issue

The joint stipulated issue is whether the Grievant was removed for just cause? If not, what shall the remedy be?

II. Facts.

The parties stipulated that the Grievant had 5 years of State service at the time of her removal. She was employed on March 7, 2005 as a Clerk 3, Lima Service Office, BWC. She was promoted to a W.C. Claims Assistant on March 19, 2006. The Grievant's employment record at the time of her removal consisted of the following: (1) a verbal reprimand on January 30, 2006 for an improper call-off from work; (2) a 1-day working suspension with pay on December 11, 2006 for tardiness and an unexcused absence; (3) a 10-day suspension without pay on May 13, 2008 for insubordination, willful disobedience/failure to carry out a direct order, neglect of duty, failure of good behavior, and for the discourteous and/or rude treatment of a fellow employee or manager.

The Grievant at the relevant times herein carried a sick leave balance of less than 20 hours. A supervisor or manager may choose to place an employee who has less than 20 hours of sick leave on Physician's Verification ("PV"). Section 29.04 of the CBA sets forth the Sick Leave Policy. It states that when this is done, the employee "may be required to provide a statement, from a physician, who has examined the employee . . . for future illness." The statement "shall be signed by the physician or his/her designee." The requirement shall be in effect until the employee has accrued a reasonable sick leave balance. "However, if the Agency Head or designee finds mitigating or extenuating circumstances surrounding the employee's use of sick leave, then the [PV] need not be required."

The Bureau's PV policy states that the BWC shall consider any employee mitigation on a case-by-case basis. An employee on PV shall submit to his/her immediate supervisor the required documentation within 3 working days after the employee's return to work from a qualifying absence. The PV must be in its original form and personally signed by the attending physician/designee. It further states: "Pursuant to the [CBA], the Ohio Administrative Code and/or BWC policy, the PV must indicate a physician examined the employee . . . on the day of the absence **and** the employee is unable to report to work on the day of the absence. The employee's failure to provide PV may result in disapproval of the leave request and subject the employee to disciplinary action."

The Grievant's supervisor, Karie Heitmeyer placed the Grievant on PV on December 22, 2009. The Grievant was ill and did not report for work on January 5, 2010.[1] She submitted a Certificate to Return to Work dated January 5, signed by her treating physician, Dr. Laura Waldron, on the same date. The Certificate states that the Grievant was under Dr. Waldron's care on January 5 and could return to work on the same day. The Grievant turned in this Certificate to management upon her return. This Certificate was accepted and management is not contending that this Certificate was not in compliance with the Grievant's obligations under PV. Management does not consider January 5 as an unexcused absence day.

[1] Dr. Waldron, the Grievant's treating physician examined the Grievant on January 5th and noted her symptoms. She referred the Grievant to a specialist. An appointment was made to see the specialist, Dr. Ellis, on Monday, January 11, 2010.

The Grievant reported for work on January 7 after feeling ill in the morning. She became sick during the workday. Supervisors saw her condition and knew that she was ill. She had vomited at least twice and co-workers attempted to provide care or assistance to her. She left work ill in the afternoon. She missed work the following day, Friday, January 8. She submitted another Certificate from Dr. Waldron on January 11, within 3 days after her last workday illness on January 8. The Certificate is similar to the earlier Certificate dated January 5, and states that the Grievant was under Dr. Waldron's care from January 7 to January 8 and would be able to return to work on January 11. The Grievant visited with Dr. Ellis, the specialist referred to her by Dr. Waldron on January 11, but returned to work after her visit. Dr. Ellis' office signed a return to work slip on January 11 asking the Bureau to excuse the Grievant from work during the time of her visit on January 11. The Grievant went to Dr. Ellis' office for an examination, but he was called out on an emergency and could not examine her. The Bureau is not contending that the Grievant violated the PV policy or CBA on January 11.

The Bureau contends that the Grievant violated the PV for her absences on January 7 and 8. It contends that the Grievant's PV from Dr. Waldron dated January 11 was deficient because it did not indicate that the Grievant had been examined by Dr. Waldron on either January 7 or 8. The Bureau considers this statement as being insufficient for these dates.

Later, the Union submitted another statement from Dr. Waldron dated February 20, 2010. This was done at the pre-disciplinary hearing after the Grievant was charged

with her policy and contract violations. Dr. Waldron signed this statement. It states that the Grievant visited with her on January 5 for a rash and that Dr. Waldron referred the Grievant to Dr. Ellis who is an infection control specialist. It further states that the Grievant called her on January 8, but Dr. Waldron would not see her and informed her that she needed to see Dr. Ellis for treatment.

