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Arbitration Decision No.: 373 After Receipt of Step 3
OCB Grievance No.: Hyman Cohen Response
Arbitrator: 15-02-(90-11-06)-0040-01-09

FACTS:

The grievant had been employed as a Clerk 1 by the Bureau of Motor Vehicles since April 1988. In October and November 1989 he was involved in two automobile accidents which resulted in a muscle injury to the grievant's back. The grievant's job entailed lifting boxes, which aggravated the injury. He was off work until April 11, 1990 for which he received disability benefits for the period starting January 20, 1990 with the exception of f ive days. He had received a f ive day suspension for failing to follow call-in procedure which he served in March, and did not grieve, thus occurred the five day gap in disability benefits. On May 10, 1990 the grievant gave a doctor's release to the employer in which his doctor stated that he would prefer the grievant had non-lifting work. The grievant's job could not be done without lifting, therefore, the grievant either left or was asked to leave work. The grievant, thereafter, failed to follow call-in procedures and did not contact the employer with any other medical statements. He was removed in October 1990 for abandoning his job.

MWLOYER'S POSITION:

The grievance was not arbitrable because the union failed to request arbitration within the time lines of the contract section 25.02. The step three response was dated December 26, 1990, however, the union did not request arbitration until February 4, 1991, well beyond the thirty day limit.

There was just cause for removal of the grievant. He had been on leave receiving disability benefits due to back injuries received in automobile accidents in October and November 1989. He failed to follow call in procedures and received a five day suspension while still off work. The grievant returned in April, 1990, however, he failed to produce a unqualified release from his doctor on May 10 as requested. The grievant left work that day and never returned, again failed to follow call-in procedures, failed to produce a proper doctor's release, and failed to respond to the employer's attempts to contact him. The rules concerning job abandonment and calling in are reasonable and the grievant had knowledge of them through the prior five day suspension.

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"ARBITRATION SUMMARY, OCSEA, Local I I AFSCME, AFL-CIO

UNION'S POSITION:

The grievance presented for arbitration has been timely filed and forwarded to arbitration. The employer dated the step three response December 26, 1990, however, the union did not receive it until a later date. The thirty day limit to request arbitration runs from receipt of the step three answer, not the date the

decision was made by the employer. Therefore, when the union requested arbitration on February 4, 1991, it was within thirty days of receipt of the step three response.

There was no just cause for removal. The grievant had been on leave receiving disability benefits due to back injuries received in automobile accidents in October and November 1989, until April 1990. The grievant received a five day suspension, which he served while off work, however, there is no connection between that discipline and the grievant's later removal. When the grievant produced a doctor's release on May 10, 1990 which indicated that the grievant should avoid lifting, the employer refused to accept it and sent the grievant home until a full release was submitted. The grievant had filed for workers compensation after May 10, thus, the grievant satisfied his obligation to notify the employer of his status. Therefore, no need for the grievant to follow call in procedures existed. Additionally, the employer never ordered the grievant back to work.

ARBITRATORIS OPINION:

The employer failed to prove that the union missed the thirty day limit contained in section 25.02. Section 25.02 does not indicate whether dating the Step 3 response starts the time period or receipt of the Step 3 response by the union starts the running of the 30 day arbitration request period. No evidence was presented as to the section's meaning. Although the employer dated the step three response December 26, no evidence was presented of when the union received it. Therefore, the employer failed to overcome the preference for arbitrability.

The employer did meet its burden in proving just cause for removal, in that the grievant abandoned his job. He had been off work, receiving disability benefits, due to back injuries received in car accidents in October and November 1989, until April 1990. He had received a five day suspension, which he served while off work, for failing to follow call in procedures. The grievant had notice of the importance of contacting the employer while off work. He submitted a doctor's release on May 10 which contained the ambiguous statement that the grievant should avoid lifting if possible. The grievant left work, never

called in, and never produced a full release to the '*6mpl6yer or at arbitration. The grievant failed to respond to the employer's attempts to contact him through his father and others. Filing for workers, compensation did not satisfy the grievant's duty to contact the employer while off work. Therefore, the grievant abandoned his job.

AWARD:

Grievance denied.

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VOLUNTARY LABOR ARBITRATION

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In the Matter of the Arbitration

ARBITRATOR'S OPINION

-between-

OHIO DEPARTMENT OF H16HWAY 6RIEVANT:

SAFETY, BUREAU OF MOTOR VEHICLES

JOHN A. 6ARNES
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-and-

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OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, Local I 1, AFSCME AFL-CIO

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FOR THE EMPLOYER: EDWARD A- FLYNN
Labor Relations Specialist
Ohio Bureau of Motor Vehicles
Department of Highwag Safety
4300 Kimberly Parkway
Columbus, Ohio 43227

FOR THE UNION: BRENDA 60HEEN

Staff Representative
Ohio Civil Service Employees
Association, Local I 1, AFSCME
1680 Watermark Drive
Columbus, Ohio 43215

DATES OF THE HEARIN6: June 21, 1991; July 15, 1991

PLACE OF THE HEARIN6: Offices of OCSEA
Columbus, Ohio

ARBITRATOR: HYMAN COHEN, Esq-
Impartial Arbitrator
Office and P. 0. Address:
Post Office Box 22360
Beachwood, Ohio 44122
Telephone: 216-442-9295

The heari ng was he] d on June 21 and Jul 15, 1991 at the of f i ces of OCSEA, Columbus, Ohio before HYMAN COHEN, Esq., the Impartial Arbitrator selected by the parties.

