Thomas J. Nowel
Arbitrator and Mediator
Cleveland, Ohio

#1100

IN ARBITRATION PROCEEDINGS PURSUANT TO AGREEMENT OF THE PARTIES

In the Matter of a Controversy Between:	)	Grievance No.
	)	30-04-20110819-
Ohio Civil Service Employees Association,	)	0104-01-14
Local 11, AFSCME	)	
	)	ARBITRATION
and	)	OPINION AND
	)	AWARD
Ohio Department of Taxation	)	
	)	DATE: APRIL 2, 2012
Re: Mickey Gonzalez Termination	)	

APPEARANCES:
John P. Gersper, Consultant for OCSEA, Local 11, AFSCME; Gregory M. Siegfried, Attorney, State of Ohio Department of Taxation; and Aimee Szczerbacki, State of Ohio Office of Collective Bargaining.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and Ohio Civil Service Employees Association, Local 11, AFSCME. The Union contends that the Employer violated the collective bargaining agreement when it terminated the employment of Mickey Gonzalez. The Employer argues that the termination of employment of the Grievant was for just cause.

The Union grieved the termination on August 19, 2011 (Jt. Exb. 1), and the grievance was denied by the Employer. The Union then notified the Employer of its intent to appeal the termination to arbitration on February 8, 2012 (Jt. Exb. 2).

The Arbitrator was selected by the parties, pursuant to Article 25, Section 25.05 of the collective bargaining agreement, to conduct a hearing and render a binding arbitration award. Hearing was held on February 24, 2012 at the offices of OCSEA in Westerville, Ohio. At the hearing the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits. Witnesses were sworn by the Arbitrator. The parties stipulated that the matter was properly before the Arbitrator.

ISSUE

The issue before the Arbitrator is as follows. "Whether the Employer removed the Grievant for just cause. If not, what shall the remedy be?"

Initially, the Union argued that witnesses, who were not named as witnesses at the pre-disciplinary hearing, should not have the ability to participate as witnesses and offer testimony at arbitration. The Union withdrew this objection with the filing of its post hearing brief. Therefore there will be no further discussion or comment regarding this issue.

WITNESSES

TESTIFYING FOR THE EMPLOYER:
Charles Kumpar, Labor Relations Administrator 1
Tammie Harrington, Program Administrator
David Dusenberry, Tax Commissioner Agent Supervisor 1
Elizabeth Kooi, Human Capital Management Manager

TESTIFYING FOR THE UNION:
Jim Lee, Union steward
Mickey Gonzalez, Grievant

RELEVANT PROVISIONS OF THE AGREEMENT

Article 2, Non-Discrimination

Section 2.01 – Non Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status. Except for rules governing nepotism, neither party shall discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer may also undertake reasonable accommodation to fulfill or ensure compliance with the Americans with Disabilities Act of 1990 (ADA) and corresponding provisions of Chapter 4112 of the Ohio Revised Code. Prior to establishing reasonable accommodation which adversely affects rights established under this Agreement, the Employer will discuss the matter with a Union representative designated by the Executive Director.

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

Article 24, Discipline

24.01 – Standard

Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the state of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse. Abuse cases which are processed through the Arbitration step of Article 25 shall be heard by an arbitrator selected

from the separate panel of abuse case arbitrators established pursuant to section 25.04. Employees of the Lottery Commission shall be governed by ORC Section 3770.02(1).

24.02 – Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

Disciplinary action shall include:

a. One (1) or more oral reprimand(s) (with appropriate notation in employee's file);

b. One (1) or more written reprimand(s);

c. One (1) or more working suspension(s). A minor working suspension is a one (1) day suspension, a medium working suspension is a two (2) to four (4) day suspension, and a major working suspension is a five (5) day suspension. No working suspension greater than five (5) days shall be issued by the Employer.

If a working suspension is grieved, and the grievance is denied or partially granted and all appeals are exhausted, whatever portion of the working suspension is upheld will be converted to a fine. The employee may choose a reduction in leave balances in lieu of a fine levied against him/her.

d. One (1) or more day(s) suspension. A minor suspension is a one (1) day suspension, a medium suspension is a two (2) to four (4) day suspension, and a major suspension is a five (5) day suspension. No suspension greater than five days shall be issued by the Employer;

e. Termination.

