

ARBITRATION DECISION NO.:

356

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Youth Services

DATE OF ARBITRATION:

May 29, 1991

DATE OF DECISION:

June 28, 1991

GRIEVANT:

Herman L. Dickinson

OCB GRIEVANCE NO.:

35-03-(90-01-16)-0077-01-03

ARBITRATOR:

Patricia Thomas Bittel

FOR THE UNION:

Tim Miller

FOR THE EMPLOYER:

Paul Kirscher

Deneen D. Donough

KEY WORDS:

Removal

Just Cause

Neglect of Duty

Insubordination

Mitigation

ARTICLES:

Article 13-Work Week,
Schedules and Overtime

§13.04-Rest Periods

Article 31-Leaves of Absence

§31.01-Unpaid Leaves

FACTS:

In August of 1989, grievant was employed with the Department of Youth Services as a Youth Leader responsible for supervising a group of youths assigned to him. In the course of breaking up a fight on August 26, 1989 grievant broke his arm and went on occupational injury leave. In October of 1989 his status changed from occupational injury leave to authorized leave without pay.

On February 9, 1990 the Department of Administrative Services notified both management and grievant by mail that his claim for occupational injury leave would be held in abeyance pending receipt of additional information.

On a physician's form dated August 28, 1989, grievant identified his return date as approximately November 6, 1989. A second back-to-work form dated October 30, 1989 did not identify a specific return to work date, stating that the grievant would be off "until further notice".

From March 1, 1990 through July 16, 1990 management made no attempt to contact grievant. On July 17, 1990 management wrote a letter to grievant, stating his absence since March 1, 1990 lacked the requisite leave request and supporting documentation. The letter ordered him to return to work on Friday July 27 and states "Your failure to report to duty as ordered will be considered insubordination and/or neglect of duty and may result in disciplinary action".

By letter dated August 20, 1990 management notified grievant his failure to report to work as ordered "constitutes neglect of duty and/or insubordination" which could result in discipline up to and including removal. The letter further placed grievant on notice of a pre-disciplinary hearing and advised him that his failure to attend the meeting "will result in a waiver of your rights to a pre-disciplinary hearing".

On August 25 grievant provided a doctor's statement to management which identified his return to work date as October 20, 1990. On August 27, 1990 the pre-disciplinary hearing was conducted and grievant did not attend. By letter dated September 7, 1990 grievant was removed from his position as Youth Leader effective October 1, 1990.

EMPLOYER'S POSITION:

Management questioned grievant's failure to verify management's receipt of the doctor's statements he claims he sent in. The employer also stated that because the whole time the grievant was away he continued to work for the Cleveland Board of Education, a position also involving the supervision of youth. Finally, it was the grievant's duty to supply the necessary verification and he failed to do so.

UNION'S POSITION:

The union emphasized grievant's 21 years of service with no prior discipline and a good record. The union found much prejudice in management's handling of grievant's situation. It maintained management did not concern itself with his AWOL status after the three day period defined in the guidelines, but waited, disregarding even its own policy. Referencing Article 31 the union asserts management could have had grievant's status evaluated but did not bother.

The union asserts discharge is out of proportion to the situation and claims there was no inconvenience to management from grievant's absence.

ARBITRATOR'S OPINION:

In this case management failed to conduct an adequate and thorough investigation. While management succeeded in substantiating grievant's technical violation of the procedures for verifying his inability to work, management did not go the next step and confirm whether or not the employee was indeed able to work.

Management is held to the higher just cause standard articulated in the Collective Bargaining Agreement regardless of what it states in the letter of removal. This Arbitrator decided this case strictly under the parties' negotiated just cause requirements and without reference to the Revised Code.

The letter of removal itself does not appear to have prejudiced either grievant or the union in this case because the matter proceeded to arbitration and has been heard pursuant to the just cause standards articulated in the Collective Bargaining Agreement.

