

#1081

IN THE MATTER OF THE ARBITRATION

BETWEEN

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11 AFSCME, AFL-CIO**

AND

**THE STATE OF OHIO
OFFICE of the OHIO PUBLIC DEFENDER**

Arbitration Date: April 29, 2011

GRIEVANT, MARY EMMONS
CASE NO. 70- 00- (2010-10-08)- 0001 - 01-09

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Katherine Nicholson
Advocate for the
Office of the Ohio Public Defender
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Columbus, Ohio 43215

Advocate for the Union:

Dan Ely
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RECEIVED / REVIEWED

MAY 25 2011

OCSEA-OFFICE OF
GENERAL COUNSEL

I. HEARING

The hearing was held at the Ohio Civil Service Employee's Union Hall on April 29, 2011. The hearing commenced at 9:00 A.M. The joint issue before the arbitrator is "Was the Grievant, Mary Emmons, for just cause? If not, what shall the remedy be?"

Testifying for the Ohio Public Defender ("the Employer") were Ken Spiert, Chief of the Legal Division, Sharon Allison, Director of Human Resources, and Robin Messmer Taylor, Administrative Assistant 3.

Testifying for the Ohio Civil Service Employee's Association ("the Union") were Jenny Lewis, OCSEA Staff Representative, and Mary Emmons, the Grievant. The hearing was adjourned at 12:45 P.M.

II. STATEMENT OF THE CASE

The Grievant was removed for violation of Rule 13 (c) of the Agency Work Rules.

The Union timely filed a Grievance asserting the Employer violated Articles 24.01, 24.05, and 24.06 of the Collective Bargaining Agreement ("the Contract"). The Grievance asks for a reversal of the charge of being AWOL for 3 or more days; reinstatement of job as a Legal Secretary and to be made whole.

The matter is properly before the Arbitrator.

III. THE EMPLOYER'S CASE

The Employer's first witness was Ken Spiert. Mr. Spiert has been with the Ohio Public Defender for thirteen (13) years and is Chief of the Legal Division. He testified that the Agency's Mission is to represent individuals convicted of felonies up to the Death Sentence. The Agency also handles Appeals, Habeas Corpus and other Court proceedings. Mr. Spiert testified that Judges in any county in the State can appoint the Public Defender Agency and they have to do it. He also testified they have to review any prisoner's request.

Mr. Spiert testified there are about fifty-three thousand (53,000) incarcerated adults and two thousand (2,000) to twenty-five hundred (2,500) juveniles. The Agency has a Death Penalty Division, a Juvenile Division, and a Trial Division.

Mr. Spiert was then shown Management 1 (M-1) which is an excerpt from the Agency's Annual Report. Exhibit M-1 is a two sided document. The first page is the Legal Case Load. Mr. Spiert testified that ninety-nine percent (99%) of the Grievant's work was Appeals and Post Conviction. The second page of M-1 shows cases by the Death, Trial, and Juvenile Divisions.

Exhibit M-1 Page 1 shows six hundred ninety (690) pending cases. Eight Hundred and thirty (830) cases were closed. Mr. Spiert testified there are a total of one thousand five hundred twenty (1,520) cases divided among eleven (11) attorneys. He said there are three (3) Staff and one (1) Supervisor.

Mr. Spiert then reviewed Exhibit M-1 Page2 and testified there are three hundred seventeen (317) Juvenile cases Pending and Seven Hundred Seventy-one (771) closed. He further testified that the over all total of One thousand eighty-eight includes four hundred seven (407)

interviews. Mr. Spiert said the Grievant was to provide support to the Legal and Juvenile Divisions. He said he first met Grievant at her interview and that he saw her every day.

Mr. Spiert said he asked each Secretary to meet with him to discuss the office and that he talked to the Grievant about Absenteeism. He testified that Ms. Taylor was Grievant's direct Supervisor and he dealt with Grievant when Ms. Taylor was gone.