The hearing on June 21 began at 9:00 a.m. and was concluded at 5:20 p.m. The hearing on July 15, 1991 began at 9:00 a.m. and concludedati:]5p.m. Post-hearingbriefsweresubmittedonJuIU25, 1991.

Shortly after October 26, 1990 **JOHN A- GARNES** filed a grievance MUi the **OHIO DEPARTMENT OF HIGHWAY SAFETY, BUREAU OF MOTOR VEHICLES,** the 'State' in which he protested his termination. The grievance was appealed to the various steps of the Grievance Procedure contained in the Agreement between the State and **OHIO CIVIL SERVICE**

EMPLOYEES ASSOCIATION, Local I 1. AFSCME, AFL-CIO, the **'Union'.** Since the grievance was not resolved, it was carried to arbitration.

FACTUAL DISCUSSION

The Grievant was employed by the State from April 2l't, 1988 to October 26, 1990. When he was terminated the Grievant filled the position of Clerk I. Among his job duties was to open and process the mail and separate it by date. He also placed the mail in banana boxes which are long boxes 'similar to a poaching pan with two (2) handles". After placing the mail in banana boxes, the boxes were placed on a shelf.

The Grievant first experienced, lifting problems in December 1989. He -,aid that he had been in two (2) automobile accidents, one (1) in October 1989 and the other in November 1989. His injury from the first accident consisted of minor muscle strain. He characterized the second accident as a reoccurrence of minor muscle strain. In addition

to the automobile accidents, the Grievant referred to the repetitious lifting of the banana boxes. He indicated that the repetitious lifting on the job aggravated the muscle strain caused by the automobile accidents.

The Grievant applied for disability benefits and after a waiting period, he began receiving benefits from January 20, 1990 through March 25, 1990 While receiving disability benefits, the Grievant was suspended for failing to follow proper call in procedures and was given a five (5) day suspension between March 26 through March 30, 1990. His disability benefits were reinstated from March 31, 1990 through April 9, 1990. The Grievant returned to work on April 11, 1990 and he worked through April 30, 1990.

On May 7, 1990 the Personnel Division advised Carolyn Y. Williams, Chief of the Drivers Division, that the Grievant's anticipated date of return was May 10, 1990. On May 10, the Grievant reported to work with a doctor's statement indicating that he would be able to resume non-stressful work, on May 10. The Grievant's doctor also indicated the following "remarks":

"Injuries are certainly work-relat-ed &

work aag(ravat-ed. Probably chronic &
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will be continually aggr-av-@ttc-d by
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liftiiig--would prefer pt. (patient) to

have non-lifting work activities, if
possible.'

The circumstances under which the Grievant left the office on May 10 are in dispute and vall be considered later in this decision.

In June 1990 the Grievant filed a claim with the Bureau of Workers' Compensation. After the hearing which took place on September 12, 1990 the Bureau denied the Grievant's claim.

From May 10, 1990 to June 7,1990 the State did not receive any documentation releasing the Grievant to return to work. On June 7, 1990, Personnel received notification that the Grievant had filed a claim vath the Bureau of Workers' Compensation. From July 2 0,1990 to October 27, the effective date of the Grievant's termination, Personnel received notices denying the Grievant's Workers' Compensation claim.

Since May 10 when the Grievant was at work for appro3dmately twenty (20) minutes, he did not return tn work before he was terminated at the close of business on October 26, 1990. The State t .P,rminated the Grievant for job abandonment.

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The circumstances under which the Grievant left the office on May 10 are in dispute and will be considered later in this decision.

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Compensation claim.

Since May 10 when the Grievant was at work for appro3dma@ly twenty (2 0) minutes, he did not return to work before he was terminated at the rlose of business on October 26, 1990, The State terminated the Grievant for job abandonment.

TIMELINESS

The State raises a threshold issue which must be resolved before addressing the merits of the instant dispute. The State contends that the Union failed to appeal to arbitration as required by Article 25, Section 25.02, Step 3, A. of the Agreement which provides as follows:

> 'If the grievance is not resolved at Step 3, the Union may appeal the grievance to arbitration by providing Nqritten notice and a legible copy of the grievance form to the Director of the Office of Collective Bargaining within thirty (30) days of the answer, or the due date of the answer if no answer is given whichever is earlier.'

A Step 3 grievance meeting was conducted on November 27, 1990. Labor Relations Administrator Marlaina M. Eblin, according to the State, issued her response to the Step 3 grievance on December 26, 1990. The State contends that the Union's appeal to arbitration under Section 25.02, Step 3 A, was not mailed until February 4, 1991. Thus, the State argues that the Union's last day to appeal the grievance to arbitration was January 31, 1991. Since there was no mutual agreement to extend the time limits, as required under Section 25-05 of the

Agreement, the State contends that the instant grievance is not arbitrable.