Under the contract, it is clear grievant could be disciplined for his unauthorized leave, though there is no indication that his offense was subject to immediate removal without the benefit of progressive discipline. While his offense was all the more serious because his unauthorized leave was long, it is also true that for approximately four and half months management allowed Grievant to be on unauthorized leave without warning him, disciplining him or advising him in any way that he should be concerned.

Finally, grievant's good record and no prior discipline in 20 years of service is generally accepted in arbitration as warranting serious consideration as a mitigating factor. In this Arbitrator's view, management

failed to give proper consideration to grievant's long history of service with the State.

AWARD:

The grievance is granted. Grievant shall be reinstated with retroactive benefits and seniority. However, due to his negligence in responding to management's demand for proper evidence of his inability to work, grievant shall receive no back pay for the period of his absence.

TEXT OF THE OPINION:

June 28, 1991

In the Matter of Arbitration
between

**Ohio Civil Service Employees Association,
AFSCME Local 11, AFL-CIO**

and

The State of Ohio Department of Youth Services

Case No.:

35-03-901016-0077-01-03

APPEARANCES

For the Union:

Herman L. Dickinson, Grievant
Tim Miller, Staff Representative

For the State:

Paul Kirscher, COB-LR Specialist
Deneen D. Donough, DYS
Labor Relations Administrator
Robert L. Jackson, Deputy Superintendent
Carolyn McCarthy, Personnel Officer

Arbitrator:

Patricia Thomas Bittel

BACKGROUND

This matter was heard on May 29, 1991 at the offices of the OCSEA in Fairlawn, Ohio before neutral arbitrator Patricia Thomas Bittel, mutually selected by the parties pursuant to Article 25 of their Collective Bargaining Agreement. The parties have stipulated to the following facts:

"1. The Grievant was employed with the department since March 2, 1969.

2. The Grievant was injured at work on August 26, 1989.
3. He was on occupational injury leave from August 26, 1989 to October 31, 1989.
4. The Grievant was terminated from DYS [Department of Youth Services] on October 1, 1990.
5. The Grievant was a youth leader at the time of his termination.
6. The Grievant has no prior discipline.
7. The matter is properly before the Arbitrator."

The parties have also stipulated to the following issue:

"Was the Grievant removed for just cause?
If not, what shall the remedy be?"

FACTS

In August of 1989, Grievant was employed with the Department of Youth Services as a Youth Leader responsible for supervising the youth assigned to him. In the course of breaking up a fight on August 26, 1989 Grievant broke his arm and went on occupational injury leave. In October of 1989 his status changed from occupational injury leave to authorized leave without pay.

On February 9, 1990 the Department of Administrative Services notified both Management and Grievant by mail that his claim for occupational injury leave would be held in abeyance pending receipt of additional information. The letter stated: "Benefits beyond 10/31/89 will be specifically denied based on medical review which found insufficient findings to justify payment."

On August 28, 1989 Dr. E. Hidvegi submitted a back-to-work form on behalf of Grievant which identified his return date as approximately November 6, 1989. A second back-to-work form dated October 30, 1989 did not identify a specific return to work date, stating "until further notice". It not stamped received by Management until December 17, 1990.

From March 1, 1990 through July 16, 1990 Management made no attempt to contact Grievant. On July 17, 1990 Management wrote a letter to Grievant, stating his absence since March 1, 1990 lacked the requisite leave request and supportive documentation. The letter ordered him to return to work on Friday, July 27 and stated "Your failure to report to duty as ordered will be considered insubordination and/or neglect of Duty and may results (sic) in disciplinary action".

By letter dated August 20, 1990 Management notified Grievant his failure to report to work as ordered constitutes neglect of duty and/or insubordination" which could result in discipline up to and including removal. The letter further placed Grievant on notice of a pre-disciplinary hearing and advised him failure to attend the meeting "will result in a waiver of your rights to a pre-disciplinary meeting".

On August 25 Grievant provided a doctor's statement to Management which identified his return to work date as October 20, 1990. The statement, from Dr. Emmanuel O. Tuffuor, stated Grievant had been under his care from 6/15/90 to 10/19/90. The form showed, however, that someone had whited out the start date of Tuffuor's care, and a changed date was written over the white out.

