

Rec'd 6/28/19

#1177

In the Matter of Arbitration) Grievance No.: DMH -2018-03815-04
Between:)

STATE OF OHIO: DEPARTMENT)
OF HEALTH AND MENTAL) Subject: Removal from
ADDICTION SERVICES) Employment of
("Employer")) Tamika Sanford

and) BEFORE:
Arbitrator — David V. Breen

OHIO CIVIL SERVICES)
EMPLOYEES ASSOCIATION,)
LOCAL 11 AFSCME,)
("OCSEA").)

OPINION AND AWARD

Case Heard: May 20, 2019

Post-Hearing Briefs Filed: June 11, 2019

Award Issued: June 27, 2019

Appearances: On Behalf of the Employer:
Laurie E. Spolarich
Labor Relations Officer

On Behalf of the OSCEA:
Bruce Thompson
Staff Representative

BACKGROUND, FACTS AND PROCEDURAL HISTORY

This grievance is covered by a Collective Bargaining Agreement (“Agreement”) between the State of Ohio (“Ohio”) and the Ohio Civil Service Employees Association (“OCSEA”) effective May 12, 2018 at the Ohio Department of Mental Health and Addiction Services (“MHAS”): Northcoast Behavioral Health care (“NBH”).

The Grievant, Tamika Sanford, was hired by MHAS, as a Therapeutic Program Worker (“TPW”) on October 27, 2008. When Grievant’s employment was terminated on October 31, 2018 Grievant was working in NBH’s Community Support Network (“CSN”) as a TPW Caseworker.

During Grievant’s employment she received a Coach Counsel/Work Plan on August 22, 2017 for failing to submit Caseworker Progress Notes in a timely manner in accordance with CSN Progress Note Policy: 02-13. Thereafter, she received a Written Reprimand dated August 31, 2017 which states:

“You are being reprimanded for the following violation: Violation of Work Rule 5:1:-Failure to follow Policies and Procedures. Policy: 02:03-CSN Progress Note. As of August 28, 2017 you did not submit your progress notes within 72 hours as indicated in the work plan you received on August 22, 2017.”

This Written Reprimand was not challenged in the grievance procedure.

As a CSN Caseworker Grievant was responsible for providing services to clients dealing with mental health and/or substance abuse issues. Her clients had individual plans to support successful living in a community setting. The individual plans list skills and goals for the client to attempt to achieve. Attaining those goals increases client chances of succeeding in a non-institutional setting. Grievant’s job as a Caseworker is to provide services to help clients master those skills. A key element of the Caseworker’s job is to provide regular and prompt Progress Notes discussing client progress.

Grievant struggled to complete Progress Notes and turn them in in a timely manner which resulted in a direct order given to Grievant on February 27, 2018 by management which states in relevant part:

1. "I am giving you a **DIRECT ORDER** to report to my office every Thursday at 9:00am for your weekly individual supervision, beginning Thursday, March 1, 2018. If you are unable to attend the meeting, you **must speak** with me, via phone or in person **prior** to the meeting to make arrangements to reschedule the meeting.
2. I am giving you a **DIRECT ORDER** to report to your assigned Act Team desk office every Wednesday from 9:00am to 10:30am and Thursday from 9:30am to 11:00am to complete your Progress Notes and submit them to my mailbox.
3. I am giving you a **DIRECT ORDER** to complete, get signed and submit all ISP's (Initial, Annual & 90 Day Review's) assigned to you each month, prior to the first working day of the following month.

Failure to comply with the above DIRECT ORDERS will result in Insubordination.

Thank you for your attention to this matter."

Shortly thereafter, on March 5, 2018, Grievant went out on a disability leave until June 13, 2018. During her leave her clients were covered by other Caseworkers. When she returned to work on June 18, 2018 all of Grievant's client's Progress Notes had been submitted in a timely manner by other Caseworkers.

Grievant worked on June 18, 19, 20, 21, 22 and 25, 2018. She called off work on June 26, 2018 and remained off of scheduled work on June 27, 28 and 29, 2018. On July 2, 2018 Grievant returned to work without a required return to work medical slip. Grievant, after 30 minutes of work, was required to leave work. Grievant could have returned to work that day if she returned with a medial note. However, she did not return for work. When she did submit her medical slip it stated that she could return to work on July 3, 2018. Grievant

however, did not report for work. Grievant claims she reported off for her July 3, 2018 shift by voice mail. The Employer testified that it had no record of Grievant's alleged voice mail report off.