Another factual circumstance occurred on January 7. The Grievant's daughter is a college student who transports herself to school with her own vehicle. This vehicle broke down on January 6 and the Grievant ordered a repair part on that date. Because the daughter did not have transportation to school on January 7, the Grievant agreed to transport her across town to the school in the morning. However, because the Grievant woke up ill, she got a late start to take her daughter to school. As a result, the Grievant was 51 minutes late for work on January 7.

The factual issues to resolve are whether the Grievant violated the PV language in the CBA and/or the policy, and if so, whether there are mitigating or extenuating circumstances that would excuse a violation. Moreover, there is another issue of whether the facts and circumstances regarding the Grievant's tardiness on January 7 would justify her removal from service based upon her employment record and the disciplinary grid.

III. Evidence and Findings.

The Absences of January 7 and 8

I find that the evidence presented at this hearing does not support a finding under any recognizable arbitral standard of proof that the Grievant's absences on Thursday, January 7 and Friday, January 8 should be considered as being unexcused, or that she used more leave than was available to her. Moreover, nothing in the record suggests that the Grievant should be found to be insubordinate for refusing to carry out a direct management order for any event related to her absences on January 7 and 8.

The Grievant's Observed Illness on January 7th

The obvious underlying purpose for requiring employees to be placed under PV when their sick leave bank is below a certain level is to insure that employees are using their sick leave for legitimate purposes, and that sick leave usage is not being abused. Requiring an employee to provide a physician's statement indicating that the employee visited a doctor and was examined on the day in question when an employee appears for duty and is visibly ill and in no condition to work is a meaningless and unreasonable requirement when management employees personally observe the employee's unfit condition and otherwise permit the employee to leave work.

In this case, the facts are clear that that management knew and excused the Grievant for her absence on January 5 based upon a doctor's statement that reported that the Grievant was in fact ill and under the care of a physician.[2] Two days later, the

[2] The Agency argues that BMV policy prohibits the acceptance of a doctor's statement that states that the employee is "under the care" of the doctor. It must be more specific to

Grievant was observed at work by co-workers and managers. She vomited twice and co-workers were attempting to care for her in the break room at work. Managers observed her and asked her if she needed to go home. She eventually left work in the afternoon with the knowledge and implied approval of management due to the fact that she was clearly unfit for duty. Requiring a PV employee to visit a doctor or emergency care center to prove what is already known and apparent to management is a superfluous, unreasonable and unnecessary requirement under these particular facts.

The January 8th Absence

The Grievant testified that she felt ill again the next day, January 8, and that she called her treating physician, Dr. Waldron. Dr. Waldron saw her on January 5th, but could not diagnose her condition. She referred the Grievant to a specialist for examination and an appointment was made for the following Monday. Dr. Waldron corroborated the Grievant's testimony by signing a statement that the Grievant called her on January 8 requesting to see her. Dr. Waldron's statement further corroborates the Grievant's testimony that she would not see her on January 8 and that she deferred any

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state that the doctor actually examined the employee on the date in question and that the employee was unable to work on that date. I can find no specific support for the proposition that "under my care" is forbidden in the record of this case. First of all, the Agency accepted the Grievant's doctor's statement for January 5 that contained the statement that the Grievant was under the care of the doctor. She is not being charged or disciplined for any issue related to her January 5 absence and it was excused. I can find no CBA language or specific policy language prohibiting the acceptance of an "under my care" doctor's statement. I accept the proposition that the specific requirements of a doctor's statement under a PV would exclude as deficient any more general statement such as "under my care." But, any particular case must also take into consideration any mitigating factors or extenuating circumstances. As a result, we are left with the generalized contract language that require determinations to be made upon the particular circumstances that might be mitigating or extenuating, and that decisions are to be made on a "case-by-case" basis.

further treatment for the Grievant until the Grievant could receive a specific diagnosis of her condition. This testimony and evidence is not refuted in the record and should be accepted as being credible.[3]

The Grievant's testimony and the note from Dr. Waldron regarding the January 7 and 8 absences show that the January 5 absence that was excused and the reasons for the appointment with Dr. Ellis on Monday, January 11, which was also excused, were related to the same conditions that were observed by management on January 7, and precipitated the call to Dr. Waldron on January 8 for treatment when the Grievant was home ill.