Disciplinary action shall be initiated as soon as reasonably possible, recognizing that time is of the essence, consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process.

The deduction of fines from an employee's wages shall not require the employee's authorization for withholding of fines.

If a bargaining unit employee receives discipline which includes lost wages, the Employer may offer the following forms of corrective action:

1. Actually having the employee serve the designated number of days suspended without pay;

2. Having the employee deplete his/her accrued personal leave, vacation, or compensatory leave banks of hours, or a combination of any of these banks under such terms as may be mutually agreed to between the Employer, employee, and the Union.

24.05 – Pre-Discipline

An employee has the right to a meeting prior to the imposition of a suspension, a fine, leave, reduction, working suspension or termination. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. An employee who is charged, or his/her representative, may make a written request for one (1) continuance of up to forty-eight 948) hours. Such continuance shall not be unreasonable denied. A continuance may be longer than forty-eight (48) hours if mutually agreed to by the parties but in no case longer than sixty (60) days. In the event an employee refuses or fails to attend a pre-disciplinary meeting, the steward and/or representative shall represent in the matter at hand. Where the affected employee is on disability, or applying for disability, and is unable or unwilling to attend the meeting, he/she shall be offered the right to participate by telephone. The call shall be initiated via speakerphone in the presence of the steward and Employer representative or designee. Failure of the employee to respond to the offer or phone call shall result in the meeting proceeding without his/her presence. Any action resulting from said meeting shall not be challengeable on the basis of the employee's absence or lack of participation. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. When the pre-disciplinary notice is sent, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee prior to the meeting. In the event the Employer provides documents on the date of the meeting, the Union may request a continuance not to exceed three (3) days. Such request shall not be unreasonably denied. The Employer representative or designee recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to ask questions, comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-disciplinary meeting may be delayed until after the disposition of the criminal charges.

24.06 – Imposition of Discipline

The Agency Head or designated Deputy Director or equivalent shall make a final decision on the recommended disciplinary action as soon as reasonably possible after the conclusion of the pre-disciplinary meeting. The decision on the recommended disciplinary action shall be delivered to the employee, if available, and the Union in writing within sixty (60) days of the date of the pre-discipline meeting, which date shall be mandatory. It is the intent to deliver the decision to both the employee and the Union within the sixty (60) day timeframe; however, the showing of delivery to either the employee or the Union shall satisfy the Employer's procedural obligation. At the discretion of the Employer, the sixty (60) day requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after the disposition of the criminal charges.

The employee and/or Union representative may submit a written presentation to the Agency Head or Acting Agency Head.

If a final decision is made to impose any discipline, including oral and written reprimands, the employee, if available, and the Union shall be notified in writing. The OCSEA Chapter President shall notify the Agency Head in writing of the name and address of the Union representative to receive such notice. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

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

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment.

Article 44, Miscellaneous

44.02 – Operations of Rules and Law

To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to state employees in areas

where this Agreement is silent, such benefits shall be determined by those statutes, regulations, rules or directives.

GRIEVANCE

Mickey Gonzalez filed a grievance on August 19, 2011 appealing his termination of employment from the Department of Taxation. The grievance states that the Employer violated Article 2, 24 and 44.02 of the collective bargaining agreement when the Grievant was terminated. The grievance reads as follows:

Mickey's employment was terminated as of Friday August 19, 2011 for absenteeism. Mickey had requested an ADA accommodation for his absence and has an active FMLA on file with the agency. The disciplinary measures being imposed are not reasonable and commensurate with the offense. The disciplinary measures are being used solely for punishment.

Remedy sought: The reinstatement of Mickey with the agency and the grievance be made whole.

The grievance of the Union was denied by the Employer, and it was then appealed to arbitration.

BACKGROUND

The Grievant, Mickey Gonzalez, had been employed by the State of Ohio Department of Taxation for twenty-four years and eleven months. At the time of his termination of employment, he held the position of Tax Commissioner Agent 5. During his employment in the Department of Taxation, the Grievant was promoted a number of times. The State of Ohio Department of Taxation administers programs related to the collection of sales and use taxes based on provisions of the Ohio Revised Code. The Grievant worked on the tax service program handling telephone inquiries from the public and responding to written queries and issues.