On August 27, 1990 the pre-disciplinary hearing was conducted and Grievant did not attend. By letter dated September 7, 1990 Grievant was removed from his position as Youth Leader effective October 1, 1990. The letter stated as follows:

"Your actions are in violation of Section 124.34 of the Ohio Revised Code, to wit: Neglect of Duty and/or Insubordination, and DYS Directive B-19, Paragraph IV, A, Rule 10, 'Reporting late for work; failing to report absence from work in a timely fashion as required by Departmental or facility rules or directives; and being absent from work without being excused', and Rule 12, 'Refusing or failing to comply with written or oral

instructions of supervisor and/or failing to comply with Departmental or local directives'."

A grievance was filed on October 15, 1990 contending Management had violated the contract by terminating Grievant without just cause. It asserted Grievant was under a doctor's care at the time of his discharge. The grievance was fully processed, culminating in the instant arbitration hearing.

Deputy Superintendent of Direct Services Robert L. Jackson stated Grievant never came back to work after breaking his arm. He explained in February of 1990 Grievant's status became absent without leave (AWOL) because he had received notice he was no longer eligible for leave without pay.

He admitted he knew of no contact by management between March 1 and July 17 of 1990. He said he did not know why there was a time lag in ordering Grievant back to work and admitted the order back to work did not warn him of possible discharge. He also admitted he did not attempt to have Grievant seen by an employer-paid doctor.

Jackson claimed Management received no documentation regarding his condition until after the pre-disciplinary hearing had been scheduled. It is the employee's responsibility to request leave from work and the request must be accompanied by a valid physician's statement with a return to work date, he explained.

He referenced the Department Policy on sick leave which states: "The physician's statement signed by a physician cannot be altered in any manner or it will be considered invalid." Jackson asserted Tuffour's documentation was unacceptable under the applicable policy. He admitted the diagnosis and signature on the doctor's statement appeared proper but stated the dates of treatment had been altered, which under the policy rendered the statement invalid.

When the pre-disciplinary hearing was held, Grievant did not attend though the Union did, said Jackson. The Union presented no information at the hearing, he stated, contending it represented Grievant was waiving his right to a pre-disciplinary hearing.

Personnel Officer Caroline McCarthy explained occupational injury leave is an interim step until Worker's Compensation begins coming in. She stated a division of the Worker's Compensation makes the decision of eligibility for receipt. She claimed Grievant received occupational injury leave from August 26 of 1989 to October 31, 1989. He applied for an extension and a decision to deny was made on February 9, 1990, she said.

She asserted after she received the February 9 notification, she advised supervision that Grievant had fallen into AWOL status because of a denial of benefits. At that point it was for supervision to handle the matter, she said.

Grievant testified he had approximately 20 years of service with the State. He explained he broke his arm while breaking up a confrontation between two youth and complications developed in his ability to grip after the cast came off.

He contended his first return date of November 6, 1989 had to be changed because his cast was still on. He said after he received the notice of discontinuance of benefits from the Department of Administrative Services, he went to a doctor immediately and asked him to send in information. He said he assumed the doctor would do so but when he received the notice of pre-disciplinary hearing, he brought Tuffour's August 25 note in personally. He admitted the doctor's secretary had altered a date, but claimed he was never told the notice was unacceptable.

He stated he did not go to the pre-disciplinary hearing in August because he thought the situation was covered. He claimed he realized his job was in jeopardy when he received the letter stating he had been removed. He contended he went to two different doctors who were supposed to send information to Management, but admitted he did not have a copy of their letters nor did he have an explanation why their letters were not received by the institution. He stated he understood an employee is AWOL if ordered to return to work and fails to do so.

He admitted he held a second job as a teacher with the Cleveland Board of Education and it was not necessary for him to take time off from that job after his injury. He said this position was Coordinator of Special Education.

It is noted that the July 17 letter sent to Grievant contained copies of applicable policy. One, B-7, addressed unauthorized use or abuse of sick leave stating:

"When unauthorized use or abuse of sick leave is substantiated, the Agency Head (or designee) will impose corrective and progressive discipline, (taking into account any extenuating or mitigating circumstances)."