Mr. Spiert testified that Grievant had a Critical Job. There are three (3) Secretaries devoted to producing documents. There are heavy case loads and it is not a seat of the pants operation. Most of the work is Appellate Practice, which requires briefs. He testified the Agency has cases in the Ohio Supreme Court and Federal District and Appellate Courts.

Mr. Spiert testified that each level requires the filing of complicated documents. The Secretary has to do indexes and has to know all the local rules. He testified that if not done properly Briefs can be stricken. The Courts have different rules for lay-out and documents required.. Mr. Spiert testified that the Supreme Court has different rules that have to be followed. Mr. Spiert testified that if a deadline is missed that the Client could suffer as the case would be dismissed.

Mr. Spiert further testified that Grievant had to do her job efficiently and timely. If a deadline is missed the Clients can file disciplinary charges against the Agency's attorneys. There are only four (4) Secretaries to do this work and when one is absent it over loads the others.

Mr. Spiert testified he became aware of Grievant's attendance issues as she called off more and more frequently. He said the attorneys were frustrated by her call-offs and would ask when she was coming in.

Mr. Spiert said he signed Grievant's initial disciplinary action and went to both the Pre-Disciplinary Hearing and the Level Three (3) Hearing. He testified the Grievant said she knew the work rules. There was argument over mitigating factors.

Mr. Spiert was referred to Exhibit C and said the first page were the Disciplinary Guidelines. He then read Exhibit C Page 21 Rule 13 (c) and testified that a first offense for Rule 13 (a) is Verbal; a first offense for Rule 13 (b) is Written but for Rule 13 (c) Removal is the only option. He did say the rules allow mitigation.

Mr. Spiert then testified that this is the only Rule 13 (c) case he has ever had. Most employees build up leave balances because of the nature of the work. He testified he has never had someone burn through their leave. Mr. Spiert testified that his biggest concern with the Grievant was that she was absent and he couldn't count on her.

On Cross-Examination Mr. Spiert testified he didn't use his right to deny leave. He said he tried to work with employees and had hopes for Grievant. He testified that he had counseled her a number of times and that her earlier incidents were not as serious as the one that got her removed. He said that even with his work load he tried to work with Grievant and that she did do good work.

Mr. Spiert then testified that Article 6.01 gave him the right to discharge Grievant during her probation but he chose not to use discipline to correct her. He testified he counseled her several times and also warned her. Mr. Spiert was asked if he used discipline as a tool and said he used counseling.

The Employer's next witness was Sharon Allison. Ms. Allison has been with the Public

Defender for three and one half (3 ½) years and is the Director of Human Resources. Prior to that she worked five (5) years with the Department of Rehabilitation and Correction.

Ms. Allison testified that she does hiring and had posted this position. She said she interviewed Grievant and also provided Orientation. Ms. Allison testified that Orientation is more than half a day and Policies and Positions are reviewed. She said the employee gets a position description and that she is very careful explaining what needs to be done. She tells employees how stressful the job is and the time sensitive nature of the work.

Ms. Allison then read Exhibit D Page 48 and testified that Grievant had signed off on the employee check list March 1, 2010. She then read Exhibit E the Donated Leave Policy and said Grievant had received this. This Policy is set up to help employees. Ms. Allison then identified Exhibit E as the Outline of Availability and Exhibit C Page 58 which says Donated Leave is not to delay discipline. She testified that Grievant was not qualified for Donated Leave.

Ms. Allison read Exhibit D Page 49 and testified that Grievant had signed off on the Discipline Guidelines. She then read Exhibit C Page 21 and reviewed Rule 13 penalties. Ms. Allison said Rule 13 (c) calls for removal for the first offense. She then read Exhibit D Page 50 which is the training check list. She next read Exhibit D Page 51. Ms. Allison testified that this Exhibit tells how to keep time and how to use the OAKS system. She said there was a thorough review of timekeeping. Ms. Allison said she did not have daily contact with the Grievant.

Ms. Allison testified that in May the Grievant was Absent Without Leave (AWOL), and that she had a conversation with Grievant's Supervisor as Grievant had 5.6 hours not covered by leave. She testified the Supervisor counseled the Grievant and gave her a warning instead of

discipline. Ms. Allison testified that she tried to work with the Grievant and give her an opportunity to move forward. She wanted the Grievant to feel wanted.