From 2009 through 2011, the Grievant was approved for FMLA leave based on specific medical conditions. He had been treated for the medical condition since 2006 (Un. Exb. 1). The Employer administers FMLA leave on a backward rolling calendar and requires employees to use accrued leave balances such as sick leave, vacation and personal time. During each of the Grievant's FMLA leaves, he was entitled to four hundred and eighty hours of protected leave.

The Grievant applied for and was granted disability leave by the Employer from May 30, 2011 through July 2, 2011 (Mgmt. Exb. 15). Following the disability leave, the Grievant was expected to return to his duties in the Department of Taxation.

On July 13, 2011, the Grievant called in to the Department indicating that he was sick and would not be at work on that day. The sick call was recorded by Karen Grant on the "Employee Call-In Form" (Mgmt. Exb. 1 – 15). David Dusenberry, the Grievant's immediate supervisor, had notified him on July 12, 2011 by way of email that he only had 2.4 hours of FMLA, and the Grievant responded by thanking him for the information and indicated that he would see him the following day (Mgmt. Exb. 14). The Grievant had also depleted all other paid leaves including sick leave. Then on July 14, 2011, the Grievant called in again indicating that he was ill and would not be at work. This call was recorded by Tammie Harrington, Program Administrator, on the "Employee Call-In Form" (Mgmt. Exb. 1 – 16). Ms. Harrington notified the Grievant on this date, by way of voice mail, that he was "... in leave without pay status and that he is out of FMLA." The Grievant continued to call in sick on July 15, 2011; July 18, 2011; July 19, 2011; July 20, 2011; July 21, 2011; July 22, 2011; July 25, 2011; July 26, 2011; and July 27, 2011 (Mgmt. Exb. 1, 17 – 25). Each call was made in compliance with the call-in policy in terms of timeliness. The Grievant did not request additional disability leave or leave of absence without pay in July, 2011.

The Department scheduled a pre-disciplinary hearing based on the continued absences of the Grievant. The initial hearing was continued at the request of the Grievant and re-scheduled on August 5, 2011. Although the Grievant was not present at the pre-disciplinary hearing on August 5, 2011, the matter went forward as he was represented by Union Steward Anthony. The hearing officer concluded that there was just cause for discipline (Mgmt. Exb. 3).

The Grievant was notified by letter, dated August 15, 2012, that his employment had been terminated by Tax Commissioner Joseph W. Testa (Mgmt. Exb. 4). The basis of the termination was as follows:

> *The reason for this action is violation of Departmental Work Rule #3C4 – Absenteeism - Absence Without Leave (e.g. failure to notify timely) There days or more; and/or Department Work Rule #18 – Any Violation of State of Ohio Policies and/or Departmental Policies (ODT-HR-002/Attendance Policies). Specifically, you have been absent from work without approval from July 14, 2011 through July 27, 2011.*

On August 5, 2011 the Grievant provided notice to the Department, through his Union steward at the pre-disciplinary hearing, that he was requesting that all time that he had taken as sick since July 6, 2011 be granted as Leave Without Pay based on the Americans With

Disabilities Act (ADA) (Un. Exb. 11). The Employer made no response to this request. Then on August 16, 2011 the Grievant sent notice to the Department that he was applying for permanent disability through the Public Employees Retirement System (PERS) (Mgmt. Exb. 9). Although the Department received documentation from the retirement system regarding the Grievant's application for disability, the request was later withdrawn.

From August 12 to August 20, 2011, the Grievant's medical provider met with him and expressed concern regarding his condition. She indicated that, with proper treatment, he could be productive in the work place (Un. Exb. 10). It does not appear that the medical provider communicated this to the Employer at this time.

The Union filed Grievance No. 30-04-20110819-0104-01-14 on August 19, 2011 appealing the termination of Mickey Gonzalez. The Employer denied the Grievance at Step 3 on November 11, 2011. The matter was processed to arbitration on February 8, 2012, and an arbitration hearing was conducted on February 24, 2012.

POSITION OF THE EMPLOYER

The Employer argues that the termination of the Grievant is for just cause. It is clear that the Grievant violated work rules #3C4 and #18 and that the Employer is in compliance with its Progressive Discipline Policy ODT-HR-004. The Grievant was absent without leave for ten working days from July 14, 2011 through July 27, 2011.

