

ARBITRATION DECISION NO.:

217

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Rehabilitation
and Correction
Ross Correctional Institution

DATE OF ARBITRATION:

October 27, 1989

DATE OF DECISION:

December 13, 1989

GRIEVANT:

Darrin Miller

OCB GRIEVANCE NO.:

27-23-(89-01-27)-0006-01-03

ARBITRATOR:

Hyman Cohen

FOR THE UNION:

Don Sargent

FOR THE EMPLOYER:

Nicholas G. Menedis

KEY WORDS:

Removal
Job Abandonment
Excused Absenteeism
Failure to Follow Post
Orders

ARTICLES:

Article 24-Discipline
§24.01-Standard

FACTS:

The Grievant was employed with the Department of Rehabilitation and Correction. He was removed from employment on January 21, 1989 for violating the following standards of employee

conduct: Rule 1 being absent one full shift without prior notice; Rule 2 job abandonment; Rule 3 excessive absenteeism; and Rule 6 failure to follow post orders.

On December 14, 1988 the Correction Officer at the Ross Correctional Institution assigned to the control room received a call from the Grievant. She indicated on the call-in slip that the Grievant called at 6:28 a.m., that he was assigned to the first shift, the reason for his absence was that he was "sick" and under the category of "will return" on the printed form, she set forth a question mark. The officer indicated that she inserted the question mark on the call-in slip because the Grievant did not give her a date when he expected to return to work. She added that the Grievant did not refer to being under a doctor's care or that his leave was supported by a doctor.

The Personnel Administrator indicated that the Grievant was disciplined on 7 occasions prior to the Grievant's removal from employment. The disciplines imposed against the Grievant ranged from written reprimands to 3 and 5 day suspensions for such infractions as sleeping on duty, tardiness, excessive absenteeism, and failure to properly call-in. The Administrator further indicated that during the Grievant's tenure with the state he was sick or absent without leave on twenty-five (25) separate occasions during 1987 and from January through September of 1988, the grievant was sick or absent without leave for various periods of time on roughly thirty (30) different occasions.

Subsequent to the December 14 call-in, on December 17, 18, 19, and 20 the Personnel Administrator received notice from her supervisor that the Grievant had not showed up for work. On December 20 the Administrator said that the Grievant called in and she talked to him for approximately fifteen (15) minutes. According to the Administrator the Grievant was instructed to submit a doctor's statement when he returned to work and the grievant was also told that he would be disciplined for job abandonment. On December 26 the Grievant returned to work without a doctor's statement and was told to go home. He returned to work on the following day without a doctor's statement but on December 28 submitted a doctor's statement.

On February 15, 1988 the Warden indicated to the Grievant that he had demonstrated a pattern of absenteeism. He warned the grievant that if his attendance did not improve he would be removed.

EMPLOYER'S POSITION:

The Employer's position is that in view of the Grievant's history with the State there was just cause for his removal.

UNION'S POSITION:

The Union claims that there were mitigating circumstances which help to explain the Grievant's absenteeism. A car wreck in May, 1987 caused him to miss one and one-half months of work. Then in February of 1988 his fiancée prohibited him from seeing his son and his mother was ill. The Union further contends that the Grievant saw a doctor on December 8, 1988 because he suffered from depression and at the same time he developed a virus. The Union claims the Grievant called the Institution on December 14 and told the Officer in the control room that the was under a doctor's care until further notice. Between December 14 and December 27 the Grievant's doctor told him that his depression causes physical and mental problems including headaches, insomnia and confusion. He went on to indicate that the mental problems that he suffered during December 1988 were related to the events of the past two years.

The Union maintains that the State did not take into account some very substantial mitigating circumstances when disciplining the Grievant.

ARBITRATOR'S OPINION:

The Arbitrator felt that the events of December 14, 1988 were critical in resolving this dispute. Based upon the evidentiary record, the Arbitrator was persuaded by the testimony of the Officer in the control room. Accordingly, the arbitrator found that the Grievant did not tell the Officer that he was under a doctor's care until further notice. Had the Grievant, in fact, told the Officer on December 14 that he was under a doctor's care and that his doctor would advise him on December 20 when he would be returning to work, the Grievant would not have stated that he forgot to call in on December 17, 18, 19, and 20.