Paul Kirschner, a Labor Relations Specialist vath the State of Ohio, Office of Collective Bargaining provided the only testimony on the issue of timeliness. He acknowledged that he was not involved in the processing of the instant grievance.

After carefully revievang the evidentiary record, I have concluded that the State failed to carry its burden of proving that the instant grievance is non-arbitrable. Eblin's response is dated December 2 6,1990. Section 2 5.02, Step 3 provides that the Union may appeal the grievance 'within thirty (30) days of the answer'. Section 25.02 does not indicate whether the thirty (30) days becomes operative upon receipt of the answer or merely the date placed on Labor Relations Administrator's response.

Eblin's answer is dated December 26, 1990. She was not present at the hearing to indicate whether her answer was mailed on December 26, 1990 to the Union. There is nothing in the evidentiary record to establish the date when Eblin's answer was mailed. Eblin's letter of transmittal indicates that her response was sent to the Grievant by 'certified mail, return receipt

requested'. However, the State failed to produce the 'return receipt' at the hearing. To conclude

that Eblin's answer was mailed on the date which appears next to Eblin's signature would be unfair and unwarranted. Since the merits of the instant dispute involves discharge, I am reluctant to find that the grievance is not arbitrable based merely on the date which appears on Eblin's response.

The State also submitted a signed and sworn statement of Charlene K. Collins who vms a Union representative during the period in question. In her statement Collins indicates that Gail Burnett, 2nd Vice President of the Union, who was Steward and 'represented' the Grievant in October, 1990 received the Step 3 response from the Grievant but "she didn't file it in a timely manner". The affidavit of Collins constitutes hearsay evidence which is highly unreliable. To attribute any weight to the affidavit would be extremely unfair and prejudicial to the Union. The failure of the Union to cross examine Collins severely handicaps the Union, especially given the nature of the threshold issue of timeliness. I cannot give any weight to the affidavit of Collins.

Thus, I find that the meaning to be given to the phrase in Section 25-02, "vhthin thirty (30) days of the answer' is ambiguous. Moreover, there is no reliable probative evidence that Eblin's answer was sent to the Union on December 2 6, 199 0. There is no evidence in

the record to indicate when her answer was sent to the Union. Accordingly, I have concluded that the grievance is arbitrable.

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THE MERITS

DISCUSSION

Having established that the grievance is arbitrable I turn to consider the merits. The parties stipulated the issue to be resolved by this arbitration as follows: 'Was [the Grievant] terminated for just cause? If not, what shall the remedy be?"

EVENTS PRIOR TO MAY 10, 1990

After two (2) automobile accidents in November and December, 1989, the Grievant applied for disability benefits which after a waiting period of two (2) weeks was approved beginning

January 20, 1990. These benefits were paid through March 25, 1990 when he was suspended for five (5) days beginning March 26, 1990.

The events giving rise to the five (5) day suspension of the Grievant in March, IcigO must be considered. The Grievant admitted that he received the disciplinary suspension in March because of his

"failure to call in He added that he was "on approved disability at the time".

On February 21, 1990 the State sent the Grievant notification that a pre-discipline meeting was scheduled for February 26, 1990 because it was 'considering a termination against [him) for job abandonment-. Greg L. Smith, the Grievant's immediate supervisor was present at the pre-discipline meeting and provided undisputed testimony as to what occurred at the meeting. Smith indicated that the Grievant said at first that he -was unclear about the work rule on notification and the call in procedure * *." According to Smith, the Grievant "also said that he wanted to come back to work and that he understood the work rule. Smith added that the Grievant understood why he was at the pre-discipline meeting.

Smith acknowledged that the notification of pre-discipline meeting to the Grievant referred to job abandonment but he was disciplined for f ailure to call in and notify him of his continuing at,sence.

Smith reported directly to Williams who indicated that before the Grievant's disability benefits were approved.. the Grievant's last day at work was January 4, 1990- Williams received documents from

Personnel which indicated that the Grievant had applied for disability benefits and that at least initially his anticipated date of return was January 27,1990. The notification from Personnel to Williams was dated January 30, 1990. It should be pointed out that the Grievant did not notify Williams of his absence from January 4 to January 27, I<)90. He failed to return to work on January 2 7. Personnel indicated on the Grievant's application for disability benefits that a doctor's statement on behalf of the Grievant had been received on January 2 9. On January 2 9, however, the Grievant did not return to work.

On January 31, 1990 the Grievant met with Assistant Chief Ruth Eckstkin. In response to

his query as to whether he was required to present a doctor's statement in order to return to work, she said that he 'needed to go to Personnel. The Grievant, however, failed to report to Personnel.

The Grievant, according to Williams, next called in on February 5 to state that he was not ready to return to work and that he 'would first check vhth his doctor". There followed notif ication from Personnel on February 7, and March 6, which indicated that the Grievant's anticipated dates of return were February 19 and March 19, 1990. Williams indicated that the Grievant was "developing a pattern" with the State not knovhng where he was and when he would be back'. Furthermore, he failed to notify the State of his absence from

work. Williams added that there were 'gaps' concerning when he said that "he would return to work and not return to work'.