Ms. Allison testified that close to September 10 Robin told her, the Grievant had been out for awhile. She said she looked into Grievant's leave balances by pulling the OAKS records and all requests for time off. Ms. Allison also pulled the Excel in and out sheets.

Ms. Allison then read Exhibit B and testified it was an Outline of Absences and Counseling. She testified Grievant had been given a Verbal on her request to flex and on April 16, 2010 was given Counseling on Flex Time. Ms. Allison read Exhibit B Page 19 and testified this Exhibit showed Verbal Counseling on improper use of Flex Time and an E-Mail about improper call-in procedure.

Ms. Allison then was referred to Exhibit I Page 111 and testified this is Grievant's work and time off report from OAKS. She said the employee enters her own time. Ms. Allison also testified this Exhibit shows from March to September 2010 the Grievant took 40.08 hours of sick leave; 29.08 hours of vacation and was AWOL 34.6 hours. The Grievant worked 1,007.9 hours.

Ms. Allison then turned to Exhibit I Page 112 and testified this shows Grievant's accruals and usage of leave. She did this for clarification. She testified this document shows sick leave. Ms. Allison testified the Grievant got to 9.4 hours. Ms. Allison further testified that every time the Grievant had one days accrual she took time off. She said just vacation was pre-approved, the others were call offs.

Ms. Allison was shown Exhibit J Page 112 which shows FMLA eligibility. She testified that the Grievant was not eligible as she had to have one year of service or work 1250 hours. She

said the Grievant was not qualified for disability.

Ms. Allison was asked “Were there any aggravating circumstances?” and she replied “ the employee had counseling on discipline and removal”.

Ms. Allison read Exhibit C Page 24 and testified it was an E-Mail to Robin Messmer Taylor from Grievant about her absence on May 6. She read Exhibit C Page 25 and testified it is an E-Mail telling of counseling on June 15. The Supervisor tells the Grievant that further occurrences could subject her to discipline. She also read Exhibit C Pages 27 - 31 and said these were requests for time off.

Ms. Allison testified that Robin told her of E-Mails showing Grievant had knowledge of discipline. She testified she told the Grievant’s Supervisor to pursue discipline. Ms. Allison read Exhibit C Page 46 and said it was the hand delivered Notice of Discipline.

Ms. Allison testified she had never had another Rule 13 (c) violation as other employees have the opposite problem of too much leave accumulation. She said if she did have the same problem with another employee she would take the same action.

On Cross-Examination Ms. Allison said it was correct that counseling was not followed by discipline. She was referred to her June 25 E-Mail which said progressive discipline next time. Ms. Allison said the discipline was not progressive. Ms. Allison testified that Rule 13 (b) would permit an employee to have three separate two day absences without being removed.

On Re-Direct Examination Ms. Allison was questioned about progressive discipline and said the counseling was on flex time. She testified that the September incident was three consecutive days and was grounds for removal. Ms. Allison testified the Rules were not new.

On Re-Cross Examination Ms. Allison was asked if the use of flex time did not prevent Grievant from being AWOL. Ms. Allison said she had allowed a flex time to avoid an AWOL. She said Grievant had to evaluate her leave each time. Ms. Allison testified that the June 25 E-Mail showed the flex time was approved after the fact.

On Re-Direct Ms. Allison reviewed Exhibit C Page 25 and said the second paragraph was Grievant's acknowledgment she didn't have enough time. Ms. Allison said Grievant's Supervisor let her flex 1.80 hours and Grievant was warned further occurrence could cause discipline.

Ms. Allison testified that the Grievant called off and then wanted to flex. Her other flexes had been approved in advance. She testified that Grievant was warned the next time she was AWOL, Removal.

The Employer's next witness was Robin Messmer Taylor. Ms. Taylor has been with the Public Defender for twenty-three (23) years. She is an Administrative Assistant 3 in the Legal Division. She said she supervises the Support Staff and makes sure Pleadings are timely filed. Ms. Taylor knows the Grievant as she was part of the interview process and the hiring process. Ms. Taylor testified she is Grievant's direct Supervisor.