With regard to mitigating circumstances, it was undisputed that since his employment with the State, the Grievant had been subjected to several unfortunate circumstances. Had the Grievant's record consisted of absenteeism due solely to the Grievant's personal problems, perhaps the outcome of this dispute would be different. However, the Arbitrator found that some of the discipline received was for various offenses, some of which were of a serious nature. Moreover, the Arbitrator underscored the fact that the Grievant's excessive absenteeism and various disciplinary offenses which included numerous counseling sessions with supervisors occurred during only two years of service with the State.

In summary, the Arbitrator found that the mitigating circumstances claimed by the Union are of insufficient weight to offset the penalty of discharge. The State had proved by clear and convincing evidence that the Grievant had been discharged for "just cause" in compliance with Article 24.01 of the Agreement.

AWARD:

Grievance denied.

TEXT OF THE OPINION:

VOLUNTARY LABOR ARBITRATION

In the Matter of the Arbitration
-between-

THE STATE OF OHIO

-and-

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, AFSCME,
AFL-CIO, [DEPARTMENT OF REHABILITATION-
ROSS CORRECTIONAL INSTITUTION]**

ARBITRATOR'S OPINION

Grievant:
Darrin Miller

FOR THE STATE:
NICHOLAS G. MENEDIS,

Chief of Labor Relations
State of Ohio, Department of
Rehabilitation and Correction
1050 Freeway Drive, N.
Columbus, Ohio 43229

FOR THE UNION:

DON SARGENT
Staff Representative
Ohio Civil Service Employees Association,
Local 11, AFSCME AFL-CIO
8 Triangle Park
Cincinnati, Ohio 45246

DATE OF THE HEARING:

October 27, 1989

PLACE OF THE HEARING:

OCSEA/AFSCME, Local 11
1680 Watermark Drive
Columbus, Ohio 43215

ARBITRATOR:

HYMAN COHEN, Esq.
Impartial Arbitrator
Office and P. O. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295

* * * * *

The hearing was held on October 27, 1989 at the OCSEA/AFSCME, Local 11, Columbus, Ohio, before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing began at 9:25 a.m. and was concluded at 4:10 p.m.

* * * * *

On or about February 2, 1989 **DARRIN MILLER** filed a grievance with the **STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTION**, the "State" in which he protested his removal from employment at the **ROSS CORRECTIONAL INSTITUTION**.

Pursuant to the grievance arbitration procedures set forth under the Agreement between the State and **OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME, AFL-CIO**, the "Union", the grievance was carried to arbitration.

FACTUAL DISCUSSION

The Grievant was removed from employment on January 21, 1989 for violating the following standards of employee conduct: Rule 1a - "being absent one full shift without prior notice". Rule 2

- job abandonment; Rule 3 - "excessive absenteeism"; and Rule 6c - "failure to follow post orders".

The State's Case:

Penny Noble was a Correction Officer 2 at the Ross Correctional Institution. She is assigned to the control room where she is employed on the third shift which begins at midnight and ends at 8:00 a.m. Among her duties are the operation of the radio, answering telephone calls and receiving "call-ins". She indicated that on the call-in slips of persons employed at the correctional facility, she fills in the name of the employee, the reason for the employee's absence, the job of the employee and the days or period of time that the employee is to be absent from work and when the employee is expected to return to work.

On December 14, 1988 Noble received a call from the Grievant. She indicated on the call-in slip that the Grievant called at 6:28 a.m., that he was assigned to the first shift, the reason for his absence was that he was "sick" and under the category of "will return" on the printed form, she set forth a question mark.

According to Noble she received a call from Major Pence about the slip and was requested to put down as near as she could remember the discussion that she had with the Grievant. As a result, in a memorandum dated December 22, 1988 to Major Pence, she set forth the following:

"In regard to the call-in made by Darren Miller, CO II, in 12/14/88, my conversation with him was as follows:

I answered the phone, stating "Ross Correctional Institution, Officer Noble may I help you?" The caller stated "This be Miller". I said, "Excuse me and he said, "This be Darren Miller". I asked what I could do for him and he said "I'm not coming in". I started to fill out the paper work and asked him his name again. He said, "Darren Miller". I then asked if he was on 1st shift and he said, "yes". When I asked for the reason he wasn't coming in, Darren Miller stated "I be sick". I then wrote "sick" on his call in slip & filed it.

