ARBITRATION DECISION NO.:
178

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Transportation,
District 8

DATE OF ARBITRATION:
September 8, 1988

DATE OF DECISION:
May 17, 1989

GRIEVANT:
George Phillabaum

OCB GRIEVANCE NO.:
G-86-0923

ARBITRATOR:
Jonathan Dworkin

FOR THE UNION:
Daniel Smith

FOR THE EMPLOYER:
Michael P. Duco

KEY WORDS:
Sick Leave
Progressive Discipline
Call-In
Arbitrability
Validity of Rule

ARTICLES:
Article 24 - Discipline
    §24.02-Progressive Discipline
Article 25 - Grievance Procedure
    §25.01-Process
Article 29 - Sick Leave

§29.02-Notification

FACTS:

On the day in question, a woman who identified herself as the grievant's girlfriend called in to the garage where grievant works and said, "[Grievant] won't be in today; he's sick."

An ODOT rule required that an employee notify his immediate supervisor within one half hour after his scheduled reporting time in order to receive paid sick leave. The rule states, "This responsibility will not be delegated to another employee."

The call was made within the time specified by the rule. Nevertheless, grievant was denied pay for this sick day on the ground that he failed to report off personally. Grievant received no formal discipline and no deduction from his sick leave balance.

While the caller did not know the grievant's last name, management has never expressed doubt that the grievant was actually ill and unable to work. The grievant had sufficient earned sick leave. ODOT conceded that grievant was not a sick leave abuser.

As a matter of practice, when an employee is unable to call off himself or herself, supervisors do accept call-ins made by others on the employee's behalf. Grievant admitted that he could have telephoned and that he was fully aware of the regulation. When asked, grievant did not explain why he did not call in himself.

MANAGEMENT'S POSITION:

The arbitrator should not inquire into the validity of ODOT's rule because this grievance is not a proper vehicle for the Union to challenge the entire rule.

The contract limits the use of sick leave to certain situations. Management has the right and the duty to insure that sick leave is used only for its intended purposes. In order to fulfill that duty, management must rely upon the integrity of the employee. Consequently, management cannot rely upon the word of a family member or friend, especially where the friend does not even know the employee's last name.

By the words, "he/she will notify his/her immediate supervisor...", section 29.02 requires the employee to report off personally.

While the ODOT rule lacks the exception contained in section 29.02, which states that an employee is permitted not to call in when he is unable, the ODOT rule is consistently applied as if it did include the exception. In the current case, grievant did not show that the exception applied to him (i.e., that he was unable to call in himself).

UNION'S POSITION:

The ODOT rule enforced against the grievant is contractually prohibited since it is more restrictive and demanding than the contractual rule regarding sick leave. The contractual rule found in section 29.02 contains an exception to the call in requirement which ODOT's rule lacks. An employee will be excused from failing to call in if he/she is unable to do so.

The Union also argued that the employer's action against the employee involved an overly technical application of the rule when grievant had done nothing substantively wrong.

Third, the Union argued that the denial of sick leave was the equivalent of a one day suspension imposed without the due-process grievant was entitled to under the contract in article 24. Under the progressive discipline requirement of 24.02, grievant, who has had no other discipline, should have received a verbal reprimand at most.

ARBITRATOR'S OPINION:

The arbitrator is free to consider the Union's arguments concerning the contractual validity of

OCB's sick leave rule. The question of relevancy cannot be determined without examining the union's arguments. Furthermore, the grievant would not receive his contractual entitlement to a full and final determination if intrinsic elements of his complaint are summarily dismissed.

Management is entitled to enforce bargained for limitations upon the use of sick leave. Section 29.02 sets out, as a means of enforcement, the requirement that person-to-person report-offs occur between the employee and either his/her immediate supervisor or supervisory designee.

While it is true that ODOT's rule differs from the contract in that it lacks an exception for employees who are unable to personally notify their supervisor, the difference is irrelevant in the case under consideration. "[A] flaw in a regulation is relevant only to the extent that it causes harm to the aggrieved employee. The only impropriety open to arbitral examination is the part that allegedly caused the individual grievant to lose something."

ODOT's Rule ought to be amended. To the extent that the rule denies a right which the agreement permits, its strict application would constitute an overreaching of management's rights.