The case of the Employer is strengthened by the fact that the Grievant did not appear at the pre-disciplinary hearing but instead submitted, through his Union steward, a request that the leave be considered as ADA leave. The Employer argues that the Americans With Disabilities Act does not support a leave of absence especially in the case of the instant grievance. Further, reasonable accommodation disputes are not arbitrable under Article 2 of the collective bargaining agreement. Waiving discipline is not included in provisions of the ADA as employers may hold all employees to the same performance and attendance standards. The ADA requires that an employee have the ability to perform the essential functions of the position with or without reasonable accommodation.

The employee's supervisor warned the Grievant that he was close to not having sufficient leave to cover additional absences on July 12, 2011, and the Grievant acknowledged this memo. Nevertheless, the Grievant called in sick beginning on July 14, 2011 through July 27, 2011. The Grievant was warned again on July 14, 2011 by Tammie Harrington that he no longer had leave to justify additional absences. The Grievant knew, when he continued to call in sick,

that he was out of all leaves including FMLA. Yet he continued to violate Department policy. He was aware of the ability to apply for leave, including short-term disability, through "MyOhio.gov" but failed to do so.

The Employer states that the termination of the Grievant is commensurate with the seriousness of the offense. Departmental Work Rule #3C4 is clear. Absence without leave of three days or more exposes an employee to termination of employment, and Work Rule #18 supports removal. This disciplinary track is reasonable, and the Grievant was familiar with the Department work rules and the consequences if violated. Absence without leave for three days or more is a "serious and not trivial" violation. Evidence and testimony at hearing also illustrates that the overall work record of the Grievant is not exemplary.

The Union cannot rely on the FMLA as a defense in this case. Evidence clearly illustrates that the Grievant had exhausted FMLA beginning on July 14, 2011. Additionally, evidence shows that the Grievant has a high level of non-FMLA leave over the past three years.

The Employer argues that documentation from the Grievant's medical provider regarding his condition in August, 2011, is not relevant in this case as it was written on February 23, 2012, one day before the arbitration hearing. The Employer did not have the ability to consider the communication and its content as it had not seen the document before the arbitration hearing.

The Employer cites an arbitration case in which the neutral distinguishes between casual absenteeism and extended absenteeism of three or more days. In this case, the Arbitrator upheld termination of employment, and this case may act as a guide in the instant matter.

The Employer requests that the Arbitrator deny the grievance in its entirety.

POSITION OF THE UNION

The Union states that the termination of employment of Mickey Gonzalez is not for just cause. The Grievant's service with the Department of Taxation spans nearly twenty-five years, and his performance evaluations indicate acceptable and exemplary service. There is no standing discipline in the personnel file of the Grievant. His service with the Employer is marked by good behavior. The Grievant had returned from an approved disability leave prior to the sick calls which resulted in his termination, and he had been on a number of recent FMLA leaves all due to his documented medical condition. In addition, the Grievant requested a leave without pay as an accommodation within the guidelines of the Americans With Disabilities Act

to cover time off from July 6, 2011 through the end of August, 2011 (Un. Exb. 11). Management failed to make response to this request. The Employer failed to inform the Grievant that he had the ability to request leave without pay knowing that he continued to suffer from his medical condition.

The Grievant's application for PERS Disability Retirement should have alerted the Department that his continued absence was due to the same medical condition and disability which had been an FMLA qualifying illness. The Employer acted unreasonably when it terminated the Grievant for the call offs.

The Union states that the memo from the Grievant's medical professional (Un. Exb. 10), which was presented at the arbitration hearing, clearly indicates that the Grievant suffered from a serious, life threatening condition during the time in which he is charged with leave without authorization. This statement also indicates that, with proper treatment, the Grievant is able to function in the work place.