"For Your Information" C/O Penny Noble"

Elaborating on the telephone discussion that she had with the Grievant on December 14, Noble indicated to him that she "had to have a reason" after he said that "he was not coming in". According to Noble, the Grievant said, "OK, tell 'em that I be sick". Noble went on to say that she told him that she knew of his "work related problems". She further told him that she "could not put down that he was not coming in". She indicated to him that she would have to have a reason and according to Noble he said, "I be sick".

Noble acknowledged that she was busy in the control room between December 14 and 22, 1988. She estimated that she receives "between 50 to 60 calls during her shift".

Noble indicated that she inserted the question mark on the call-in slip because the Grievant did not give her a date when he expected to return to work. She added that the Grievant did not refer to being under a doctor's care or that his leave was supported by a doctor.

Sandra Price is the Personnel Administrator at Ross Correctional Institution. Price indicated that the Grievant "was disciplined on eight (8) prior occasions (7 of which occurred prior to the Grievant's removal from employment on January 29, 1989). Beginning August 20, 1987 through August 14, 1988, the discipline imposed against the Grievant consisted of three (3) written reprimands, three (3) five (5) day suspensions and one (1) three (3) day suspension for the following infractions: Sleeping on duty; leaving a perimeter vehicle unattended, lost control of

weapons; tardiness, excessive absenteeism, left post and unit; left man-down security instrument unattended in inmate housing unit; failure to properly call-in; absence of one (1) full call-in policy. Several of these infractions were repeated by the Grievant.

Price indicated that the Grievant was hired on January 11, 1987 and removed from employment on January 21, 1989. She said that during his tenure with the State as a Correction Officer 2, the Grievant had a poor attendance record. During 1987 the Grievant was sick or absent without leave on twenty-five (25) separate occasions. From January through September, 1988, the Grievant was sick or absent without leave for various periods of time on roughly thirty (30) different occasions. During 1987 the Grievant was unavailable for work when scheduled eighteen percent (18%) of the time and during 1988 he was unavailable thirty-seven percent (37%) of his scheduled time.

Turning to the events which led to the discharge of the Grievant, Price indicated that the call-in slip on December 14, 1988 indicated that he was sick. For three (3) days afterward she received slips to indicate that he did not report to work (it should be noted that December 15 was not a work day). On December 17, 18 and 19, 1988 Price received notice from her supervisor that the Grievant had not showed up for work. On December 20 she received a fourth slip concerning the Grievant which indicated that he was not at work and her supervisor stated that he had abandoned his job since he did not contact the Institution. Afterwards, on December 20 Price said that the Grievant called in and she talked to him for approximately fifteen (15) minutes. She stated that she told him that he did not contact the Institution for four (4) days and his failure to do so was considered job abandonment. According to Price, she instructed him to submit a doctor's statement when he returned to work. She also told him that he would be disciplined for job abandonment. Price went on to state that the Grievant returned to work on December 26 without a doctor's statement. As a result he was told to go home. The following day, on December 27, he returned to work again without a doctor's statement and was prohibited from working. On the next day, December 28, the Grievant returned to work with a doctor's statement.

At the pre-disciplinary conference that was held on January 3, 1989, Price indicated that the Grievant acknowledged that he had a discussion with her in which she impressed upon him the importance of a doctor's statement when he returned to work. She testified that at the pre-disciplinary hearing the Grievant acknowledged that he forgot to bring in a doctor's statement on December 26. At the hearing he also stated that on the following day, December 27, the Grievant said that he could not obtain a doctor's statement because it was Christmas and he could not obtain it from the doctor. When the Grievant was asked at the pre-disciplinary meeting why he had not submitted a doctor's statement between December 20 and December 24, 1988, Price stated that he responded by indicating that he did not know why he failed to do so.

Price indicated that the Grievant called in sick on December 11, 12 and 13, 1988 and it was approved. She then stated that he was aware of the call-in policy required by the State.