The Union's contention that the employer has no authority to deprive an employee of earned, bargained for sick leave cannot be correct, since then the employer would always be required to grant every sick leave application, whether contractual call-in procedures are followed or not. The call-in requirements are a prerequisite to receiving the benefit. While sick leave may have been earned, its use is conditional upon correctly following the call in procedure.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Ohio Department of Transportation
District 8

-and-

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION OCSEA/AFSCME,
AFL-CIO Local 11 State Unit 6

Grievance No.:
G86-09-23

Decision Issued
May 17, 1989

APPEARANCES

FOR THE STATE
Michael P. Duco, Advocate
Felicia Bernardini,
Labor Relations Specialist
Rachel L. Livengood,
Labor Relations Specialist
Creola Reese,
County Superintendent
Edward A. Stebbins, Supervisor

FOR THE UNION
Daniel Smith,
OCSEA General Counsel

ISSUE:

Article 29, §29.02: Denial of sick leave for failure to call off personally.

Jonathan Dworkin, Arbitrator
P. O. Box 236
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

Grievant, an employee of the Ohio Department of Transportation (ODOT), was denied a day of sick leave for failing to comply with an ODOT Rule relative to reporting off. The Rule has been in existence for at least seven years -- four years longer than the Collective Bargaining Agreement. It is stated and restated in several Management documents and has been published, posted, distributed, and discussed with all District 8 ODOT Employees. Grievant himself received a copy which he signed, acknowledging receipt.

The portion of the Rule at issue in this dispute requires that an employee unable to work because of illness or injury telephone his/her supervisor not less than one-half hour after his/her scheduled starting time. It makes no exception for employees too sick or otherwise unable to call in; it does not allow for delegation of the duty. It states in pertinent part:

When an employee is unable to report to work, he/ she shall notify the immediate supervisor or other designated person daily by telephone or other means of communication within one-half (1/2) hour after the scheduled reporting time for work. It is the responsibility of the employee to contact the supervisor. This responsibility will not be delegated to another employee.

. . .

Employees failing to comply with sick leave rules and regulations will not be paid. [ODOT Directive No A-267; Emphasis added.]

On August 8, 1986, Grievant was scheduled to be on his job at 7:30 a.m. Within the time frame required for reporting off, a woman identifying herself as his girlfriend called the garage and said, "George won't be in today; he's sick." The message was taken by the County Superintendent who

asked, "Which George are you talking about?" The caller did not know Grievant's last name, and the Superintendent had to go to the garage to ascertain which "George" was absent.

Grievant was denied this sick day for failing to report off properly. He was not paid for August 8. He received no formal discipline and no deduction from his sick-leave balance. A grievance protesting the denial was initiated at Step 1 on August 26, 1986. In it, Grievant requested "to be paid for this day & have U.A. (Unauthorized Absence) taken off my record." The grievance was denied at Step 1 and advanced to Steps 3 and 4. The Employer stood firm and the matter was appealed to arbitration. It was heard in Columbus, Ohio on September 8, 1988. At the outset, the Representatives of the parties stipulated that the dispute was procedurally arbitrable and the Arbitrator was authorized to issue a conclusive award on its merits. Arbitral jurisdiction is more specifically defined and limited by the following language in Article 25, §25.03 of the Agreement:

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

THE ISSUES

It is obvious that the Employer's denial of sick leave for August 8, 1986 was proper under ODOT regulations. The Rule is essentially unambiguous. It requires employees to call off themselves, not through members of their families, friends, agents, or other volunteers. The fact that Grievant violated the Rule is not reasonably debatable.

The Union does not challenge the facts. Its position centers on the argument that the ODOT Rule is more restrictive and demands more of employees than the Collective Bargaining Agreement permits. In other words, the Union contends that Grievant was deprived of a sick day because he violated a regulation which was contractually prohibited. Article 29, §29.02 is at the heart of the Union's position. It provides:

ARTICLE 29 - SICK LEAVE

. . .

§29.02 - Notification

When an employee is sick and unable to report for work, he/she will notify his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification. [Emphasis added.]

The first question asserted by the Union is: "Does the ODOT Directive violate the Agreement?" The Union contends that it does and, therefore, that the deprivation of the sick day was contractually improper.

The Union's second issue is: "Can the Employer legitimately deny sick leave for a purely technical departure from call-off procedures?" The Union observes that Supervision never expressed doubt that Grievant was actually ill and unable to work on August 8. The Superintendent accepted as true the information she received from the person who telephoned in Grievant's stead. Grievant had a sufficient balance of earned sick leave, and the call was made before the contractually specified deadline. The Union concludes, therefore, that the Employer's action against Grievant was overly technical and lacked substantive foundation.

