

ARBITRATION DECISION NO.:

591

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Mental Health,
Millcreek Psychiatric Center for Children

DATE OF ARBITRATION:

August 8, 1995

DATE OF DECISION:

November 14, 1995

GRIEVANT:

Ricky L. Cotton

OCB GRIEVANCE NO.:

23-11-(94-12-15)-0177-01-04

ARBITRATOR:

Charles F. Ipavec

FOR THE UNION:

Lenny Lewis, Staff Representative

FOR THE EMPLOYER:

Cindy Sorell, Advocate
Rachel Livengood

KEY WORDS:

Absence Without Leave
Discrimination
Job Abandonment
Just Cause
Neglect of Duty
Progressive Discipline

ARTICLES:

Article 1 - Recognition
 §1.01 - Exclusive Representation
Article 2 - Non-Discrimination
 §2.01 - Non-Discrimination
 §2.02 - Agreement Rights
Article 24 - Discipline
 §24.02 - Progressive Discipline
 §24.05 - Imposition of Discipline
Article 25 - Grievance Procedure

Article 44 - Miscellaneous
§44.03 - Work Rules

FACTS:

The grievant was a Therapeutic Program Worker for the Millcreek Psychiatric Center for Children. He was placed on Administrative Leave with Pay on March 24, 1994 due to an investigation of alleged sexual abuse charges. On October 3, 1994 the grievant was indicted based on these charges and was incarcerated because he could not post bail.

The grievant was given a notice dated November 4, 1994 to report to work on November 8, 1994. He was unable to report to work due to his incarceration. A predisciplinary hearing was held on November 18, 1994. The conclusion management reached following this hearing was that the grievant was guilty of neglect of duty and job abandonment for failing to follow his order to report to work. As a result, the grievant was removed on November 22, 1994.

EMPLOYER'S POSITION:

The Employer contended that the grievant abandoned his job because he did not comply with the notice issued by his employer to report to work on November 8, 1994. Therefore, the Employer argued that this grievance should be denied.

THE UNION'S POSITION:

The grievant's attorney contended that the grievant was not progressively disciplined in accordance with Contract Article 24. Further, the attorney argued that the grievant was not terminated properly because he was not convicted until March, 1995. Ohio Revised Code 5119.072 states that persons "convicted" of certain offenses are not to be employed by the state. Thus, this ORC provision could not be relied upon because this provision applies only to persons "convicted" not to persons "indicted" as the grievant was in this case.

The advocate also argued that it was unfair that the grievant did not receive pay from 11/4/94 to 11/7/94 because he did not receive notification that he was removed from pay status until 11/7/94. Lastly, the attorney argued that the grievant was discriminated against because he was not able to post bond and was incarcerated. If the grievant had been able to post bond the Union contended that the grievant would have been continued on Administrative Leave.

ARBITRATOR'S OPINION:

The Arbitrator concluded that there was not sufficient proof to support the Union's contention that the grievant was being discriminated against. The Union did not present any evidence of an employee who was able to post bond, after having been indicted, and was continued on Administrative Leave. Further, the Arbitrator concluded that the grievant is entitled to have been paid through November 7, 1994, the day before the grievant was ordered to report to work, because his Administrative Leave status could not end until the next status, return to duty, began on November 8, 1994.

Based on the fact that the investigation was complete when the indictment was returned, the Arbitrator also concluded, pursuant to Contract Article 24, that the Employer had the option to terminate the Administrative Leave, and if circumstances warranted the grievant could have returned to work. In this case the grievant could not return to work. Therefore, it was appropriate for the Employer to terminate the grievant's Administrative Leave. Additionally, the Employer had just cause to terminate the grievant based on the grievant's Neglect of Duty - Absence Without Leave/Job Abandonment.

AWARD:

The grievance is sustained to the extent that the grievant is to be paid through Monday, November 7, 1994. In all other respects, the grievance is denied.

TEXT OF THE OPINION:

UNITED STATES OF AMERICA
VOLUNTARY LABOR ARBITRATION
GRIEVANCE NO. 23-11-941215-0177-01-04

CHARLES F. IPAVEC
Arbitrator

In the Matter of the Arbitration Between:

THE STATE OF OHIO
DEPARTMENT OF MENTAL HEALTH,
MILLCREEK PSYCHIATRIC CENTER
CINCINNATI, OHIO

- and -

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, AFSCME LOCAL 11,
AFL-CIO

OPINION AND AWARD

Grievance Filed by

Ricky L. Cotton

The hearing for this matter was held on August 8, 1995, in the conference room of the Warren Correctional Institution, Lebanon, Ohio, before Charles F. Ipavec, the arbitrator to whom this case was assigned pursuant to Article 25 of the Contract between the parties.