Williams confirmed Smith's testimony that the Grievant indicated at the pre-discipline meeting 'a desire to return to work'. In his March 19, 1990 letter to the Grievant, Director Michael M. Denihan informed the Grievant of his "failure to follow proper call-in procedures * *." Denihan also advised the Grievant that if he continued "to ignore proper reporting procedures further disciplinary action may follow'.

After the Grievant served his disciplinary suspension during the last week of March, 1990, on April 3, 1990, Personnel Officer Dottie Milburn sent 'a physician's statement of orthopedic disability' to 'Disability Benefits" to Williams. The Grievant's physician indicated that he was able to resume regular work on April 10, 1990. On April 3, 1990, Personnel notified Williams that the Grievant's anticipated date of return to work was April 10, as set f oM in the report of the Grievant's doctor. The Grievant returned to work on April I 1, 1990 and continued to work through April 30, 1990. On May 7, 1990 Personnel advised Williams that the Grievant's anticipated date of return was May 10, 1990.

EVENTS OF MAY IO, I 990

It is undisputed that the Grievant reported for work on May 10, 1990. According to Smith's version of the events, he approached the Grievant and requested a doctor's release to return to work. After three (3) to four (4) minutes, the Grievant gave Smith his "attending physician's

statement', in which the doctor indicated that the Grievant was able to resume 'non-stressful work on May 10, 1990". The doctor's remarks' which have been previously set forth, bears repeating:

> "Injuries are certainly work related & work aggravated--probably chronic & %III be certainly aggravated by lifting--would prefer pt (patient) to have non-lifting work activities if possible.'

After reading the doctor's "remarks", Smith brought the doctor's statement to Williams. According to Smith, Williams agreed that "there are no non-liftina light duties to perform' in the Grievant's job. Smith testified that Williams instructed him to tell the Grievant that there were no non-lifting job duties. Smith did so, and the Grievant told him that he was going to leave and not perform his job duties. Smith said that he then left the building.

Williams confirmed that Smith gave her the doctor's statement. She indicated that in his remarks the doctor set forth that 'would prefer" the Grievant to have a non-lifting job. Williams indicated that the Grievant was sent to Personnel on May 10.

The Grievant said that he placed his doctor's statement on Smith's desk when he reported for work on May 10. Shortly afterwards, Smith came to his desk and requested him to report to Williams. In Williams'office, the Grievant said that she informed him that -she talked to Edward A. Flynn, the Labor Relations Manager and he told her that there could be no variations in [his] job duties. While talking to him, the Grievant said that Williams had his doctor's statement which she received from Smith -in front of her". The Grievant said Williams told him that since -there could be no variations from [his] job duties, [he) would have to get a full release from [his] doctor in order to return to work'. The Grievant said that he "then left'.

A "summation" dated September 25, 1990 by the Hearing Officer at the pre-discipline hearing that was held on September 7, 1990 which preceded the Grievant's termination, in relevant part, indicated the follovhng:

> 'Dottie Milburn advised Mr. Garnes that he could not return to work on a restricted basis and that he would need a signed doctor's statement stating that he is able to return to

work * *.'

The Grievant testified on re-direct examination that this finding by the Hearing Officer was 'accurate'.

EVENTS AFTER MAY 10

On June 7, 1990 the Grievant filed a claim with the Bureau of Workers' Compensation. A pre-disciplinary hearing was held on @,eptember 7, 1990 in which the Hearing Officer found that just cause e;dsted for disciplinary action because the Grievant failed to follow proper call-in procedures after May 10. Among the findings of the Hearing Officer were the following

> I,* * Mr. Garnes left at 8:20 (on May 10, 1990) and has not yet returned to work. His supervisor advised him to keep in contact with the BMV Personnel Office or his division.

Mr. Garnes has not contacted the BMV Personnel Office since late June, 1990.

Mr. Garnes has not contacted his division since May 10, 1990.

The Hearing Officer acknoTMedged that the Grievant filed a claim Mth the Bureau of Workers'Compensation and that a hearing on his claim was scheduled for September 12,1990.

The Grievant testified that as a result of the hearing before the Bureau of Workers'Componsation on September 12, the Bureau denied his claim. He indicated that he filed an appeal from the Bureau's denial of his claim.

ANALTSIS

I have concluded that the State proved by clear and convincing evidence that the Grievant was discharged for just cause. The Grievant failed to notify the State of his continuing absence from work in violation of the State's Work Rules, and Section 29.03 of the Agreement. Accordingly he abandoned his job.

It is of great weight that the "remarks" section of the doctor's statement which the Grievant presented to the State on May 10, 1990

indicated in relevant part that he [the doctor] "would prefer pt. (patient) to have non -lifting work activities if possible'. The Grievant was advised by Williams and Milburn that in order to resume his full time duties, he was required to submit a doctor's release without restrictions. It is of great weight that in his 'remarks' the Grievant's doctor does not require the Grievant to perform non-lifting work. He merely states that he 'would prefer' such 'non-lifting work activities if possible'. In light of the wording of these 'remarks, I find it nothing less than extraordinary that the Grievant was not able to obtain a doctor's release vhthout the qualifying terms 'would prefer" and "if possible". Indeed the doct-or's remarks imply that the Grievant was not prohibited from non -lifting work. The reasonable inference to be drawn is that if such non-lifting activities were not possible then the Grievant would be able to perform lifting activities. However, the Grievant never submitted a doctor's statement to the State providing for his release to return to work @thout restrictions.