Price said that if the employee indicates on a call in, that he or she is under a doctor's care, the employee is not required to call in every day. She went on to state that in such a case the employee normally gives a specific length of time that he or she is expected to be absent from work.

Gary Mohr is the Warden at the Ross Correctional Institution. He referred to various occasions involving the discipline of the Grievant when he discussed with him his problems concerning attendance. Mohr indicated that on February 15, 1988 the Grievant had committed his third violation of the Standards of Employee Conduct. The Grievant had been absent eight (8) Saturdays and five (5) Sundays since July 4, 1987. In talking to the Grievant, Mohr related that the Grievant acknowledged that there was a pattern of absenteeism. Mohr testified that he told the Grievant he was taking a "dangerous route" concerning his employment with the Institution. He

warned him that if his attendance did not improve he would be removed. According to Mohr, the Grievant acknowledged Mohr's warning. Mohr said that at the time he thought "we could turn it around".

Mohr testified that Major Pence prepared a document which was introduced at the hearing indicating the offenses committed by the Grievant and the dates on which various supervisory employees had counseled the Grievant. The indicates that between July 23, 1987 and December 26, 1988 there were roughly twenty-six (26) occasions in which various supervisors counseled the Grievant concerning such offenses as "breach of security", "gross neglect of duty", "call-in procedure late", "unauthorized use of phone", "inappropriate uniform", "AWOL-no show" and "job abandonment".

Mohr stated that the Grievant came to work for the Institution on July 11, 1987 and his probationary period concluded in May, 1987 when the first inmate arrived at the Ross Correctional Institution. Mohr acknowledged that during the Grievant's probationary period there were no inmates at the Ross Correctional Institution which he indicated was completely filled with inmates in the fall of 1987.

Mohr testified about an episode which occurred on August 20, 1987 involving the Grievant. The Grievant was sleeping on duty in his perimeter vehicle at a time when there were a loaded .36 and a shotgun in the vehicle. Mohr stated that the Institution is a sixty (60) acre compound and that the perimeter vehicle is considered to be the "last line of defense". In other words, the perimeter vehicle has replaced the tower and is the "last line of defense" of the Correctional Institution. Sleeping on duty in the perimeter vehicle, Mohr indicated, was a serious breach of security for which the Grievant was suspended for five (5) days.

Less than two (2) months later on October 1, 1987 the Grievant left his perimeter vehicle unattended. In doing so, a loaded shotgun was left in the vehicle. The Grievant left his perimeter vehicle to investigate an episode in the parking lot. Although the Grievant acted with reasonable intent, according to Mohr, he committed a serious offense for which he was given a written reprimand.

On March 20, 1987 Mohr stated that the Grievant was given a five (5) day suspension. This discipline resulted from the Grievant leaving a "mandown security instrument" unattended in the inmate housing unit. A "mandown security instrument" sets off an alarm if it is placed in a vertical position. The instrument will trigger a signal when it goes off prompting correction officers to respond to the area where the mandown security instrument is located. Mohr stated that a hostage situation could develop if a mandown instrument falls into the hands of an inmate. Mohr testified about an occasion in August, 1988 when the Grievant was strip searched, because the Institution was informed by an inmate that the Grievant was in possession of contraband including marijuana with the intent to sell such contraband within the Institution. As a result of the strip search nothing was found on the Grievant.

Mohr indicated that in 1987 that he would consider the Grievant a promising employee. While at work, according to Mohr, he performed well except on those occasions when he was disciplined. He acknowledged that he could use "more staff".

The Union's Case:

The Grievant indicated that he had several "problems" while working at the Ross Correctional Institution. The Grievant referred to a car wreck in May, 1987 which caused him to miss one and one-half months of work. The next event which created a problem to him occurred in February, 1988. He indicated that his fiancée prohibited him from seeing his son. At the same time his mother was ill.