The State of Ohio was represented by Cindy Sorell, Advocate, and Rachel Livengood, Manager Dispute Resolution. Also present were Tim Wagner, Peter B. Steele, John Quigley and Pat A. Mayer.

The grievant, Ricky L. Cotton, was represented by his personal attorneys, H. Louis Sirkin, and Laura Abrams. Lenny Lewis, staff representative, represented the Union. Tommy Cotton was also present.

No stenographic record was made of the proceedings at the hearing; accordingly then, the entire record for this case consists of the documents presented into evidence and this opinion and award.

GRIEVANCE

On December 5, 1994, Ricky L. Cotton filed a grievance form, identified as grievance No. 23-11-941215-77-01-04 in which the statement of the facts was as follows:

"The union is requesting a step 3 hearing on Mr. Cotton's removal (claim of abandonment) from his employment as a TPW at the Millcreek Psychiatric Center for children."

The remedy sought was stated as:

"That Mr. Cotton be returned to his position as TPW at Millcreek and that the state make whole on the interest & money in PERS & lost wages."

The portions of the contract between the parties allegedly violated by the State of Ohio were listed as:

2.02, 24, 2.01, 44.03, 1.01 and any other applicable articles

WAIVER AND RELEASE

The grievant, having chosen to be represented by his own private counsel, submitted the following Waiver and Release:

"I, Ricky Cotton, hereby release and hold harmless Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, its subordinate bodies, and all agents from all duties of representation and liabilities related to the Step 3 meeting to be held in grievance no. 23-11-941215-177-01-04. I waive all legal rights and challenges as related to Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, its subordinate bodies, and all agents in the matter of such Step 3 meeting.

I have chosen to retain private counsel to represent me at the Step 3 meeting held in the matter of grievance no. 233-11-941215-177-01-04 at no cost or liability to the Union. I understand that I will be solely responsible for any fees or costs assessed by said Counsel and will seek no recourse from the Union.

The presence of any representative of Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO during the presentation of the merits of the grievance shall not be construed to constitute representation for Mr. Cotton. Such presence is for the limited purpose of protecting the integrity of the collective bargaining agreement OCSEA and the State of Ohio as the proceeding impacts Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, with respect to the interpretation of said agreement."

The foregoing Waiver and Release was signed by the grievant on January 12, 1995, and accepted by the Union on January 24, 1995.

STIPULATED ISSUE

The stipulated issue presented to the arbitrator in this case was: "Was Ricky Cotton removed for just cause? If not, what shall the remedy be?"

STIPULATED FACTS

The following facts were stipulated by the parties:

1. Mr. Cotton was hired on October 28, 1985, as a Therapeutic Program Worker for the Millcreek Psychiatric Center for children.
2. Mr. Cotton was placed on Administrative Leave with Pay - March 24, 1994.
3. Mr. Cotton was indicted on October 3, 1994.
4. Deleted.
5. Mr. Cotton currently resides at the Warren Correctional Facility.
6. Mr. Cotton was given a notice dated November 4, 1994 to report to work on November 8, 1994.
7. Mr. Cotton was removed from state service November 22, 1994.

8. The grievance is proper before the Arbitrator.

POSITION OF THE EMPLOYER

The employer alleges that the grievant, Ricky Cotton, abandoned his job as a Therapeutic Program Worker. The grievant was ordered to return to work on November 8, 1994 and did not do so and further cannot now report to work because he is incarcerated at the Warren Correctional Institution.

The grievant, in his job, was to provide direct care to children and adolescents who have mental health problems due to drug and alcohol abuse, physical abuse, and sexual abuse. The grievant was being investigated by the Highway Patrol and the Department of Mental Health for alleged sexual abuse of a number of the children at Millcreek Psychiatric Hospital for Children. Pursuant to Article 24.05 of the Contract between the parties, the grievant was placed on Administrative Leave with pay on March 24, 1994. On October 3, 1994, the grievant was indicted by the grand jury and is incarcerated due to the fact that he could not post bail. The grievant was removed from his job on November 22, 1994, after not having reported for work on November 8, 1994, pursuant to a notice issued by his employer dated November 4, 1994. The within grievance should be denied.

POSITION OF THE GRIEVANT

The conviction of the grievant on felony charges is currently on appeal; however, initially in this case the procedures as set forth in paragraph 24.02 of the Contract were not followed. Such contractual provision provides for progressive discipline which the grievant was not given.

In March, 1994 the grievant was given an Administrative Leave with pay and in October, 1994 the grievant was indicted.

Following the indictment, the Agency dreamed up some trumped-up reason to terminate his employment; however, the Agency knew that he could not return to work based upon the allegations of sexual assault on several patients, so that there was no alternative position to which the grievant could have returned to work and reassignment was not possible.