Ms. Taylor read Exhibit D Page 56 and said it is Grievant's Position Description. This description tells of the time sensitive nature of the job and the importance of daily logs and phone calendars. Grievant would be required to talk to attorneys daily. She then read Exhibit D Page 55 and testified Grievant signed off on the Position Description.

Ms. Taylor then read Exhibit D Pages 50 - 54. She testified Exhibit D Page 51 covers timekeeping; Exhibit D Page 51 summarizes the legal documents used; Exhibit D Page 53 tells

of the importance of mail, use of over-night and how very time sensitive this is. She further testified after 4:30 P. M. You post your own mail.

Ms. Taylor counseled Grievant about her lack of leave. She testified she felt Grievant understood. The Grievant was absent May 4.

Ms. Taylor read Exhibit I Page 88 and testified it is the OAKS time sheet. The May 6 entry submitted by Grievant shows her short hours. She then read Exhibit C Page 25 which is her E-Mail to Grievant about counseling. Ms. Taylor testified she told Grievant flex time had to be pre-approved and there was no guarantee. Grievant said she understood. She testified she thought this was the beginning of discipline and that she had warned Grievant.

Ms. Taylor then read Exhibit C Page 27 which is an E-Mail to her from Grievant about time sheets. Ms. Taylor advised Grievant they could meet anytime. She testified Grievant asked if flex time had been approved and Grievant knew flex time had to be approved in advance. Ms. Taylor met with the Grievant for the third time.

Ms. Taylor read Exhibit C Page 31 which is a July 31 E-Mail from Grievant to her. Ms. Taylor did approve flex time for July 23. She testified she told Grievant flex time is always up to the Supervisor and Grievant said no need to meet. Ms. Taylor testified that she allows all employees to flex.

Ms. Taylor testified that Grievant was starting to abuse leave and she wanted everything clear. She said between March and September she had four meetings with Grievant on use of leave. Ms. Taylor wanted everything clear. Within one month of hiring, Grievant asked for leave which Ms. Taylor approved.

Ms. Taylor read M-2 which is an E-Mail from Grievant to void reserved days to adjust time for missed days.

Ms. Taylor testified that in September 2010 Grievant did not have leave. She said the Grievant called the front desk and called her voice mail. Ms. Taylor said Exhibit F Page 63 is a transcript of Grievant's voice mail calls to her.

On September 9, the Grievant called the front desk and Ms. Taylor's voice mail and left a message at 7:30 A.M. Ms. Taylor's hours are 10:30 A.M. to 6:00 P.M. The Grievant said she would be in the following day. Ms. Taylor testified the Grievant never tried to talk to her during her working hours.

Ms. Taylor then read Exhibit E. Page 64 and said it was the September 13 E-Mail from Grievant. Grievant said she was sick and knew she was out of leave. Ms. Taylor testified the Grievant called at 6:51 A.M. on September 14 and said she wasn't feeling good. The Grievant said the Doctor had called in a prescription and she would be in the next day. There was no attempt to contact Ms. Taylor during working hours. On September 15 the Grievant called again and said she hoped to be in tomorrow.

Ms. Taylor then read Exhibit G Page 65 and testified that the Grievant had called again and said she would be off the rest of the week. The Grievant said she had a concussion and a neck injury and would be in on Monday. Ms. Taylor said the Grievant did have documentation.

Ms. Taylor testified that the Grievant's hours were 9:30 A.M. to 5:30 P.M. and she should have called off between 9:00 A.M. and 10:00 A.M. She said the Grievant's call off reasons were not consistent. Ms. Taylor said she did get a call from Grievant's boyfriend on her

personal cell phone at 8:30 A.M.

Ms. Taylor testified she contacted Human Resources and said the Grievant was in Leave Without Pay status; and she started checking Grievant's time.