The Employer demonstrated through testimony: that Grievant ran out of Family Medical Leave ("FMLA") the pay period ending June 23, 2018; and that Grievant was sent a notice to her of her expired FMLA leave by regular mail and by an email dated June 22, 2018. Since her FMLA leave entitlement had expired Grievant's absences for June 26, 27, 28 and 29 and July 2, and 3, 2018 were considered unauthorized by the Employer. Grievant also reported off for scheduled work on July 20, 2018. That absence was also considered unauthorized.

On July 29, 2018 Management sent Grievant a second direct order regarding Progress Notes which states in relevant part:

1. "I am giving you a **DIRECT ORDER** to report to my office every Thursday at 9:00am for your weekly individual supervision, beginning Thursday, March 1, 2018. If you are unable to attend the meeting, you **must speak** with me, via phone or in person **prior** to the meeting to make arrangements to reschedule the meeting.
2. I am giving you a **DIRECT ORDER** to report to your assigned Act Team desk office every Tuesday from 9:00am to 10:30am and Thursday from 9:30am to 11:00am to complete your Progress Notes and submit them to my mailbox.
3. I am giving you a **DIRECT ORDER** to complete, get signed and submit all ISP's (Initial, Annual & 90 Day Review's) assigned to you each month, prior to the first working day of the following month.

Failure to comply with the above DIRECT ORDERS will result in Insubordination.

Thank you for your attention to this matter."

This second direct order was given to Grievant because one (1) of the designated days that Grievant was to work on her Progress Notes changed from Tuesday to Wednesday because of a scheduling conflict.

Grievant submitted Progress Notes to management on August 9, 2018 for services provided to clients in June of 2018. Those Progress Notes were submitted late, almost two (2) months after Grievant completed her client services. Those Progress Notes submitted were the last Progress Notes given to the Employer by Grievant even though she continued working until September 17, 2018.

Grievant had no FMLA leave or sick leave to cover her absences starting on June 26, 2018. In that regard, Grievant submitted four (4) Requests for Leave without pay. The first dated July 9, 2018 was for her absences from June 26 through June 29, 2018. The second request dated July 9, 2018 was for her absence on July 2, 2018. The third request dated July 9, 2018 was for her absence on July 3, 2018. And, the fourth request dated July 24, 2018 was for her absence on July 20, 2018. None of these Requests for Leave without pay were approved by management.

On September 7, 2018 Grievant had a pre-disciplinary meeting attended by her OCSEA representative and management. Thereafter, by a letter signed by management on October 28, 2018, Grievant was informed that she was removed (discharged) from employment effective October 31, 2018. That letter states in relevant part:

“On or about June 26, 27, 28, 29, 7/2, 7/3 and 7/20/18 you were off work with no available leave to cover your absence. Having no available leave caused you to be in an AWOL status. You were sent a letter on June 27, 2018, notifying you that you had exhausted your allotted 480 hours of FMLA. Although you exhausted your FMLA, you continued to call off.

Per policy 2.13 (Progress Notes), You failed to submit progress notes within the 72 hours of servicing the client as policy states. You had not submitted progress notes since July 19th and prior to July 19th your progress notes were not submitted timely and were submitted sporadically.

Your actions are violation of OhioMHAS Policy HR-22: Code of Conduct and General Work Rules 4.1 – Failure to follow policies and procedures. (Specifically, policy 2.13 – (progress notes). Rule 5.8 – More than forty hours of unauthorized leave. (AWOL).

This letter is to notify you that due to the seriousness of the above listed infraction(s) you are hereby removed from your position as Therapeutic Program Worker effective 10-31-18.”

Shortly thereafter, OCSEA filed Grievance No.: DMH-2018-03815-04 protesting the Employer’s removal decision in relevant part as follows:

“Grievant was terminated from employment as a Therapeutic Program Worker (Case Manager) at the Northcoast Behavior Healthcare on 10/31/18. The employer cited failure to submit progress notes in a timely manner, Actions in violation of OhioMHAS HR-22 Code of Conduct and General Work Rules 4.1. Failure to follow policies and procedures & 5.8 More than 40 hours unauthorized leave AWOL. It is the Union’s contention that the grievant was unfairly held to performance standards that are inconsistent and arbitrary!”

Resolution Requested: Grievant to made whole. Grievant to be reinstated to employment as a Therapeutic Program Worker (Case Manager) at Northcoast Behavior Healthcare with all back pay and accruals restored to her, furthermore, to be paid any medical and dental bills incurred during the unfair termination.”