The Union states further that Article 24 of the collective bargaining agreement is controlling. It outlines the manner in which employees may be disciplined. Article 44.04 of the Agreement states that work rules may not be in violation of the Agreement, and they must be reasonable. The manner in which the cited work rules were applied to the Gonzalez case does not meet this test. Work rules must take into account mitigating circumstances such as serious illness. Although Work Rule # 3C4 indicates removal for an unauthorized absence of three or more days, Work Rule # 18 states that the severity of the discipline must be reflective of the offense. The Employer gave no consideration to this rule when it terminated a disabled employee with long term service and no prior disciplinary actions. The Employer instead should have worked with the Grievant during a time of illness and "legitimate need."

The Grievant testified that he had previously sued the Department on the basis of race. The Union suggests that, although this litigation occurred many years ago, the Employer has a long memory and took this opportunity to retaliate.

The Union states that, in one recent arbitration case between the Employer and Union, it was determined that an employee's disability and legitimate illness must be considered by the Employer when deciding discipline. In another case the Arbitrator determined that the Employer's disciplinary grid is not a mandate when determining just cause. There is sufficient precedent for the Arbitrator to consider when analyzing just cause as it relates to the instant case. The Union states that, after a review of arbitration history between the State of Ohio and OCSEA, bargaining unit members have never been terminated for absenteeism without prior progressive discipline, and, in cases regarding job abandonment, decisions are split. The

Grievant was not charged with job abandonment. In fact he called in every day in a timely manner.

The Union concludes that the termination of the Grievant was not for just cause. The Employer failed to follow the principle of progressive discipline and therefore violated Article 24 of the Agreement. The Grievant should be returned to employment with the Department and made whole.

DISCUSSION

It is clear that the Grievant's FMLA leave had been exhausted when he called in sick on July 14, 2011, and all other paid and unpaid leaves had likewise been exhausted. He continued to call in sick through July 27, 2011. The Employer had the option of advising the Grievant that he could have applied for additional leave without pay, but it is clearly at the option of the Department to grant such leave. It is also clear from the record that the Grievant was aware that he had no approved leave available from July 14, 2011 through July 27, 2011.

Although the Grievant had no approved leave, he called the Department every day in compliance with the call-in policy. The Employer notified the Grievant by way of email (Mgmt. Exb. 12) that he would no longer have FMLA coverage after July 13, 2011, but this email from Supervisor Dusenberry also noted that the Grievant should "confirm this with HR." This memo did not suggest that there was potential policy violation if the Grievant continued to call in sick, and it did not indicate the consequences of continued absence. Program Administrator, Tammie Harrington, called and left a voice mail with the Grievant on July 14, 2011 (Mgmt. Exb. 1 – 16) indicting that he no longer possessed FMLA leave and that he was in leave without pay status. Ms. Harrington did not indicate that he was in violation of Department policy and that discipline was a possibility. The record indicates that the Grievant was not notified by the Employer that continuing to call off sick could result in discipline up to termination of employment. The Employer should have known that the medical condition of the Grievant could have affected his ability to understand the consequences of not returning to work. The Grievant had not abandoned his position. The Employer had the ability to contact the Grievant at any time.

The Union argues that the Grievant asserted rights based on the Americans With Disabilities Act when he requested accommodation at the pre-disciplinary hearing on August 5, 2011, but this was after the fact. The ADA request was submitted after the incidents which were the subject of the pre-disciplinary hearing.

The Union also argues that the termination of the Grievant is the result of retaliation for an earlier law suit, but there was no evidence at hearing to support this claim.

The Employer states that the Grievant's failure to attend his pre-disciplinary hearing strengthens its case, but Article 24 of the Agreement allows for a Union steward to represent an employee who fails or chooses not to attend such hearing. The Grievant was represented by his Union steward at the hearing, and the non-attendance of the Grievant is not persuasive at arbitration.

The Employer argues that Policy #3C4 is unambiguous. The penalty for absence without leave for three days or more is removal. The Employer argues further that Policy 18 supports the termination of the Grievant. It states that the severity of the discipline should be reflective of the offense. The Union argues that these policies are not controlling in this case, but that the just cause provisions of Article 24 of the collective bargaining agreement must first be considered. This argument holds merit.