The grievant was improperly terminated because he was not convicted until March, 1995 and there can be no reliance on Ohio Revised Code 5119.072 because such statutory provision relates only to persons convicted of certain offenses and not to persons indicted but not convicted. It was not possible for the grievant to return to work because of his incarceration after having been indicted and, further, because of his inability to post bond so as to be allowed to be free on bond.

Before November 4, 1994, the decision of the Agency to terminate the grievant was already in motion and the cause which they alluded to was job abandonment. The allegations of sexual assault are not related in this case.

The Chief Executive Officer of the Agency had several telephone conversations with the grievant and knew that the grievant could not post bond and was incarcerated. The grievant was treated unequally because the Agency made a difference between the ability to post a bond and the inability to post a bond. If the grievant had the financial resources to post a bond, he would have not been incarcerated and would have remained on Administrative Leave with full pay until his conviction; however, in this case since the grievant did not have the financial capabilities to post a bond, the Agency chose to terminate him.

The Agency stated that they were concerned about the publicity and the reaction of the public if the grievant were continued on Administrative Leave after he was indicted and incarcerated; however, that is merely a play on words because had the grievant been able to post bond, he would have been continued on Administrative Leave. In this case, there was no quid pro quo and the grievant was treated differently and unfairly.

The grievance should be sustained and the grievant should be paid the wages he lost up to the date of conviction.

DECISION

When the allegations of sexual assault were made known to the Agency, the grievant was placed on Administrative Leave and as the grievant pointed out, there was no alternative position to which the grievant could have returned to work so that it would be reasonable to expect that the grievant would remain on Administrative Leave until the allegations were either proven or disproven, after due investigation. In this case, it appears to the arbitrator, that the Highway Patrol and the Department of Mental Health took an inordinate amount of time to resolve the allegations with which the grievant was accused.

When the Agency learned that the grievant had been indicted and was incarcerated, they issued the grievant an order.

At a predisciplinary hearing held on November 18, 1994, a number of matters were discussed, primarily relating to the fact that the grievant was of the opinion the Agency had treated him unfairly and that his wife was contacted concerning his termination even before he was notified. The Agency answered such comments by stating that they wished to put in motion the procedures to give the grievant's wife an opportunity to maintain a cash flow because her husband was unable to work due to his incarceration.

The conclusion reached at the predisciplinary hearing was as follows:

“Conclusion Mr. Cotton did not dispute the charge that he did not comply with the terms of Mr. Steele's order that he return to work. He did however, question the fairness of that order in stipulating dates so close together. He did question the fairness of withholding wage payment from him for the period 11/4/94 to 11/7/94, as he did not receive notification that he was removed from pay status until 11/7/94. If a review of that issue does indicate that he did not receive notification until 11/7/94 it would indicate that Mr. Cotton should be paid for the dates 11/4, 11/5, 11/6 as they were regularly scheduled working days.

Mr. Cotton did not follow that order of the Chief Executive Officer and is therefore, guilty of neglect of duty. He is, as stated to him in Mr. Steele's letter of November 4, guilty of job abandonment. An appropriate disciplinary measure should be forthcoming.”

At the Step III grievance response on January 24, 1995, two excerpts from such response are meaningful at this time. They are:

“Mr. Sirkin presented that Mr. Cotton was not given a pre-disciplinary meeting and it was also mentioned that a three (3) day notice was not afforded him concerning the meeting. There is a pre-disciplinary conference notice dated 11/14/95 setting the meeting for 11/18/95. There was some trouble getting the letter to Mr. Cotton because he was incarcerated. A copy of the notice also went to the union so they would have been properly notified. The meeting did occur on 11/18/94 with a union steward in the CEO's office, and Mr. Cotton on the phone. Management did comply with the contract per Article 24.

Mr. Sirkin stated that Mr. Cotton was incarcerated on 10/3/94 and still is because of the amount of bail being excessive. It is argued strongly by Mr. Sirkin that Mr. Cotton did not abandon his job, but rather he could not report due to being incarcerated. At the same time I made it understood that the Department would not pay an individual on a lengthy incarceration who was not able to report for work. Mr. Sirkin believes that Mr. Cotton, if exonerated should be returned to work with pay because none of this was his fault.”

The Contract between the parties clearly provides for a grievant to be given a three-day notice of a predisciplinary meeting and in this case, as the Agency alleged, there was some difficulty in getting the notice to the grievant; however, such a notice is critical if the grievant then is not able to attend the predisciplinary hearing, but in this case the grievant did attend, by telephone, and at that time he did not raise the issue that the predisciplinary hearing was faulty due to inadequate notice. In the opinion of the arbitrator, the participation of the grievant, by telephone, in the predisciplinary meeting of November 18, 1994,

constituted a waiver, and that the three-day notice would not be raised as a procedural issue.