It should be noted that the State vigorously opposes arbitral determination of whether the

ODOT Rule is valid or invalid. It regards this dispute as composed of relatively uncomplicated facts, and argues that the issue should be whether or not those facts justified the sick-leave denial. The Employer maintains that this controversy is not a proper vehicle for the Union to challenge the entire Rule, and urges the Arbitrator to limit his examination to the facts and the result.

The Arbitrator finds little merit in the State's assertion that the validity or invalidity of ODOT's Rule is irrelevant. The grievance was initiated by the affected Employee and brought to arbitration by his Bargaining Unit. In a sense, this case belongs to the Union and it has every right to require arbitral examination of all its grounds for relief. It may turn out that the contractual propriety or impropriety of the Rule is irrelevant. If so, the Arbitrator will disregard the issue when fashioning the award. But the question of relevancy cannot be decided without examining the Union's arguments; nor will Grievant receive his contractual entitlement to a full and final determination of his complaint if intrinsic elements of the complaint are summarily dismissed from consideration.

The primary issues are those asserted by the Union: whether or not the Rule violates §29.02 of the Agreement and whether or not the action on Grievant's request for sick leave violated the language or intent of §29.02. In the event that the Union prevails on these questions, the final question is the remedy, if any, Grievant is entitled to receive.

THE UNION'S ARGUMENTS

The Union contends that Management applied its policy in a hypertechnical fashion. The Employee's alleged "violation," according to the Union, was neither significant nor substantive. All he did was have someone report his absence for him. He did not disregard the time lines for reporting; he had more than sufficient sick leave to cover his day off; and even ODOT concedes that he was not a sick-leave abuser. In fact, every indication is that he was a good employee who follows regulations.

The Union points out that the denial of sick leave was equivalent to a one-day suspension. The result was the same -- Grievant lost a day's pay. In the Union's judgment, what Management did was subject the Employee to a disciplinary layoff without according him any of his due-process entitlements. Article 24 of the Agreement carefully defines and restricts Management's disciplinary authority. Section 24.02 establishes strict guidelines which compel Management to follow progressive discipline except for the most serious mis-conduct. According to the mandate, the first level of progressive discipline is a verbal reprimand; the second is a written reprimand. A suspension of one or more days is not permissible until the third level. The Union contends, without refutation by the State, that Grievant's record was discipline-free. Therefore, even if he did violate a minor employment requirement, he should have received a verbal reprimand at most. He was not subject to a suspension. The Employer did not and could not legitimately argue that Grievant's noncompliance with regulations was so severe as to justify accelerated discipline. These arguments were stressed in the Union's opening statement:

Failure to follow the Employer's call off procedures is a problem which falls well within the range of offenses which may be corrected by the Employer's disciplinary powers. Section 24.02 of the Agreement provides that the Employer shall follow the principles of progressive discipline and that discipline shall be commensurate with the offense. Denial of sick leave for failure to properly follow call off procedures violates these principles. Different facts can either excuse the employee's failure to properly call off or call for a more severe penalty. Denial of sick leave (a one day suspension) is simply arbitrary and capricious.

The Union concludes that Grievant did not deserve discipline. His "misconduct" was trivial. It

did not adversely affect operations. The Employer was placed on notice that Grievant was too ill to come to work; and it learned it on time. In the Union's view, the Employer's insistence on rigid obedience to a Rule, which is not only arbitrary and unreasonable, but in conflict with the Agreement as well, is contrary to the very essence of the collective-bargaining relationship.

The Union argues that there can be no doubt concerning the inconsistency between the Rule and §29.02 of the Agreement. The contractual provision is permissive. While it generally requires employees to notify Supervision personally of their absences, it contains an exception for those unable to do so. It states that notification procedures must be followed "unless circumstances preclude this notification." The ODOT Rule, according to the Union, is invalid because it lacks the exception. It states in expressly mandatory terms, "this responsibility will not be delegated . . ."

The Union calls attention to the fact that ODOT's failure to amend its rule to conform, with §29.02 demonstrates the Agency's unreasonable resistance to contractual commitments. Other State agencies have taken a different approach, fashioning sick-leave regulations which comport with the Agreement. For example, the sick-leave policy of the Department of Mental Health was amended in 1988. It states in part:

B. Approval

1. All employees intending to use Sick Leave will notify their supervisor no later than 1/2 hour after the beginning of the regularly scheduled work time unless circumstances preclude this notification. [Emphasis added.]