Under these particular and unique circumstances, it is unreasonable to require the Grievant to leave her sick bed at home and visit an urgent care facility for examination and treatment in order to produce a PV for explanation of her illness on January 7 and 8. She was already under the care of a physician who knew of her illness, could not diagnose it, and referred her to a specialist. Her treating physician advised her that she could do nothing more for her and to see the specialist on Monday for her scheduled appointment. Under these circumstances, going to an urgent care place would be a meaningless gesture and a needless expense even if the Grievant could have been well enough to make the trip. There is no evidence that the emergency care physician could

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[3] This is a very different case than that heard by Arbitrator Murphy in the "O'Dell" award supplied by the Agency in support of its position. In that case, the doctor's statement was insufficient and did not provide an excuse for the entire shift. The Union claimed that the medical appointment was for the same medical condition for which the grievant called off for her entire shift, but *there was no testimony from the grievant to support this claim.* "The Grievant did not testify, and the absence of this testimony leaves open the reason for the prescheduled appointment." Murphy award, pp. 8-10.

have done anything more to treat the Grievant when her treating physician could not diagnose her symptoms. The most that could have been accomplished by this act, even if the Grievant could have brought herself to the urgent care unit for treatment, was the obtaining of a note verifying that she appeared and was examined by a doctor. This would have relieved her of any possible discipline from her employer because she would have been able to comply with her PV, but such an act under all of these circumstances was unnecessary and any discipline for her inability to produce a statement for January 8 should have been considered and found to be an excusable mitigating or extenuating circumstance under Section 29.04 of the CBA.[4]

The Tardiness on January 7

There is no question that the Grievant was tardy on January 7. She was 51 minutes late and she was subject to being disciplined. Her daughter's circumstances do not excuse her from reporting to work on time. She attributes her illness in the morning to contributing to her inability to drive her daughter to school and appear for work on time. Nevertheless, she made a decision to work even though she felt ill. Once she made her decision, she was obligated to meet her work responsibilities by reporting on time. As stated above, her illness was clear and observable later in the day. But, her daughter's intervening problem with her car and the Grievant's decision to drive her daughter and

[4] This is a much different case than the award by Arbitrator DuVal Smith who found that an employee with a very poor attendance record and under a Last Chance Agreement failed to show "due diligence" by not producing a doctor's statement covering the date of her absence when she was able to do so. The arbitrator mentioned the employee's ability to go to an urgent care facility to protect her interests, but failed to make a reasonable effort to produce a statement for the date in question. Here, the Grievant was home ill on January 8, called her doctor for an appointment and followed her doctor's instruction to not come in and to see the specialist on Monday.

report to work carried with it the obligation to handle the daughter's situation in a manner that would not involve the Grievant's tardiness.

The principle of just cause requires a review of the penalty as well as a determination of the charged misconduct. This principle is reflected in the Agency's Disciplinary Policy and Grid. It contains the requirement of progressive and corrective discipline and takes into account the seriousness of the offense. The grid for the violation for excessive tardiness contains a 6 step process for repeated offenses starting with a verbal warning for the first offense to a written warning, a minor suspension, a medium suspension, a major suspension and then removal.

Section 24.06 of the CBA requires that disciplinary measures shall be "reasonable and commensurate with the offense and shall not be used solely for punishment." Once it is found that the Grievant did not have an unexcused absence for January 7 or 8, that she did not use more leave than available to her, and that she was not insubordinate, it cannot be found that discharging her for the January 7 tardiness is a reasonable penalty commensurate with her offense.

The Grievant had attendance issues in 2006, some 3 or 4 years before the events of January 7 and 8, 2010. She received a verbal reprimand and a 1-day suspension for the 2 attendance events in 2006. She improved her attendance without any problems in

2007, 2008 and 2009.[5] A minor suspension would appear to be enough of a corrective form of discipline to bring the Grievant's attention back to her attendance responsibilities.

VI. Award.

The grievance is sustained in part. The discharge shall be vacated and removed from the Grievant's personnel records. She shall be reinstated to her former position, but she shall receive a 1-day suspension without pay for her tardiness on January 7, 2010. The Grievant shall be restored all of her lost pay (except for the 1-day suspension) and benefits, including her lost seniority, less any interim earnings and her receipt of any unemployment compensation benefits. Jurisdiction is retained for 30 days after the issuance of this award to resolve any issues resulting from the within issued remedy for the Agency's contract violation.

Date of Award: October 30, 2010

Mitchell B. Goldberg, Arbitrator

[5] The Grievant received a 10-day suspension for insubordination in 2008, but as stated above, the Grievant was not insubordinate as charged in this case. Corrective and progressive discipline therefore should focus upon her attendance performance, which reoccurred after a period of satisfactory attendance.