The Grievant testified about a strip search which he was subjected to in September, 1987. He

had driven to work with a correction officer named "Robinson". Apparently Robinson had been caught bringing drugs into the Institution for the purpose of selling the drugs to inmates. Robinson had been strip-searched and the Ohio State Police found contraband on him including two (2) plastic bags of marijuana. Since the Grievant drove with Robinson to work he said that he believed that Major Pence and the other officers were under the impression that he (the Grievant) knew about the contraband entering the Institution for the purpose of sale to the inmates. The Grievant indicated that he did not bring drugs into the Institution. However, the authorities at the Institution procured a search warrant to strip search the Grievant. However, nothing of an illegal nature was found on him. The Grievant indicated that he never confronted the inmate that accused him of bringing drugs into the Institution for the purposes of sale to the inmates. He said that Mohr told him that he was prohibited from presenting his accuser to him. In any event as a result of being strip searched the Grievant said that he was hurt and angered by it. The Grievant also said that only black correctional officers had been strip searched.

In March and April, 1988 the Grievant indicated that he participated in three (3) counseling sessions under the employer's Emergency Assistance Program (EAP). The Grievant said that he was counseled on his off days.

Turning to October 1988, the Grievant indicated that he was working with "Dian Keller". An inmate "got riled up and socked an officer in the face". The Grievant was present at the time and he said that the inmate did not obey his orders. With the help of Sergeant Lawless he was able to subdue the inmate but sustained a pinched nerve as a result of the scuffle. The Grievant was absent from work until December 5, 1988. During that period of time he indicated that he did not advise the Institution on a daily basis of his absence.

The Grievant indicated that he saw a doctor on December 8 because he suffered from depression. At the same time he said that he also developed a virus. He was under a doctor's care from December 8 to December 9, 1988 and the doctor's note indicated that he was able to return to work on December 10, 1988. On December 12, 1988 he was still subjected to virus and also had sinus problems. He was absent from work on December 12.

On December 14 he called the Institution and spoke with Noble. He said that he was under a doctor's care until further notice. While talking to her, the Grievant said that she interrupted their discussion to obtain a pen and paper. According to the Grievant, she asked him when he would return to which he said, he would be going to the doctor on December 20 and it depends upon his visit to the doctor. The Grievant said that she put a question mark on the call-in slip. The Grievant repeated that Noble told him during their telephone discussion that she would put a question mark after the statement on the slip which calls for the date of his return to work.

The Grievant said that he had a high school diploma and that he had attended Community College. Although he did not receive a degree he satisfactorily completed his English courses along with biology and social science courses. Thus when he read Noble's statement on December 22, 1988 concerning her account of their telephone discussion, he found it "degrading" and that the comments attributed to him insulted his intelligence. He believed it was an "ethnic slur" and he "could not believe" that Noble would set forth the account of their telephone discussion in the manner in which she did. The Grievant indicated that if Noble had taken his statement down verbatim he would not be in the predicament that he was in.

On December 20, 1988 the Grievant reported to work at the correctional facility and requested to speak to Captain Evener. According to the Grievant, Captain Evener asked him where he had been to which the Grievant said that he had been sick and under a doctor's care. The Grievant related that Captain Evener said that "we thought you had quit" and he then he told him to see Price. The Grievant testified that Price told him that he would be disciplined and that he would need a doctor's excuse in order to return to work. The Grievant told Price and Captain Evener that

he had "come from the doctor's office and told them the reasons why he had been at the doctor's office". The Grievant testified that he felt that the December 14 call to Noble had covered those reasons for his absence from work.

The Grievant acknowledged that he did not obtain a doctor's excuse on December 20. He then returned to work on December 26 and the Grievant said that he was turned away because he did not have a doctor's excuse. He added that the doctor was not in his office due to the Christmas holiday. He returned to work on December 28 after he had received a doctor's excuse which he submitted to the State.

Between December 14 and December 27 the Grievant's doctor told him that his depression causes physical and mental problems including headaches, insomnia and confusion. He went on to indicate that the mental problems that he suffered during December 1988 were related to the events of the past two (2) years. The Grievant also stated that he lost a good friend to suicide which contributed to his depression.

The Grievant testified on his disciplinary record beginning August 20, 1987. He indicated that on that day it was a very hot day and there was no air conditioning in the vehicle. As a result, he fell asleep on duty in a perimeter vehicle, which he was assigned to on that day. He received a five (5) day disciplinary suspension for sleeping on duty.