Management's Disciplinary Policy B-38, not enclosed in the letter, contains Disciplinary Guidelines which specify an absence without leave of three or more days warrants removal.

ARGUMENTS OF THE PARTIES

Management

Management questions Grievant's failure to verify receipt of the doctor's statements he claims he sent in. It discredits his assumption everything was "ok" even after he received his pre-disciplinary notice. It asserts an anomaly exists because the whole time Grievant was away he continued to work for the Cleveland Board of Education, a position also involving the supervision of youth.

It was his duty to supply the necessary verification, argues Management, and he utterly failed to do so. Pointing out he did not even attend the pre-disciplinary hearing, it argued none of his actions indicated genuine interest in continuing his job with the Department. The grievance should therefore be denied, it maintains.

Union

The Union emphasizes Grievant's 21 years of service with no prior discipline and a good record. It points out his receipt of occupational injury leave was based on conclusive proof of injury. It notes the October 30, 1989 doctor's notice stated he could not come back to work until further notice.

Tuffour's August 25, 1990 note set a return to work date of October 20, well after the date he was terminated, emphasizes the Union. "Since they knew why he was out, why did they discipline him?" it asked. He had no reason to expect discharge given the slips he had already provided to Management, it contends.

The Union asserted notice and proper investigation are both elements of just cause. It submitted three arbitration cases in support of its position on just cause. Through these decisions and by argument, it attacked tardy discipline as unfair, offered support for the contention that poor investigation is proper grounds for setting aside discipline, and relied on the concept that Management's reliance on ORC 124.34 created procedural fault because the statute holds Management to a lesser standard than the collective bargaining agreement.

The Union found much prejudice in Management's handling of Grievant's situation. It maintained Management did not concern itself with his AWOL status after the three day period defined in the guidelines, but waited, disregarding even its own policy. Referencing Article 31 the Union asserts Management could have had Grievant's status evaluated but did not bother.

The Union asserts discharge is out of proportion to the situation and claims there was no inconvenience to Management from Grievant's absence. It asserts the grievance should be granted with Grievant reinstated and given full back pay.

DISCUSSION

Did Grievant Receive Due Process?

The Union has raised a number of due process challenges to the just cause of Grievant's discharge. Each will be separately addressed.

It has claimed Grievant was not on notice he could be discharged for taking an unauthorized leave. This argument cannot be credited due to direct testimony from Grievant that he knew AWOL status could lead to

discharge.

The Union has also claimed Management failed to properly investigate the case. It asserts proper investigation of a disciplinary situation is an essential element of just cause.

Conducting a thorough and fair investigation is indeed an element of just cause. In this case Management failed to conduct an adequate and thorough investigation. Article 31.01 provides as follows:

"The Employer shall grant unpaid leaves of absence to employees upon request for the following reasons:

C. For an extended illness up to one (1) year, if an employee has exhausted all other paid leave. The employee shall provide periodic, written verification by a medical doctor showing the diagnosis, prognosis and expected duration of the illness. Prior to requesting an extended illness leave, the employee shall inform the Employer in writing of the nature of the illness and estimated length of time needed for leave, with written verification by a medical doctor. If the Employer questions the employee's ability to perform his/her regularly assigned duties, the Employer may require a decision from an impartial medical doctor, paid by the Employer as to the employee's ability to return to work. If the employee is determined to be physically capable to return to work, the employee may be terminated if he/she refuses to return to work."

Article 13.04 Failure to Return from Leave states:

"Failure to return from a leave of absence within five (5) working days after the expiration date thereof may be cause for discipline unless an emergency situation prevents the employee's return and evidence of such is presented to the Employer as soon as physically possible."

While Management succeeded in substantiating Grievant's technical violation of the procedures for verifying his inability to work, Management did not go the next step and confirm whether or not the employee was indeed able to work. When Grievant tendered to Management a doctor's statement confirming his inability to work through and past the date of his removal, Management made no effort to confirm whether or not that doctor's statement was true. It merely rested on the technical violation of a policy voiding any statement with corrections.