The Grievant contends that he performed his job duties on May 10, 1990. Shortly after reporting for work he said that he was sent home. There is nothing in the evidentiary record that the State assigns light duty jobs to its employees. Moreover, the Grievant did not object to the State requesting him to leave on May 10 until he obtained a doctor's clearance without restrictions. At the hearing, and given the phrases "would prefer" and "if possible" in the doctor's

remarks", the Grievant did not explain why he was not able to resume his full duties. The doctor's "remarks" could not be characterized as unequivocal and certain. The Grievant did not explain why he was not able to obtain a doctor's full clearance to resume his duties given the clear intent of the doctor's 'remarks' that he 'would prefer non-lifting work activities, if possible'.

Furthermore, the State was not arbitrary or unreasonable in requiring the Grievant to obtain an unqualified medical release in order to return to work. The- .-remarks" of the Grievant's doctor raised doubt as to whether the Grievant could resume his normal duties. I believe that the State acted vasely in requiring the Grievant to obtain a release which would remove such doubt.

It is significant that the Grievant never provided the State vhth any medical documentation after May 10,1990. The State was left in the dark about the Grievant's status until he was terminated at the close of business on October 26,1990. The State received notification on June 7,

1990 that the Grievant filed a claim with the Workers' Compensation Bureau. Thereafter the only documentation that the State received were rejections by the Bureau of Workers' Compensation of the Grievant's claims. As I have already indicated, the Grievant carried a burden of explaining why he was not able to obtain a doctor's unqualified release to return to work. Hoviever, from

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May 10, 1990 the State has never received such an explanation. Moreover, the Grievant failed to provide notification of his absence and the reasons for his absence, from May 10, 1990 to the close of business on October 26.-1990.

The Grievant relies for the most part on contacting Milburn in Personnel after May 10, in his efforts to seek workers' compensation and disability benefits. He testified that 'this satisfied [his) responsibility to notify "the State--this is what he was instructed to do". However, Milburn was on sick leave between August 13 through August 31, 1990, at which time she retired from employment. The Grievant admits that he never contacted Personnel or his supervisor after June 7, 1990 when he gave notice to Personnel that he filed a claim Mth the Bureau of Workers'Compensation.

The failure of the Grievant to notify the State of his absence and the reasons for his absence must be viewed in light of the absenteeism of the Grievant from January, 1990 to October 26, 1990, and the Grievant's failure to comply with the State's Work Rules and Section of the Agreement on the requirements of notification of his absence. The Grievant worked until January 4,1990 after which he @,vorked between April 11, 1990 through April 30,1990. He reported for ,.Rork on May 10, 1990 and was on duty for roughly twenty (20) minutes when he was told that an unqualified doctor's release was

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required to continue to work. Thus, from January through almost the end of October [the Grievant was terminated at the close of business on October 26,19901 the Grievant worked slightly more than three (3) weeks. It should be noted that the Grievant suffered from a minor muscle strain from two (2) automobile accidents in late 1989. He indicated that the repetitious lifting on the job aggravated the muscle strain.

On March 19, 1990 the Grievant was suspended 'for five (5) working days for failure to follow proper call-in procedures". He failed to file a grievance and thus I have inferred that he acquiesced **in** the discipline that he received. It is undisputed that at the predisciplime hearing before the five (5) day disciplinary suspension was imposed, he admitted that he understood the notification rules. It should be underscored that he was disciplined despite receiving disability

benefits.

On May 10, 1990 the Grievant showed up for work with a doctor's statement which was equivocal in releasing the Grievant to his regular full time duties. As the Grievant's doctor indicated, he would prefer non-lifting work activities if possible'. Despite the uncertain language in the doctor's statement, the Grievant has not submitted a full medical clearance to return to work. Indeed, he did

not produce such a medical release at the arbitration hearing.

It is true that from May 10, 1990 the Grievant never received a letter from the State to return to work. Moreover, he never received a telephone call. However, it must be underscored that it is not incumbent upon the State to pursue the Grievant in order to determine his status. The Grievant knew that he ws absent from work, and was aware of the reasons for his absence. It is not only the State's Work Rules that require an employee to provide the State with notification of the reasons for absences, but common sense requires it as well.

This is not to conclude that the State did not make an effort to contact the Grievant. It did. I am persuaded by Williams' testimony that she periodically asked the Grievant's father about the Grievant's whereabouts and when he would be returning. According to Williams, the Grievant's father said to her that he 'did not know what his son was up to". He also told her that "he would give him [her] message Ptiid he could not control whether his son %ffas coming back or not".

The Grievant's father, Mr. Garnes, Sr., who is employed by the State [the same agency that employed his son] said that the Grievant lived "next door' to him. He testified that he 'did not know for sure" if

his son had a telephone on May 10. Mr. Garnes, Sr, denied that Williams gave him a message concerning the absence of his son and his failure to call the State. He also failed to recall Flynn's discussion with him, whereby Flynn told him to tell his son in February 1990 that he should either report for duty or notify his supervisor of his absence. In light of the obvious motive to protect his son, I do not find the testimony of Mr. Garnes, Sr., credible.