Ms. Taylor read Exhibit I Pages 113 and 114 and testified the Grievant called off April 12,13,14 and 29. Exhibit I Page 114 shows Grievant's calls off per month. The Grievant had ten Cost Saving Days (CSD). Ms. Taylor read Exhibit I Page 115 and testified that in September the Grievant called off on the 2nd and the 7th through the 17th. She said on the calls off the Grievant said she would be back the next day. Ms. Taylor testified the Grievant never asked her for direction.

Ms. Taylor then read Exhibit C Pages 20 and 21 which is the discipline grid. She said her main concern was the attorneys getting their work done and that Grievant was not a reliable employee.

On Cross-Examination Ms. Taylor was asked: "Did you chose to forgo the Contract Article 38.11 on discipline?" She replied: "Correct". She was asked: "Did you have the tools to correct this with management rights?" Ms. Taylor said "Yes".

Ms. Taylor was then asked if management had used discipline per the contract, the Grievant would have been disciplined sooner. On May 6 the Grievant was still on probation and on June 15 there was informal counseling on prior approval for flex. She said "Yes". Ms. Taylor said she counseled Grievant three times on flex with no discipline. Ms. Taylor testified she allows all employees to flex. It is a stressful environment and employees may work over to do the job; so flexing is permitted.

Ms. Taylor was then asked about Contract Article 6.01 which says employees can be discharged during probation or an extension of probation may be requested. Ms. Taylor testified she thought the Grievant was still on probation and didn't realize the probation was over in June.

Ms. Taylor was then asked about Contract Article 24 which says discipline is to be corrective. Ms. Taylor said she never used discipline to correct Grievant's behavior.

Ms. Taylor testified the Grievant had CSDs. She said she took Grievant's word about what she said happened and her assurances it wouldn't happen again.

On Re-Direct Ms. Taylor testified that she became concerned and went to Human Resources. She said she found out that Grievant's probation was over. Ms. Taylor testified the Agency was stressing the use of CSDs. She said Grievant's scheduled CSDs were changed due to her call offs.

Ms. Taylor testified that other support staff had medical issues but they used approved flex time and had leave to cover their absences. Ms. Taylor read Exhibit C Page 25 and testified Grievant was AWOL in May. She testified that she counseled Grievant. Ms. Taylor further testified that Grievant was AWOL in June and she advised Grievant that the next time there would be discipline.

Ms. Taylor testified Grievant's third time was in September and she was removed for AWOL. She testified that Grievant understood the counseling. She said Grievant said she understood; and said she wouldn't do it again.

Ms. Taylor was referred to Exhibit C Page 25 and said it said Progressive Discipline. She also testified there was an E-Mail on July 16 and that Grievant flexed out that day.

On Re-Direct Ms. Taylor testified that the first two E-Mails concerned no leave for absence. She then Testified that Exhibit C Page 26 was a different issue. Grievant wanted to flex on Thursday so she could leave early on Friday. Ms. Taylor also testified that Grievant got over time with out prior approval.

IV. THE UNION'S CASE

The Union's first witness was Jenny Lewis. Ms. Lewis has been a Staff Representative for three years and works with various agencies.

Ms. Lewis identified the discipline grids from several agencies. U-1 Ohio Department of Natural Resources, U-2 Ohio Department of Agriculture, U-3 Nursing Board, U-4 Taxation and U-5 Public Defender. She reviewed all five Exhibits as to AWOL and Absence with Prior Notification.

Ms. Lewis was asked about the distinction between AWOL and Job Abandonment. She read Exhibits U-2 and U-3 and testified that Abandonment is: "No call, No show".

Ms. Lewis read the Public Defender Grid and testified there is no distinction on AWOL and no reference to call in. Ms. Lewis said it starts with Removal and that is unusual.

On Cross-Examination Ms. Lewis testified she works primarily with Worker's Comp, the Department of Youth Services and the Blind School. She said the Union Exhibits were not from her agencies; and that she wasn't asked for them.

Ms. Lewis testified that the agencies have different missions. She was asked: "Is attendance crucial in some agencies?" She replied: "Yes".