On October 1, 1987, the Grievant received a written reprimand because he left the perimeter vehicle unattended. The Grievant explained that he received a call from an officer that there was a visitor with a camera which was prohibited on the premises. He left his perimeter truck while the shotgun was in the rack and seized the camera from the visitors.

On February 15 the Grievant received a written reprimand for tardiness, excessive absenteeism and pattern abuse. He also left the post in his unit. The Grievant explained that he had domestic problems over seeing his son. He said that his fiancée created such problems.

On March 20, 1988 the Grievant received a five (5) day disciplinary suspension because he left his "mandown security instrument" unattended in the inmate housing unit. The Grievant indicated that the inmates were locked in their cells and there was no loss of control of the instrument. He told the officer who relieved him that the mandown alert was in the drawer.

The Grievant acknowledged receiving a written reprimand on August 15, 1988 and July 25, 1988 for tardiness and failure to properly call-in and tardiness and being absent one (1) full shift without notification and for failing to comply with the call-in policy.

On August 14, 1988 the Grievant received a five (5) day disciplinary suspension for failing to use proper call-in procedures, and tardiness. The Grievant indicated that his son was sick in the hospital. As a result he acted like a father to his son.

The Grievant indicated that he felt that the State was out to get him for whatever he did. He added that especially after Robinson got caught with drugs he began to receive discipline.

On cross-examination the Grievant said that between June 8, 1987 [after he had returned to work due to a car wreck in May, 1987] and February 1988 his attendance was "pretty good".

The Grievant said that he was harassed while at work and also that the stress that he suffered was job related. He acknowledged that while driving his automobile to work, his automobile ran out of gas a few times. The Grievant acknowledged that he did not grieve the prior disciplinary actions taken by the State.

DISCUSSION

The issue to be resolved by this arbitration is whether the Grievant was discharged for just cause, if not, what is the remedy to be awarded.

This Grievant was discharged for "being absent one full shift without proper notice"; "job

abandonment"; "excessive absenteeism" and "failure to follow post orders". The events that precipitated the discharge occurred between December 14, 1988 and December 27, 1988.

The events of December 14, 1988 are critical in resolving this instant dispute. On December 14, 1988 it is undisputed that the Grievant telephoned the correctional facility and spoke to Noble. However, the details of their conversation are in dispute. The Grievant testified that he told Noble that he would be absent and under a doctor's care until further notice. He also said that he told Noble that he would not know when he would return to work until he visited his doctor on December 20. Noble said that the Grievant told her that he was sick but he did not disclose to her that he was under a doctor's care. Furthermore, Noble stated that the Grievant did not tell her he return to work.

Based upon the evidentiary record, I am persuaded by Noble's version of the conversation with the Grievant. Accordingly, I have concluded that the Grievant did not tell Noble that he was under a doctor's care until further notice. I find it highly unlikely that Noble would fabricate what the Grievant told her on December 14. She is a bargaining unit member and there was no evidence to indicate that she ever had any difficulties with the Grievant. Moreover, her recollection of the details of their conversation has the ring of truth.

Noble's version of her telephone conversation included the phrases by the Grievant that "I be sick", and "This be Darren Miller". As a witness at the arbitration hearing the Grievant did not speak in this manner and for the most part, used proper English. However, he said that his physician told him that the depression which he suffered from, causes headaches insomnia and confusion. Furthermore, he acknowledged that he had mental problems during December, 1988 which were "related" to the events of the past two (2) years. The Grievant further stated that he was taking anti-depressant medication. In light of these considerations, I have concluded that the improper use of "be" in his speech on December 14, might have been due to his condition and the medication that he was taking at the time.

There are other factors which support Noble's version of her conversation with the Grievant on December 14, 1988. The Grievant said that he told Noble that he would be visiting his doctor on December 20 and that his return to work depended upon the advice of his doctor. He returned to work on December 26 without a doctor's note and was told by his supervisor to leave. He reported to work on February 27 but was "turned away" because he did not present a doctor's note. The Grievant said that he obtained a doctor's note on February 27, which he brought to work on the following day, February 28 when he was "put to work".