Moreover, Gail Burnett, 2nd Vice-President of the Union, said that Williams requested her to contact the Grievant to find out when he would return to work. She said that she tried to contact the Grievant several times in order to find out when he would return to work.

On one (1) occasion, Burnett was successful in reaching him. The Grievant told her that he was "in the process of going to the doctor'. Burnett never told Williams of her conversation with the Grievant. Burnett indicated that she talked to Mr. Garnes, Sr. several times in order "to get hold of the Grievant through his father". On one (1) occasion Mr. Garnes Sr. returned her telephone call, but she "could not remember' what he said. In light of the testimony of Mr. Garne.-,, Sr. and Burnett, the Grievant was as elusive to them as he was to the State. In any event,

the State exercised a good faith effort to contact the Grievant but was unable to do so.

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On August 8, 1990, Williams requested Denise Friend Foster, deputy Administrator to schedule a pre-disciplinary hearing for the Grievant. The request provides that the Grievant did not report to work on May 10, Williams also indicates that the Grievant 'was suspended March 26-30, 1900 for job abandonment'.

The evidentiary record establishes that the Grievant reported for work on May 10, 1990. Furthermore the Grievant was suspended during the last week of March, 1990 'for failure to follow proper callin procedures'.

I find no prejudice to the Grievant in what is an internal State document from Williams to Foster. In addition, after indicating that the Grievant did not report to work on May 10, 1990, Williams indicates in her August 8, 1990 memorandum to Foster that the Grievant spoke with Smith on May 10 and that he 'has not reported since'. Thus, although the document by Williams is confusing, she refers to the Grievant reporting to work on May 10. Again, I find that the August 8 memorandum does not prejudice the Grievant's rights.

The Union states that on May 10, 1990 the Grievant was willing and able to work. There is nothing in the evidentiary record to support his conclusion. Despite the qualified nature of the "remarks' by the Gric-varit's doctor, the Grievant said that he left work on May IO,

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The Union states that on May 10, 1990 the Grievant was willing and able to work. There is nothing in the evidentiary record to support his conclusion. Despite the qualified nature of the "remarksby the Gric-vant's doctor, the Grievant said that he left work on May 10,

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,vhen Williams told him that there could be no variations from his job duties and that he would have to obtain a full release from his doctor in order to return to work.

Despite the fact that the Grievant's doctor indicated that he would prefer' the Grievant to perform non-lifting activities if possible" the Grievant did not protest Williams' requirement that he obtain a release without restrictions. I have inferred that the Grievant's silence and hasty departure from the office indicates that he was only too willing not to work unless the 'preference' of his doctor was converted to a requirement. The Grievant's willingness not perform work without this doctor's preference is confirmed by his failure to obtain a doctor's statement Mthout the qualifying terms contained in the doctor's statement submitted on May 10, 1990. No such doctor's statement was submitted at the hearing. I find that the evidentiary record waffants the reasonable inference that the Grievant was not valling and able to work.

Turning to another argument raised by the Union. I find a reasonable connection between the disciplinary -=suspension of the Grievant in March, 1990 and his conduct on May 10, 1990 and his

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conduct until the close of business on October 26, 1990 when he was terminated,

It is undisputed that the Grievant received a disciplinary suspension of five (5) days in late March, 1990 for failing 'to follow proper call-in procedures'. His failure to call in and establish contact with the State after May 10, 1990 leads to the reasonable inference that the Grievant is indifferent to his employment with the State. In effect, the failure to call **in,** in the absence of any

evidence of his inability to do so, implies an attitude by the Grievant of giving up or rejecting the basic obligations to his employer. His conduct manifested an attitude, in effect, of abandoning his job.

The Grievant's silence on May 10, 1990 as well as his failure to provide any medical documentation which would cure the equivocating language of his doctor concerning the non-lifting activities that he [the doctor] would prefer, if possible, as well as his continuing failure to notify the State after May 10 or after June 7, indicates a consistent course of conduct. His conduct not only indicates a la k of interest and indifference in the job, it is also irresponsible. Based upon the Grievant's conduct, the job had little value to him. The evident.iary record leads me to conclude that the failure to follow proper call-in procedures is not only directly connected to the offense

job abandonment but in this case, it is also a component of job abandonment.

STATE'S WORK RULES

Smith, Williams and Bessie Smith, Personnel Officer referred to three (3) different Rules contained in the State's Work Rules, which were violated by the Grievant. The first Rule that was referred to concerns "Absence Without Leave' contained in Section C. 1. which provides as follows:

> "C. LEAVE POLICIES
>
> 1. ABSENCE WITHOUT LEAVE
>
> 'Any employee who absents himself/herself from duty habitually or for three or more successive duty days, vathout leave and without notice to his/her immediate supervisor of the reasons for such absence may be subject to removal for neglect of duty under provisions of Section 124-34 Ohio Revised Code."