Ms. Lewis was referred to Article 43.04 of the Contract which says work rules shall be

reasonable. She was asked: "Is it reasonable for an agency to have work rules based on operational needs?" She said: "Yes". Ms. Lewis said she did not know what Grievant was disciplined for.

Ms. Lewis testified that two Union Exhibits differentiated between AWOL and Job Abandonment. She was shown M-3 which is the discipline grid from the Ohio Department of Transportation and M-4 which is the grid from the Architect's Board. She testified that these Exhibits show Removal for a first offense of three days or more.

On Re-Direct Ms. Lewis says work rules are to be presented to the Union for discussion. She testified that the Union reviews but cannot grieve them until there is harm.

On Re-Cross Examination Ms. Lewis said she is not assigned to the Public Defender.

The Union's next witness was Mary Emmons, the Grievant. She was a Legal Secretary. The Grievant testified that she got feed back from Ken Spiert and Robin Taylor.

The Grievant testified that she got Strep Throat and had a Doctor's note for a car wreck. She said she had no missed time. The Grievant testified her daughter moved to Tacoma, Washington and she used her CSDs as soon as she got them to go see her daughter. She testified that her car had broken down and Ms. Taylor told her to use sick leave.

The Grievant testified she had a head injury. She went to Riverside Hospital three days later and found out she had a concussion. The Emergency Room gave her Percoset. She testified she asked the doctor when she could go back to work and he said Friday. The Grievant said she was referred back to her doctor.

The Grievant testified that it was normal to use vacation time for unplanned absences and there was no clear flex time policy. She testified she communicated her confusion with the flex time policy.

The Grievant testified that she asked for her Supervisor to call her back. She also testified that she was never told Leave Without Pay would result in discipline.

The Grievant then testified that she was counseled by Ms. Taylor and that Mr. Spiert told her she did a good job. She said the attorneys were complimentary. The Grievant said when she had free time at work she would reorganize her files. She said the Supervisor gave her a job assisting Mr. Young's assistant in reviewing newspapers. The Grievant testified she was never told about deadlines.

The Grievant then testified about September. She was asked: "Did you know to call off every day?" She replied: "I called the receptionist and the Supervisor".

The Grievant then testified that her boy friend told her the medicine was affecting her. She said she had never had a head injury to this degree. She said she wasn't sure how she was acting.

The Grievant testified that she wants her job back and wants to prove herself. She also testified that no discipline sent her mixed messages. She doesn't recall leave being denied.

The Grievant testified that she thought adverse action was coming when she met with Human Resources and Ken Spiert.

On Cross-Examination the Grievant read Exhibit C Page 46 which is the Removal letter. She testified that there was no performance charge, only a violation of Rule 13 (c) for three days.

The Grievant then read Exhibit C Page 49 and testified she had signed off on the discipline guidelinse. She then read Exhibit C Page 48 and said it was her receipt for the discipline grid. She then read Exhibit C Page 21 which is Discipline Grid Rule 13 (c).

The Grievant then read Exhibit C Page 29 and testified it said: "No need to meet". She was then shown Exhibit G Page 70. She testified this is the Doctor's statement that she can return to work September 10.

The Grievant read Exhibit I Page 86 and said it is Cost Saving Days. She then read Exhibit I Page 88 and testified that this is the OAKS schedule and she had no paid leave for May 6. The Grievant then read Exhibit I Page 92 and testified on May 25 she had 2.2 hours sick leave.

The Grievant then read Exhibit I Page 94 about sick leave. She then read Exhibit I Page 98 and testified that for July 15 and 16 it showed 1.7 CSD, 6.22 sick leave, and 8 CSDs. She further testified that Exhibit I Page 100 showed July 19 5 hours CSDs and 3 hours sick leave; July 20 8 hours CSDs; July 21 8 hours CSDs; July 26 8 hours CSDs. Exhibit I Page 102 shows August 2 8 CSDs, August 3 8 CSDs and CSDs up to August 6. Exhibit I Page 106 shows September 2 8 hours sick leave, September 7 1.4 hours sick leave and 6.6 hours vacation, September 8 3 hours compensatory September 8 vacation. Exhibit I Page 107 shows a negative vacation. September 14 no vacation, September 15, 16, 17 no paid leave.