Another agency, the Department of Rehabilitation and Correction, apparently recognized that denial of an employee's entitlement to earned sick leave is akin to discipline. On November 30, 1987, it issued new rules stating that violations would be handled under the contractual disciplinary procedures, not by arbitrarily divesting an individual of a day's pay. The new regulation provides in part:

Any corrective action taken under this policy will assure the principles of progressive discipline and will be applied consistently to all employees.

According to the Union, ODOT stands alone in its recalcitrance.

In sum, the Union asks that the grievance be sustained. By punishing the Employee for a technical flaw on his adherence to an arbitrary, extra-contractual Rule, the Employer breached §29.02 of the Agreement as well as the negotiated protections against unreasonable, punitive disciplinary action.

THE EMPLOYER'S ARGUMENTS

The State acknowledges that sick leave is an earned benefit. It points out, however, that nothing in the Agreement grants employees carte blanche to use the benefit at their discretion. Sick leave balances are not meant to provide optional days off. They can be used only for specified reasons. As stated in Article 29, §29.01:

Sick leave shall be granted to employees who are unable to work because of illness or injury of the employee or a member of his/her immediate family or because of medical appointments or other ongoing treatment. The definition of "immediate family" for purposes of this Article shall be: spouse, significant other who resides with the employee, child, grandchild, parents, mother-in-law, father-in-law, son-in-law, daughter-in-law, grandparents, brother, sister, brother-in-law, sister-in-law

or legal guardian or other person who stands in place of a parent.

Regardless of regulations, sick leave is a contractually restricted benefit. It is not available unless the explicit reasons, defined by the Agreement itself, are present. The Employer maintains that Supervisors have the right -- indeed, they have the obligation -- to assure that the allowance provided by Article 29 is used only for its intended purposes. How does Supervision carry out this function? Obviously, a supervisor cannot be sent to the home of every employee who reports off to make certain s/he is not abusing the privilege. In most instances, the Employer must rely upon the integrity of the individual who calls in sick. But it is the integrity of the employee that is to be relied upon, not the word of a family member or friend -- especially a friend who does not even know the employee's last name.

Reliance is an inherent component of §29.02. Like the ODOT regulation, the provision does not relieve employees of the duty to report off personally. To the contrary, §29.02 reinforces the duty, specifying that "he/she [the employee claiming to be unable to work] will notify his/her immediate supervisor. . ." The only exception, available only rarely, occurs when "circumstances preclude this notification."

The Employer concedes that the ODOT Rule does not contain the words of the contractual exception. Nevertheless, the Agency applies the exception routinely. In fact, to the extent that the written policy is more restrictive than the Agreement, it is uniformly ignored by Supervision and employees alike. If an individual is unable to call off him/herself -- if, for example, s/he is incapacitated or does not have a telephone -- supervisors do accept call-ins made by others on the ill employee's behalf. The Employer presented witnesses who gave unvarying testimony that this is how the policy is and has been enforced. Employees who truly cannot telephone are never deprived of sick days on that account. The only requirement is that the circumstances be explained, and the Employer urges that there is nothing arbitrary or capricious in that requirement.

Neither Grievant nor his "girlfriend" explained why the call-in responsibility had to be delegated. The opportunity for explanation was presented at each level of the grievance procedure. If the Employee was too sick to telephone or lacked a telephone, he could have communicated his excuse and it is more likely than not that it would have been accepted. What Grievant did say in the preliminary grievance steps made it clear that his violation was deliberate. Rather than claiming that he was unable to call in, he admitted that he could have telephoned and that he was fully aware of the regulation. He gave absolutely no exculpating explanation in either the grievance levels or the arbitration hearing. It follows, according to the Employer, that Grievant disregarded both ODOT policy and §29.02. If Supervision had granted his sick day, it would have violated its own responsibility to monitor and enforce compliance with the explicit sick-leave language of the Agreement.

The Agency finds little merit in the Union's arguments concerning the disciplinary impact of denying Grievant's application for sick leave. Admittedly, the denial probably had a salutary corrective effect, and that may have been one of Supervision's objectives. But the simple fact is that Grievant did not meet the prerequisites. He did not call in personally and he made no claim of inability to do so. The leave application was turned down, and should have been turned down, because the Employee simply did not qualify for the benefit. Accordingly, the Employer urges that the grievance be denied.