Another Rule referred to by the @3tate's vatnesses is Section C. 3
II A and C N%7tiik,.h provide as follov-7s

> "C. LEAVE POLICIES

I 1. Notif<u>ication</u>

A. Employees who are sick and unable to report to work shall notify their immediate supervisor or designee who is a member of the management staff. Notification vhll be made on a daily basis no later than one half (1/2) hour after the scheduled reporting time for work * *.

C. When convalescence at home is required, employees shall be responsible for notifying their immediate supervisor or equivalent supervisor at the start and termination of such perioll of convalescence."

There is a caveat after the Sick Leave provisions that is set foM in the Stato,'s Rules which provides as folloxvs:

"Note: Employees should refer to the appropriate labor contract which may expand on or clarify the above descriptions.'

In this connection Article 29, Section 29-03 provides as follows:

..* * Notification

When an employee is si,,-k and unable to report for work, he/she ,,Ml notif i

his/her immediate supervisor or designee no later than one half (1/2) hour after starting time, unless circumstances preclude this notification. The Employer may request a statement, personally written and signed by a physician who has examined the employee or the member of the employee's immediate family, be submitted within a reasonable period of time. In institutional agencies or in agencies where staffing requires advance notice, the call must be made at least ninety (90) minutes prior to the ,;tart of the shift or in accordance %ith -current practice, whichever period is less.

If sick leave continues past the first day, the employee will notify his/her ,supervisor or designee every day unless prior notif ication N-va@. given of the number of days off. When institutionalization, hospitalization, or convalescence at home is required the employee is responsible for notify the supervisor at the start and end of such period.'

I have concluded that the Grievant violated the Work Rules providing for notification and Section 29-03 **of** the Agr"ment. The A W.O.L. Rule in Section C.1

is not arcane or -complex. It. is a basic, -lirriple and common sense Rule. It provides that an employee @7to is habitually absent or absent for three 3 or more successive dut,7 dalls

without leave and Athout notice "to his immediate supervisor of the reasons for such absence may be subject to removal for neglect of duty". After May 10, 1990 the Grievant was absent for three (3) or more successive days and was habitually absent. He was 'without leave' and he did not provide reasons for his absence to his immediate supervisor.

Turning to Section C. 3 11 A. I have concluded that the Grievant failed to provide notification on a daily basis to his immediate supervisor or designee who is a member of the management staff. He also failed to provide such notification on a daily basis. The premise upon which Section C. 3 II A becomes operative is that the employee is sick and unable to report to work. There was no medical documentation submitted by the Grievant after May 10, 1990 that he was sick and unable to report to work. In any event, he failed to provide notification on a daily basis that he was sick and unable to report to work.

Section C. 3. II C. requires notification when convalescence at his home is required. There is no evidence in the record that the Grievaiat,oms required to be convalescing at his home. Indeed, after May 10, 1990 there is nothing in the evidentiary record about the nature of his condition at all. The Grievant did not notify his supervisor or equivalent supervisor at the start and termination of

such period of convalescence, contrary to the terms of Section C. II C of the Work Rules.

Turning finally to Section 29-03 of the Agreement, the State is not required to request a statement personally written and signed by a physician who has examined the Grievant. Thus, at its discretion, the State did not request such a doctor's statement from the Grievant's doctor.

In addition to the State's Work Rules on notification, which are included in Section 29-03, the Section also sets foM the following:

> "If sick leave continues past the first day, the employee @ll notify his/her supervisor or designee every day unless prior notification was given of the number of days off.'

It is enough to state that the Grievant failed to comply v4th these notification provisions

contained in Section 29-03.

The point to underscore is that after MatT 10, 1990 the Grievant provided no notification at all to the Statp,. on his absence and the reasons for his absence. There is nothing in the Work Rules or Section 29-03 that provides that filing claims for Workers' Compensation benefits and/or disability benefits excuses an emplo@iee from complil,ing vhth the Work Rules and Section 29-03 of the Agreement.

The notification provisions are not subject to the procedures and decisions of outside agencies. There is nothing in the applicable notification provisions that requires an e.@austion of the appeals process of other agencies before notification is required.

The purpose to be served by the notification provisions

contained in the Work Rules and Section 29-03 **of** the Agreement is

different than the filing and processing of Workers' Compensation

claims. Notification of absence is among the fundamental
responsibilities owed by an employee to an employer which are inherent in the work relationship. The responsibilities were
eloquently stated **in** 49 LA 365 (Dworkin, 1967):

> 'Among the principal obligations owed to the employer are that the employe will attend to his job, will be regular in his attendance, will conform to his scheduled hours of work and vall
> comply with any reasonable rules and
> provisions governing advance
> notification of an intended absence.
> An employee is obligated tk) report for work regularly and to seasonably notify his employer of circumstances which prevent him from reporting as scheduled.' Atpages 368-369.

It should be underscored that the Grievant was well aware of
the Work Rules requiring notification. It is undisputed that he

acknovnedged that he understood the notification requirements for absenteeism at the pre-discipline hearing which preceded his **five** (5) day disciplinary suspension in late March, 1990.

Moreover, the Grievant was disciplined while receiving disability benefits.

Since May 10, 1990, the Grievant has failed to satisfy the principal obligations set forth in the *M"tia FJ@trir* decision.