The Grievant has a record of long service with the state, nearly twenty-five years. In addition there is no standing discipline in his personnel file. Evidence in this case indicates that his performance has been acceptable to excellent during the term of his service to the Department. The Employer states that the Grievant "does not have an 'exemplary' work record." There is no specific evidence regarding any previous discipline of the Grievant, and, again, the record in this case does not indicate discipline for absenteeism during his tenure in the Tax Department. If the Grievant had significant absenteeism outside approved leaves and FMLA, as the Employer argues, the use of lower level disciplinary action could have been utilized in an attempt to correct the behavior, but this did not occur. The Employer cites Arbitration Case number 23-18-880713-0104 as supporting its position in the instant case. Arbitrator Pincus supported the Employer in denying an appeal of termination based on continued absenteeism. But the Arbitrator in this case relied, in part, on the element of progressive discipline. The Grievant had been disciplined a number of times prior to the final penalty of termination. In the instant case, the Grievant, a long tenured employee has no identifiable discipline on his record leading up to his termination.

The Union cites Arbitration Case number 27-03-031205-1274-01-03 in support of its argument regarding just cause. Arbitrator Graham says the following regarding this termination case and the State's disciplinary grid: "Even if the grid mandated discharge, it is not binding upon an arbitrator. Given the Grievant's years of good service with the State a penalty short of discharge is warranted in this situation." The Arbitrator in the instant case submits that this proposition may be applied here.

"Some consideration generally is given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record and it may be aggravated by a poor one. Indeed, the employee's past record often is a major factor in the determination of the proper penalty for the offense. In many cases, arbitrators have reduced penalties in consideration of the employee's long, good past record." (How Arbitration Works, Sixth Edition, Elkouri and Elkouri, Alan Miles Ruben, Editor-in-Chief, page 983)

The parties have bargained the just cause standard in Article 24.01. Inherent in the just cause standard are proper notice that an action may lead to discipline, progressive discipline and the principle that the penalty must fit the violation. The parties have bargained further that the Employer must follow the principle of progressive discipline in Article 24.02. These are elements which may be controlling in any disciplinary case of a bargaining unit employee. The policies and rules cited by the Employer in this case are not necessarily in conflict. Policy No. ODT-HR-004 states on page 3 that the discipline grid is not exhaustive and are examples "of violations and recommended disciplinary action." This policy statement indicates "recommended" and not mandated. Policy # 18 allows for elements of just cause and progressive discipline when it indicates that the penalty should be reflective of the offense.

An Employer has the right to expect its employees to report for work outside approved leaves, FMLA and other such authorized reasons regarding absence. The Employer had an opportunity to warn the Grievant that discipline was a possibility if he continued to call in sick without authorized leave beginning on July 14, 2011. Likewise, the Grievant knew he was completely out of authorized leave beginning on July 14, 2011. He failed to request additional leave without pay or disability leave. Both the Grievant and management could have handled this matter with open communication consistent with Department policy.

The Employer violated Article 24.01 and 24.02 when it imposed the penalty of termination on a long tenured employee with no official discipline. The Grievant was in violation of Policy #3C4 when he did not attempt to obtain additional approved leave to cover absences beginning on July 14, 2011. The grievance is granted in part and denied in part. The Grievant, Mickey Gonzalez, is restored to employment. The personnel record of the Grievant will reflect a five day suspension pursuant Article 24, Section 24.02, paragraph (d) of the collective bargaining agreement. The Grievant is to be made whole beyond the five day suspension in respect to wages, benefits and seniority rights. The Arbitrator retains jurisdiction for a period of thirty days on the sole issue of remedy.

AWARD

The grievance is granted in part and denied in part. The Grievant, Mickey Gonzalez, is restored to employment. The personnel record of the Grievant will reflect a five day suspension pursuant to Article 24, Section 24.02, paragraph (d) of the collective bargaining agreement. The Grievant is to be made whole beyond the five day suspension in respect to wages, benefits and seniority rights. The Arbitrator retains jurisdiction for a period of thirty days on the sole issue of remedy.

Signed and dated this 2nd Day of April, 2012 at Cleveland, Ohio

Thomas J. Nowel
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd Day of April, 2012, a copy of the foregoing Award was served upon Gregory M. Siegfried, representing the State of Ohio Department of Taxation; John P. Gersper, representing OCSEA, Local 11 AFSCME; and Aimee Szczerbacki, representing the State of Ohio Office of Collective Bargaining, by way of electronic mail.

Thomas J. Nowel
Arbitrator