OPINION

Management does have authority to monitor sick-leave usage. The fact that the right exists is clear; it is not open to reasonable debate. It is unmistakably implicit in the language of the

Agreement itself. As the Employer argued, Article 29 establishes that the allowance is a restricted one, available only for defined, limited purposes. The restrictions undoubtedly reflect a bargaining-table resolution of the goals of the Union and those of the State. It is axiomatic that the Union represented the interests of the Bargaining Unit in negotiations and sought the most open sick-leave language it could obtain. The limitations ultimately adopted probably reflect the competing goals of the Employer's negotiating team. Having achieved the limitations, Management was of course entitled to enforce them. One of the means of enforcement, set forth in §29.02, is the requirement that person-to-person report-offs occur between the employee and either his/her immediate supervisor or a supervisory designee. To the extent that the ODOT regulation calls for such person-to-person communication, it is not only consistent with the Agreement, it is almost a word-for-word reiteration of the contractual provision.

There is a discrepancy between the Agency Rule and §29.02. The Agreement allows employees latitude when circumstances preclude them from reporting themselves off. The regulation makes no such exception. To the contrary, it states that the responsibility is the employee's and "will not be delegated." To the extent that the Rule (at least on its face) denies a right which the Agreement permits, its strict application would constitute an overreaching of Management Rights. The Rule ought to be amended.

The fact that part of a work rule is inconsistent with the governing labor-management contract is not always critical. In grievances of this kind, a more pertinent area for examination is how the aggrieved employee was treated under the rule. The manner in which a rule is applied is generally more important than what the rule says. In an individual grievance (as opposed to a class or policy grievance), a flaw in a regulation is relevant only to the extent that it causes harm to the aggrieved employee. The ODOT Rule may well be defective in many areas. It may, for example, establish a contractually impermissible rate of sick-leave accrual. But that fact would not be germane to the grievance of an employee who complains that s/he was improperly denied sick leave for reasons other than accrual rate. The Rule is made up of several parts, any one of which may be improper. But the only impropriety open to arbitral examination in an individual grievance is the part which allegedly caused the individual Grievant to lose something. In other words, there must be a connection between the improper portion of the regulation and the loss.

Grievant would have presented a justifiable case if circumstances had precluded his personal call-in and Supervision had refused to honor a message from anyone else. Those facts would have raised the flaw in the Rule and demonstrated a connection to Grievant's loss. But those are not the facts which the Union placed before the Arbitrator. The facts of this dispute are that Grievant could have made the call himself, but elected not to. There were no circumstances which precluded him from calling. He simply chose not to obey the Rule. His choice was also not to obey the Agreement. Undisputed evidence confirms that the Agency defers to the Agreement in the area where the Rule conflicts. It does accept delegated messages when employees are unable to call off for themselves. There is no evidence that Supervision acted any differently in Grievant's circumstances.

In the final analysis, the Arbitrator agrees with the Employer's contention that the alleged defect in the Rule is irrelevant to this controversy. In fact, the ODOT regulation really has little to do with the case. It is apparent that the Employee's sick-day request was denied pursuant to the language of §29.02 of the Agreement. Therefore, the pivotal issue is whether or not §29.02 permitted the Agency to deny the request, thereby causing the Employee to lose a day's wages.

The Union contends that the denial of sick leave was equivalent to imposing discipline in derogation of Grievant's due-process rights. Sick leave, according to the Union, was bargained for and earned, and the Employer had no authority to summarily deprive Grievant of it. This is an important contention with far-reaching implications. If the Union's position is adopted, the result will

be tantamount to requiring the Employer to grant every sick-leave application, whether contractual call-in procedures are followed or not. Employees will have the unbridled right to exhaust their sick days however and for whatever reasons they choose. The only recourse available to the State will be formal discipline.

In the Arbitrator's opinion, such decision would be patently wrong. It would practically abolish employee responsibilities set forth in Article 29. The Arbitrator finds that the contractual call-in requirements are not independent of the sick-leave benefit. They are, in fact, prerequisites for the benefit. An employee seeking to use sick leave must meet the express conditions precedent or lose the allowance. The fact that sick leave is earned does not make it unconditional.

It is concluded that Grievant forfeited his right to sick leave on August 8, 1986 by voluntary disregarding clear conditions bilaterally imposed upon every member of the Bargaining Unit seeking to use sick leave. The fact that he also violated an ODOT Rule is substantively irrelevant. His breach of the contractual conditions was enough to warrant divestiture of the sick day, because the conditions are incorporated into the allowance itself. It is accurate for the Union to argue that the lost day was equivalent to a one-day disciplinary layoff. But that does not alter the fact that Grievant elected to disqualify himself for the benefit and, therefore, was not entitled to it.

The grievance will be denied.

AWARD

The grievance is denied.

Decision Issued:
May 17, 1989

Jonathan Dworkin, Arbitrator