The Grievant testified that prior to her head injury the Agency did all it could. She also testified the Agency gave her leave for her head injury. The Grievant said her argument was management was too lax.

The Grievant was asked: "You knew you would go into unpaid leave status?" She said,

“Yes”. She called off on June 14 for 8 hours and got to flex 1.8 hours.

The Grievant read Exhibit C Page 25 which is Ms. Taylor’s E-Mail to Grievant telling her flex time had to be pre-approved. This was the second time in unpaid leave status. The Grievant testified she doesn’t recall responding but the E-Mail was not confusing. She read Exhibit C Page 26 and testified she said no need for a meeting. The Grievant testified she never called her Supervisor during work hours. The Grievant testified she knew there would be a sanction for unpaid leave status.

On Re-Direct the Grievant testified that she never called her Supervisor during the Supervisor’s work hours. She said she was never called that she would be removed.

The Grievant then read Exhibit C Page 21 Rule 13 (c) and testified it calls for Removal and that she had signed off on the Grid.

V. OPINON AND AWARD

This case has been well presented by both parties, both in their Exhibits and in their witness testimony.

The Employer argues that there was Just Cause for Removal. The Employer offered evidence that there was a clear notice of the work expectation; and continual guidance by the Supervisor on both leave and flex time.

The Employer contends that the Grievant was given every benefit of the doubt and allowed to use all available leave. When Grievant, despite counseling and warnings went AWOL in September, she was Removed.

Mr. Spiert’s testimony was undisputed concerning the critical nature of the work and the

impact on inmates, attorneys and co-workers if the work was not done efficiently and timely.

There was a 25% loss of productivity with every call-off.

Mr Spiert had the right to deny improper use of leave and as early as May 6, the Grievant was in a no pay status.

Ms. Allison testified about a clear hiring and orientation procedure. This included a Notice of Duties and Instruction on Leave.

The Employer offered documented evidence from Human Resources as to all Grievant's leave, or lack thereof prior to discipline.

Ms. Taylor gave Notice to the Grievant on leave usage and warned Grievant that future infractions would lead to discipline. The Grievant's calls in September did not make direct contact with her Supervisor. The Grievant admitted she was out of leave.

The Employer's evidence was that Grievant was not confused about the fact she would be disciplined if she became in leave without pay status.

The Employer has evidence that its work rule is reasonable. The Employer argues that Grievant was a short term employee and there was just cause for removal.

The Union concedes the facts are not in dispute. The Union contends that the Employer's work rule is unreasonable and that the Employer ignored its responsibilities.

The Union offered evidence by Jenny Lewis, OCSEA Staff Representative about the discipline grids at other State Agencies. The Union had Ms. Lewis do comparisons of the grids. The Union argues that the grids do differ.

The Union also argues that the Employer is at fault for several reasons. The Union's

evidence is that the Employer permitted Grievant to complete her probationary period without asking to have it extended.

The Union also argues that the Employer had the contractual right to discipline the Grievant as the events occurred and failed to do so. The Union contends this led Grievant to believe that her behavior would be tolerated. The Union argues that the Employer's laxness sent Grievant a mixed message and should be tolerated.

The Arbitrator finds the Union made a valiant effort in this case but the Employer's evidence is clear and convincing. There is evidence that the operational needs of the Agencies differ. The Union has evidence that discipline grids vary but no evidence the Employer's work rule is unreasonable.

The Union's argument that the Employer was lax for not imposing discipline is out weighed by the extensive evidence of counseling given to the Grievant. The evidence is clear as to the counseling the Grievant received. The evidence is also clear that Grievant was warned.

The facts are that the Grievant was a short term employee who had used up all available leave and still wouldn't come to work. If Grievant failed to put any stock in counseling and warnings, it is unlikely that fines or short term suspensions would have gotten her attention.

Grievance Denied.

Entered at Ironton, Ohio this 9th day of May 2011.

Craig A. Allen
Craig A. Allen, Arbitrator