It should be underscored that on December 20 in a telephone discussion with the Grievant, Price told him that he had not contacted the Institution for four (4) days. She added that his failure to do so constituted job abandonment. It is undisputed that she warned him that when he returned to work, he was required to submit a doctor's statement. She also told him that he would be subject to discipline for job abandonment.

At the pre-disciplinary hearing which was held on January 3, 1989, the Grievant acknowledged that Price told him on December 20 that he could not return to work without a doctor's note. The Grievant did not dispute Price's account of their telephone conversation on December 20.

An investigatory interview was conducted by Major Richard L. Pence on December 30, 1988. During the interview, the Grievant acknowledged that he did not call in on December 17, 18, 19, 20, 24, 25 and 26, 1988 because he forgot that he was required to do so. The Grievant did not dispute Major Pence's written account of the investigatory interview which was agreed to by the parties as a joint exhibit.

Had the Grievant, in fact, told Noble on December 14 that he was under a doctor's care and that his doctor would advise him on December 20 when he would be returning to work, the Grievant would not have stated that he forgot to call in on December 17, 18, 19 and 20. There would be no need for him to call in on each of these days. As Price indicated, had the Grievant said that he

was under a doctor's care, he would not be required to call in every day.

There is also the August 15, 1989 letter from Dr. John W. Tyznik which leads to the conclusion that Noble's version of the December 14 conversation is credible. In his August 15, 1989 handwritten statement, Dr. Tyznik indicates that the Grievant "was temporarily totally disabled from 12-8-88 to 12-26-88. I approved return to work on 12-27-88. He has not been seen here since 12-20-88". However, on an earlier "certificate return to work" by Dr. Tyznik, he indicated that the Grievant was under his care "from 12/8/88 to 12 /9/88 and is able to return to work on 12/10/88". Another doctor's note, signed by "D. Greenfield, D.O." and dated 12/12/88, indicated that the Grievant has been under his care from "12/12/88" and "is able to return to work on 12/13/88". The Grievant failed to reconcile Dr. Tyznik's August 15, 1989 statement with the previous notes of Doctors Tyznik and Greenfield.

GRIEVANT'S RECORD

The offenses committed by the Grievant in December 1988 must be viewed against his record of previous offenses, none of which was grieved. During his two (2) years of service with the State, he has committed seven (7) offenses warranting discipline, including written reprimands on (3) occasions, three(3) five (5) day suspensions and a three (3) day suspension. The offenses have included sleeping on duty, leaving the perimeter vehicle unattended while weapons were located in the vehicle, excessive absenteeism, tardiness, failure to follow call-in policy and pattern abuse (absent on "eight (8) Saturdays and five (5) Sundays", between July 4, 1987 and February 15, 1988.

The Union contends that the August 14, 1988 episode should not be considered because it was not referred to in the Step 3 decision by the State. Even if the August 14, 1988 episode which involved the Grievant's failure to use proper call-in procedures, tardiness and failure to follow policies which resulted in a five (5) day disciplinary suspension is not considered, the Grievant's record is unsatisfactory.

The is also the Grievant's overall absenteeism record in 1987 and 1988. He was unavailable for work eighteen percent (18%) of the time in 1987 and thirty-seven percent (37%) of the time in 1988. Of roughly fifty-two (52) pay periods, in 1987 and 1988 the Grievant received full pay for merely twenty-three(23) pay periods, and no pay for four pay periods.

Furthermore, between July 23, 1987 and December 26, 1988, the Grievant has engaged in counseling sessions with various supervisors over a range of problems, including call-in procedure, AWOL, sick leave abuse, gross neglect of duty and job abandonment. Mohr indicated that as a result of the offenses committed by the Grievant and the numerous counseling sessions, he had lost his ability to correct the behavior of the Grievant.

CLAIM OF MITIGATING CIRCUMSTANCES

It is undisputed that since his employment with the State, the Grievant has been subjected to several unfortunate circumstances. In June, 1987, the Grievant was involved in an automobile accident, in which he suffered physical injuries. As a result, he was absent from work between May 3, 1987 and June 7, 1987. In February 1988, the Grievant had personal problems with his fiancée who "did not let" him see his son. At the time, his mother was ill. During April and March, 1988, the Grievant participated in counseling sessions under the State's emergency assistance program (EAP). Finally, during October, 1988, while subduing an inmate, the Grievant suffered a pinched nerve.