Following the Step 2 grievance meeting on November 28, 2018 the Employer responded to the grievance in relevant part as follows:

“... the grievant failed to submit progress notes timely on a regular basis. Management contends that the grievant was removed for just cause. Management contends that from June 26, 2018 through July 20, 2018 the grievant was absent without leave on 7 different occasions. The grievant had exhausted her FMLA entitlement. The union contends the imposed discipline was without just cause. The grievant was not notified of her FMLA status until a letter was sent to her on June 27, 2018. Furthermore,

the grievant was under doctor's care at the time of her absences in June. The grievant attempted to return to work on July 2, 2018 but was sent home. The grievant had the physician's verification sent to the employer on July 3, 2018 and returned to work. The grievant did not feel well on July 20, 2018. Her supervisor donated leave for her absence and that leave was denied. Regarding the progress notes, the grievant fell behind as she was assigned additional duties and was helping co-workers with their duties. I find the imposed discipline was for just cause. It is the Grievant's responsibility to keep track of her FMLA entitlement. The letter sent from management is only a courtesy. It is also the grievant's responsibility to provide appropriate physician's verification pursuant with policy. Regarding the grievant's progress notes, they are part of her job duties and she is required to ensure they are current."

The grievance was denied appealed to arbitration. An arbitration hearing was scheduled and held with the undersigned Arbitrator on May 20, 2019. Post-Hearing Briefs were filed on or about June 11, 2019. The record was then closed.

ANALYSIS AND FINDINGS

The Employer has the burden of proof in this removal case. This analysis of whether the Employer's burden was met starts with a review of the policy provisions alleged to be violated.

First, the Employer alleges that Grievant violated Ohio MHAS Policy HR-22: Code of Conduct and General Work Rules 4.1-Failure to follow policies and procedures, specifically, Policy 2.13 – (Progress Notes).

Policy 2.13, Progress Notes states in relevant part:

“PURPOSE

To ensure Progress Note documentation contains all the required elements and are submitted within the time frame established, and

accurately reflects time spent with clients, the specific interventions utilized, and the client's response to those interventions.

POLICY

Progress Notes will reflect the implementation of the Individual Service Plan, including documentation of the choices and perceptions of the client regarding the services provided. Progress notes will be submitted according to a short time frame that is designed to ensure the provision of quality services and the accuracy of the documentation of those services.

PROCEDURE

...

3. All Progress Notes will be completed by staff, copied, batched, and submitted to their supervisor within 3 working days of the date of service. (A working day is defined as any day the employee is on the clock). Staff is to initial and date the batch ticket indicating number of tickets and total time billed.
4. The supervisor is to mark date received from staff along with initials to indicate notes have been reviewed.
5. The supervisor will have 2 working days in which to review the Progress Note against the staff itinerary and travel logs to spot check at least one staff's notes each day for quality and format. They will submit the notes to data entry for input into the billing system.
6. Submission of progress notes outside of the defined time frame will be grounds for disciplinary action."

The evidence provided by the Employer clearly proved that Grievant violated this policy. When Grievant returned to work from disability leave on June 18, 2018 there was no back log of Progress Notes for her clients. She worked on June 18, 19, 20, 21, 22 and 25, 2018 and did not submit Progress Notes for those dates of service until August 9, 2018. According to policy, those Progress Notes were to be completed and submitted to her Supervisor within three (3) working days of the date of service. Needless to state, Grievant failed to

comply with this policy provision despite having received: a Verbal Reprimand for the same offense on August 31, 2017; and, direct written orders to submit timely Progress Notes on February 29, 2018 and on July 24, 2018.

Also, Grievant worked between June 25, 2018 and her last day of work on September 17, 2018 and she turned in no Progress Notes for that time period. As the Employer stressed, submission of timely Progress Notes is a key duty of a Caseworker. Those notes reflect Caseworker time spent on client specific interventions used and the client's response to those interventions to meet the Individual Service Plan. Those notes had to be submitted timely to ensure quality services and payment to the Employer for those services.

Grievant claims that her case load was too large and that travel prohibited her from turning in timely Progress Notes. Her claim was countered by the Employer's CSN Residential Director, Lauren Williams ("Williams"), who testified credibly that Caseworkers are expected to perform 80 hours of productive service per month, which amounts to 20 hours per week, leaving plenty of time in a 40 hour work week to complete Progress Notes. Williams also credibly testified that no other Caseworkers were behind in submitting timely Progress Notes. Moreover, as stressed by the Employer, Grievant had been given direct orders to spend a least three (3) hours a week writing Progress Notes which Grievant did not do.