The Union questions why the State waited from May 10, 1990 to September 7, 1990 to impose discipline. The State waited for the decision by the Bureau of Workers' Compensation after his hearing on September 12,1990 before removing him for job abandonment. Thus, the State did not act with dispatch or in a hasty manner. It exercised extraordinary patience, forebearance and restraint. It offered the Grievant every opportunity to return to work. After the Grievant's claim was decided by the Bureau of Workers' Compensation, the Grievant continued with his failure to notify the State of his absence and the reasons for his absence. The State's patience and tolerance in (lealiiic, with the Grievant should not be penalized.

DISPARATE **TREATMENT**

The Union presented evidence presumably for the purpose of sho"ng that the State treated the Grievant in a disparate manner. Burnett said that the first time that she went on disability, she called

in the first time but did not do so thereafter. The second time that she

was on disability leave, in 1989, Burnett called in every day for three

(3) days. She said that she as told that she did not have to do so after

the third day. The third time was in April, 1991 when after turning in

the forms. and a doctor's statement, she did not call in. On cross-
e.@mination, Burnett said that when she did not report to work on May 16, 1991 (the most recent occasion when she was on disability) she called her supervisor.

I cannot conclude that Burnett' experiences with disability leave are similar to the Grievant's history between January 4, 1990 through October 26, 1990. The Grievant received a five (5) day disciplinary suspension in late March, 1990 for failing to comply vatb call in procedures. There is also the equivocal nature of his doctor's statement on May 10, 1990. The Grievant never submitted a subsequent doctor's statement to clear up the uncertainties of the .. remarks" by the Grievant's doctor which was presented to the Sate on May 10. There was no medical document submitted by the Grievant beyond the doctor's statement which he presented to Smith and Williams beyond May 10, 1990. Furthermore, the Grievant failed to give notification to the State contrary to Section C. I after June 7, 1990. Although the Bureau of

Workers'Compensation denied his claim, and the Grievant appealed the Bureau's decision, he nevertheless failed to give the State notification. Despite the efforts by the State to find out

the Grievant's status through his father, who lived next door and the Union, the State remained in the dark on the Grievant's status and uncertain as to when he would return to work. I find no disparate treatment between Burnett's experiences with disability leave and the Grievant's conduct between January 4, 1990 and October 26, 1990.

It should be noted that Jeff Griffin, Chief Steward, provided testimony concerning employees who have applied for disability leave and his own experience between 1984 and 1985. Rather than elaborate on his testimony, it is enough to state that Griffin acknowledged that he "did not investigate the State's notification requirements on disability'. Moreover, Griffin stated that hIS 'understanding' of the State's call in procedures was that he gave the State the dates that he would be out. The Grievant never advised the State of the period of time that he would be absent, beyond May 10, which was supported by medical documentation. It is enough to state that the evidence provided by Griffin is inadequate to show that the State treated the Grievant in a disparate manner.

CONCLUSION

Section 24.02, in relevant part, provides that '[Aln arbitrator deciding a discipline grievance must consider the timeliness of the Ernployee's decision to begin the disciplinary process." The Union claims that while the decision of termination of the Grievant "may

the Grievant's status through his father, who lived next door and the Union, the State remained in the dark on the Grievant's status and uncertain as to when he would return to work. I find no disparate treatment between Burnett's experiences with disability leave and the Grievant's conduct between January 4, 1990 and October 26, 1990-

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CONCLUSION

Section 24.02, in relevant part, provides that '[Aln arbitrator deciding a discipline grievance must consider the timeliness of the Employee's decision to begin the disciplinary process." The Union claims that while the decision of termination of the Grievant "may

have been made timely' consistent with Section 2 4.05 ['no more than 45 days after the conclusion of the pre-disciplinar7 meeting"] the State waited until the last day to make its decision.

It is sufficient to state that were I to conclude that the State did not act in a timely manner in arriving at its decision of termination, it would nullify a contractual requirement contained in Section 24-05. I doubt that the parties would have intended such a result in drafting the terms of Sections 24.02 and 24.05 of the Agreement. By the very nature of job abandonment, it is an 'offense' that is poles apart from the more common disciplinary offense. The very nature of job abandonment requires a "wait and see" approach to give the employee every benefit of the doubt. I find that the State's decision of termination was made in a timely manner.

Furthermore, the Grievant was first hired on April 24,1988. He was terminated at the close of business on October 26, 1000. Accordingly, his short term tenure with the State cannot be given much weight as to mitigating circumstances.

As I have previously established the failure to follow proper call in procedures for a lengthy period of time, from May 10, 1990 to October 26.. 1990 is reasonably connected to job abandonment. Indeed, it is a component of job abandonment. The reasonable inference to be drawn is that the job had little value to the Grievant. The Grievant's

conduct indicated an extaordinary indifference to his job. As a result he committed the offense of neglect of duty and abandoned his job.

AWARD

The State proved **by** clear and convincing evidence that the Grievant was discharged **for** just cause.

The grievance is denied.

Datp,d: September 3, 1991
Cuyahoga County
k-@eveland, Ohio

C4iEN, Eshrtial Arbitrator

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