In *Philips Petroleum Co.*, 48 LA 402 (Jenkins, 1967) the Arbitrator commented on the excessive absenteeism of an employee in the following manner:

"An employee may be absent from work so much of the time as to become, in effect a part-time employee. The Company is entitled to insist on reasonable attendance. While an employee may be perfectly capable of doing a job, the job does not get done by him, if he is not there. The Company is entitled to have an employee that will get the job done. If an employee has repeated absences over a long period of time even if such absence are justified, he becomes of so little value as to justify his termination". At pages 404-405. See e.g., cases cited in Elkouri and Elkouri, *How Arbitration Works*, Fourth Edition (BNA, 1985) at page 579.

If the Grievant's record consisted of absenteeism due solely to the Grievant's personal problems, automobile accident and suffering an injury caused by subduing an inmate, perhaps, the outcome of this dispute might be different. However, as I have already established, the Grievant has received discipline for various offenses, some of which were of a serious nature. In connection with the offense of excessive absenteeism, between July 4, 1988 and January 23, 1988 the Grievant had been absent on eight (8) Saturdays and five (5) Sundays. The Grievant acknowledged that there was a pattern to his absenteeism. Furthermore, on various occasions, the Grievant did not comply with the State's call-in policies and committed the offense of tardiness. As Noble testified, the failure to call in creates serious staffing problems for the State. If an employee cannot cover for the absent employee, the position is left short. If the position is filled by another officer, his job might not be filled. It should be pointed out that an officer cannot leave his post until the officer is relieved. If the officer is not relieved, the officer is required to be "held over".

In September 1987, after Robinson had been found with drugs which resulted from a strip search, the Grievant., who drove to work with Robinson, also was subjected to a strip search. Although no contraband was found on his person, the Grievant believed that his supervisors thought he knew about Robinson bringing contraband into the correctional facility. The strip search, he indicated, caused him distress. Mohr testified, other employees have been subjected to being strip searched, and on some occasions illegal contraband has been found. I have also concluded on the basis of Mohr's testimony, that both black and white officers have been strip searched. Thus, there is no evidentiary basis to conclude that the State discriminated against the Grievant, a black person, because he was subject to a strip search. The fact that the Grievant drove to work with Robinson, and the "tip" from an inmate that he was selling drugs, serves as a reasonable basis for a correctional institution to strip search the Grievant. Furthermore, there are obvious common sense considerations for the State to maintain the anonymity of the inmate who supplies the State with a "tip" that the Grievant, a correctional officer, had sold drugs to inmates.

Moreover, it should be underscored that the Grievant's excessive absenteeism, and various disciplinary offenses which included numerous counseling sessions with supervisors occurred during merely two (2) years of service with the State. Thus, his brief tenure with the State is a factor to be taken into account in determining the outcome of the dispute between the parties.

To sum up, I find that the mitigating circumstances claimed by the Union are of insufficient weight to offset the penalty of discharge.

PENALTY

The Grievant's offense from December 14 through December 26, 1988 violated Rules 1(b), 2, 3 and 6(c) of the Standards of Employee Conduct. These Rules provide as follows:

Rule 1 b: "Being absent for one full shift without proper notice".

Rule 2: "Job abandonment--three or more days (consecutive) without proper notice".

Rule 3: "Excessive absenteeism".

Rule 6(c): "Failure to follow post orders, administrative regulations and/or written policies or procedures."

It is enough to state that for a first offense of job abandonment, the standards warrant disciplinary suspension of "5-10" days or "removal". In light of the unsatisfactory record of the Grievant, I have concluded that the State's penalty of discharge should be not disturbed. The State has proved by clear and convincing evidence that the Grievant has been discharged for "just cause", in compliance with Article 24.01 of the Agreement.

AWARD

In light of the aforementioned considerations the State proved by clear and convincing evidence that the Grievant has been discharged for "just cause" in compliance with Article 24.01 of the Agreement.

Dated: December 13,1989
Cuyahoga County,
Cleveland, Ohio

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