Second, the Employer claims that Grievant violated OhioMHAS Policy HR-22: Code of Conduct and General Work Rules, Rule 5.8 which states:

"Rule 5.8 More than forty (40) hours of unauthorized leave
Failure to return on approved leave or unapproved absence of more than forty hours"

Pursuant to Policy HR-22, Rule 5.8 is a Level Five violation calling for Automatic Removal for a first offense. The evidence provided by the Employer clearly proved that Grievant violated this Rule. She missed seven (7) shifts without any available leave from June 26, 2018 through July 20, 2018.

There is no dispute that Grievant missed work on June 26, 27, 28 and 29, 2018 and had no available leave to cover those absences which total 32 hours of unauthorized leave. Grievant returned to work for her scheduled shift on July 2, 2018 but did not have a required medical note stating she was able to return to work. Grievant was told she had to leave work and could only return with medical documentation. Grievant did not return to work with a medical slip on July 2, 2018 and was only paid for 30 minutes of work for that day.

Grievant failed to report for her scheduled shift on July 3, 2018 even though her medical slip said she could return to work on that day. Grievant claimed that she called and reported off via voice mail but management had no record of that call. By July 3, 2018 Grievant had accumulated 47.50 hours of unauthorized leave. Grievant also reported off for her scheduled shift of July 20, 2018. At that time she had accumulated 1.80 hours of available sick leave time and had no FMLA entitlement. By July 20, 2018 Grievant had a total of 53.70 hours of unauthorized leave in clear violation of Rule 5.8.

In Grievant's defense OCSEA stressed that Grievant had a serious medical condition requiring an operation that resulted in a nicked nerve which prevented her from working. This Arbitrator is sympathetic about Grievant's medical condition but FMLA entitlement and sick leave are the remedy for her medical condition. Grievant had exhausted all of her available leave time and the Employer was not contractually obligated to excuse her absences. There are only so many absences this Employer could tolerate and still get necessary work performed.

OCSEA also argues that: (1) Grievant made several Requests for Leave without pay which should have been approved by the Employer; (2) the Employer's CEO is the only person who can approve or disapprove such requests and her requests were never forwarded to him; (3) management representatives testified that they were given authority to approve or disapprove such requests but provided no documentation to support that claim; and, since the approval process was mishandled Grievant's absences should be approved without pay.

The Employer argues that: (1) Bernadette Mosley (“Mosley”), the Employer’s Labor Relations Officer, credibly testified that the Employer’s Human Resources Department was the CEO’s designee when it came to approving Requests for Leave without pay; (2) such requests were consistently denied when there was no FMLA entitlement unless the requesting employee was hospitalized; (3) Grievant was not hospitalized when the requests were made; (4) the practice has been consistent and it was not necessary to provide any documentation; and, (5) Grievant made no effort to find out whether her requests were approved.

This Arbitrator finds the Employer’s arguments persuasive. There is no contractual requirement that such requests must be forwarded to the CEO or that only the CEO could approve or disapprove such requests. Grievant’s Requests for Leave without pay were denied, consistent with the practice of the Employer in these circumstances. There is no evidence that the Employer’s decision to deny her requests was arbitrary, capricious, unreasonable or discriminatory.

The OSCEA also contends that the Employer over-reached in its attempt to correct the Grievant’s actions. According to the OCSEA the primary purpose of progressive discipline is to let the Grievant know she has a performance problem and an opportunity for improvement. Removal, according to the OCSEA, is not corrective. It is finite. It did not afford the Grievant time to address the Employer’s concerns. Nor did the removal action give the Employer the opportunity to address the concerns of the Grievant.

Frankly, the OCSEA’s arguments fly in the face of the actual facts of this case. Grievant received counseling and then a Verbal Reprimand on August 31, 2017 for not submitting her Progress Notes in a timely manner. She also received direct orders on February 27, 2018 and July 29, 2018 regarding actions she must take. Grievant did not comply with those direct orders.

With respect to the Grievant’s violation of Rule 5.8 prohibiting “More than 40 hours of unauthorized leave,” there is no contractual requirement to take

corrective progressive discipline. As the Employer correctly stressed a Rule 5.8 violation is a Level 5 infraction and as such is considered so egregious that removal is the only appropriate discipline.

The record also reflects that: (1) when Grievant reported to work she was a good employee; (2) Grievant' Progress Notes, when submitted, were excellent; and, (3) Grievant had substantial service time with the Employer – about ten (10) years. Those mitigating circumstances were considered. However, based on the record as a whole, the Employer's decision to remove the Grievant was for just cause. Therefore, this grievance is denied.

AWARD

This grievance is denied.

Date: June 27, 2019

/S/David V. Breen
David V. Breen, Arbitrator