Mr. Sirkin also commented that if the grievant were to be exonerated he would be entitled to back pay. This grievance does not resolve that issue, in that, in the opinion of the arbitrator, such an issue does not become ripe until after the grievant in fact is exonerated and found to have been innocent.

The main question posed in this case, and which the arbitrator must address, is the length of time, if any, that the grievant is entitled to be paid pursuant to having been placed on Administrative Leave.

The grievant has argued that it is unfair to not pay him his Administrative Leave during the period of time that he is incarcerated because he is unable to post bond, whereas another employee in the identical situation concerning an indictment, but who had the financial resources to post bond, would be permitted to remain on Administrative Leave until they were either convicted or found not guilty and could then return to regular duty work. However, no evidence was presented of any employee who was able to post bond, after having been indicted, and was continued on Administrative Leave. Section 24.05 of the Contract between the parties provides in pertinent part as follows:

"An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except that in cases of alleged abuse of patients or others in the care or custody of the State of Ohio, the employee may be reassigned only if he/she agrees to the reassignment."

The foregoing language of Article 24 of the agreement between the parties gives the Agency an option in that the Agency may place an employee under investigation on Administrative Leave or may reassign such employee to another job. The language also contains an exception that such reassignment will only be made with the employee's agreement in cases of alleged abuse of patients of the type that the grievant was alleged to have participated in. The foregoing language is applicable only during the time that an investigation is being conducted, so that when the grievant was indicted, the investigation was deemed then to have reached a conclusion and the Agency then had the authority to terminate the Administrative Leave or to reassign the grievant to another job. As was very clearly brought out in this case, the reassignment possibility to another job was non-existent because the grievant was incarcerated; therefore, the Agency acted to terminate the Administrative Leave.

The grievant was on Administrative Leave and by memorandum from the Chief Executive Officer, the grievant was informed that he was to report for work on Tuesday, November 8, 1994. As the grievant progressed from the status of Administrative Leave to active duty, one status, the Administrative Leave, could not end until the next status, return to duty, started, which by the documents submitted by the Agency was November 8, 1994; so that, in the opinion of the arbitrator, the grievant is entitled to have been paid through November 7, 1994. At the predisciplinary hearing, held on November 18, 1994, it was concluded by the Agency that the grievant was guilty of job abandonment, and that an appropriate disciplinary measure should be forthcoming.

By memorandum dated November 22, 1994, the Director of Mental Health notified the grievant as follows:

"This letter is to notify you that you are removed from your position of Therapeutic Program Worker at the Millcreek Psychiatric Center for children.

The reason for this action is to wit that you have been found guilty of neglect of duty - Absence without leave/Job Abandonment. You were informed in a letter of November 4, of the revocation of your Administrative Leave. You were further ordered to return to work no later than November 8, 1994. You did not comply with this order.

Your removal is effective immediately this date."

The arbitrator is of the opinion that the employment of the grievant was not terminated until November 22, 1994 and that the employment status of the grievant prior to such date was that of an Administrative Leave

through November 7, 1994 and a personal leave from November 8, 1994, the date he was to report for work, and November 22, 1994, the date his employment was terminated; accordingly then, the grievant is entitled to be paid through November 7, 1994.

This case does not turn on the question of whether or not the grievant had the financial capability to post bond because, in the opinion of the arbitrator, pursuant to the language contained in Article 24 of the Contract between the parties, when the investigation was completed to the point that an indictment was returned, the Agency then could terminate the Administrative Leave and if the circumstances warranted, could have returned the grievant to work either at his previous job if that would have been appropriate, or to some other job agreeable to the grievant. If the grievant was not willing or available to take his old job or his reassigned job, then it would be proper for the Agency to determine that the grievant abandoned his job.

The arbitrator reviewed the award issued by Arbitrator Pincus ,and found that the two cases were similar even though the Pincus case involved a sick leave and this case involves an Administrative Leave.

Based upon the facts and information as existed on the date the grievance was filed, December 5, 1994, the Agency did have just cause to terminate the grievant on November 22, 1994; however, that does not resolve the overall issue if circumstances should arise which would make the grievant eligible for employment with the Agency.

AWARD

Grievance No. 23-11-941215-0177-01-04 is sustained to the extent that the grievant is to be paid through Monday, November 7, 1994 as a continuation of the Administrative Leave upon which he was placed in March, 1994; and in all other respects, the grievance is denied and the Agency had just cause to terminate the employment of the grievant on November 22, 1994.

Charles F. Ipavec
Arbitrator

Dated November 14, 1995 and made effective at the Millcreek Psychiatric Center for Children, Cincinnati, Hamilton County, Ohio.