The corrections on the statement pertained exclusively to the dates of treatment, not to Grievant's inability to work at the point in time of his removal. Management failed to contact either the doctor or the Grievant to notify them of the unacceptability of the doctor's statement. This failure is contrary to Policy B-7 which requires extenuating or mitigating circumstances to be taken into account.

Article 31C speaks to Management's right to terminate for refusal to work only in the context of a determination that the employee is actually physically capable of working. No such determination was made here. For these reasons Management's investigation was insufficient.

The Union has also argued Management's reliance on ORC 124.34 was a procedural error defeating the just cause of the case. As pointed out in State ex rel. Rollins v. Board of Education for the Cleveland Heights-University Heights City School District, 523 N.E. 2d 1289 (Ohio 1988), on matters of wages, hours or terms and conditions of employment, a collective bargaining agreement entered into pursuant to R.C. Chapter 4117 prevails over conflicting law unless such law falls within one of the exceptions listed in R.C. 4117.10(A). R.C. 124.34 has not been argued to fall within one of the exceptions listed in R.C. 4117.10(A). Hence the requisites of just cause prevail over the lesser standard articulated in R.C. 124.34.

Management is held to the higher just cause standard articulated in the collective bargaining Agreement regardless of what it states in the letter of removal. This Arbitrator decides this case strictly under the parties' negotiated just cause requirements and without reference to R.C.

The letter of removal itself does not appear to have prejudiced either Grievant or the Union in this case because the matter proceeded to arbitration and has been heard pursuant to the just cause standards articulated in the collective bargaining Agreement. 124.34. Simply stated, the loose standards of R.C. 124.34 have been superseded by the collective bargaining Agreement in this case, and Management's mistaken referral to R.C. 124.34 in the removal letter has had no significant impact on the proceedings here.

Was Grievant's Offense Dischargeable?

Under Article 13 it is clear Grievant could be disciplined for his unauthorized leave, though there is no indication that his offense was subject to immediate removal without the benefit of progressive discipline. Even so, Grievant knew and it is commonly known that being absent from work without leave is a dischargeable offense.

Though not binding on the Union, Management's Disciplinary Policy specifies removal for AWOL status of three or more days' duration. In most cases, these facts would justify removal of the AWOL employee. In Grievant's case, however, extenuating circumstances exist.

While his offense was all the more serious because his unauthorized leave was long, it is also true that for approximately four and a half months Management suffered Grievant to be on unauthorized leave without warning him, disciplining him or advising him in any way that he should be concerned.

This inaction on the part of Management created a false sense of security. Certainly, had Management intended to act on a three day limit for absence without leave, it grossly exceeded this time line and rendered it meaningless.

The evidence shows Grievant was indeed unable to work through and past the time of his removal. He provided credible confirmation of this to Management, which confirmation was rejected solely because of a technicality.

Certainly Grievant would have committed a dischargeable offense had he been progressively disciplined, or had he failed to provide any excuse for his continued absence. However, his offense was not one of fraud against Management, a clearly dischargeable offense. Rather, it was one of negligence in sending a tardy response to Management's very tardy information request -- a less serious matter. Given Management's own lackadaisical approach to enforcing its rules against absence without leave, Grievant should have been given the benefit of a specific warning of impending discharge prior to any final decision.

Should Grievant's Removal Have Been Mitigated?

Grievant has served the State of Ohio for over 20 years with a good record and no prior discipline. A record such as this is generally accepted in arbitration as warranting serious consideration as a mitigating factor. In this Arbitrator's view, Management failed to give proper consideration to Grievant's long history of service with the State.

AWARD

The grievance in this case is granted. The removal of Grievant was without just cause. He shall be reinstated with retroactive benefits (excluding time off) and seniority. However, due to his negligence in responding to Management's demand for proper evidence of his inability to work, Grievant shall receive no back pay for the period of his absence.

Respectfully Submitted,

Patricia Thomas Bittel
June 28, 1991