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REVIEWED BY
CE 12/6/00
JAN 16 2001

GRIEVANCE COORDINATOR

OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
Ohio Bureau of Workers Compensation

-AND-

OCSEA/AFSCME, Local 11

APPEARANCES

For The Bureau of Workers Compensation
Roger A. Coe, Management Advocate
Samantha Coon, Management 2nd Chair
Fred Butler, Supervisor
Shirley Turrell, Office of Collective Bargaining
Mr. Hans Neugebauer, Service Office Manager Supervisor 2

For OCSEA
Steven W. Lieber, OCSEA Staff Representative
Marie A. DuBose, Grievant
Michael Williams, Grievant's Friend
Ellise, Shore, Claims Service Specialists

Case-Specific Data

Date of Hearing:	**September 12, 2000**
Date of Award:	**November 9, 2000**
Contract Year:	**1997-2000**
Type of Grievance	**Discharge/Job abandonment**
Grievance No.	**34-03-991115-111-01-09**

Robert Brookins

Robert Brookins
Arbitrator, Professor of Law, J.D., Ph. D.

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I. Procedural Background

The parties to this dispute are Canton, Ohio Bureau of Workers Compensation (the Employer or BWC) and the Ohio Civil Service Employees Association (OCSEA or the Union), representing Ms. Marie A. DuBose (the Grievant). On October 19, 1999, BWC scheduled a predisciplinary hearing for October 26, 1999 to determine if the Grievant should be terminated for, *inter alia*, job abandonment.[1] On October 22, 1999, a friend of the Grievant's (Mr. Michael Williams) hand delivered to BWC a letter from the Grievant, dated October 22, 1999, requesting a postponement of the predisciplinary hearing "due to circumstances beyond her control."[2]

As a result, BWC rescheduled the predisciplinary hearing for October 28, 1999, when the hearing was in fact held. On October 29, 1999, the Predisciplinary Hearing Officer sustained BWC's charge of job abandonment against the Grievant. Accordingly, on November 5, 1999, BWC terminated the Grievant's employment, effective November 8, 1999 for having failed to effect personal contact with BWC from October 13, 1999 to October 20, 1999.[3] When she was terminated, the Grievant had accumulated approximately 17 years of service with BWC and was classified as a Claims Service Specialists.[4]

The Grievant filed a Step 3 grievance (Grievance No. 34-03-991115-111-01-09) (the Grievance)[5] on November 15, 1999, causing a Step 3 hearing to be scheduled for December 16, 1999.[6] On December 21, 1999, the Step 3 hearing was held as scheduled and Hearing Officer Nancy V. Kuss subsequently denied the Grievance. The parties then agreed to arbitrate the Grievance and selected the Undersigned to hear the

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1 Joint Exhibit No. 2 at 1.

2 Joint Exhibit No. 4.

3 Joint Exhibit No. 3 at 3.

4 Joint Exhibit No. 2 at 5.

5 Joint Exhibit No. 3 at 5.

6 Joint Exhibit No. 3 at 6.

dispute and scheduled an arbitral hearing for September 12, 2000. Accordingly, on September 12, 2000, the Undersigned held an arbitral hearing on this matter at the Ohio Bureau of Workers Compensation, in Canton, Ohio. All parties relevant to the resolution of this dispute were present, and the hearing commenced at approximately 9:00 a.m.

During that hearing both parties had a full and fair opportunity to present any admissible evidence and arguments supporting their positions in this dispute. Specifically, they were permitted to make opening statements and to introduce admissible documentary and testimonial evidence, all of which was subject to relevant objections and cross-examination. Finally, the parties had a full opportunity either to offer closing arguments or to submit post-hearing briefs and opted for the former.

II. The Facts

The events leading to the Grievant's termination began, on October 12, 1999, when a jury of her peers convicted the Grievant of driving under the influence of alcoholic beverages. Apparently, to avoid a work-related, attendance-based conflict, the Grievant got permission for a vacation leave covering her trial date, October 12, 1999. Immediately following the adverse verdict, on October 12, 1999, the judge ordered the Grievant to appear for sentencing the next day, October 13, 1999. Subsequently, however, the Grievant's attorney apparently predicted that overcrowded conditions in the county jail would substantially delay her actual incarceration. Because the Grievant did not expect to be incarcerated on October 13, 1999, she never requested an unpaid leave of absence to cover any forthcoming sentence.[7] On the morning of October 13, 1999, the Grievant telephoned BWC, spoke to a supervisor (Mr. Paul Werstler), obtained sick leave from 8:00 to 12:00 a.m., and promised to report to work on the afternoon of October 13.[8]

However, the October 13, 1999 sentencing hearing went awry. First, the Grievant arrived late for

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[7] Furthermore, reason suggests that even if the Grievant had expected incarceration to begin on October 13, she could not have known what length of unpaid leave to request until the court actually pronounced her sentence.

[8] Mr. Neugebauer admitted that this call was proper and she was excused from work for the time requested on October 13, 1999.

the hearing, thinking it convened at 9:45 a.m. instead of 8:45 a.m. Worst still, the judge imposed a 15-day sentence to begin forthwith. The Grievant immediately asked permission to telephone BWC but was told to make that call from her holding cell, where she discovered that only collect calls were permitted.

Essentially, two reasons prevented the Grievant from telephoning BWC collect on October 13, 1999. First, she thought that BWC had a policy or a practice of rejecting collect calls from employees. Second, the Grievant discovered that collect calls would reveal her location to recipients, including BWC, and she desperately wished to conceal her incarceration from her employer and fellow employees.

To conceal her incarceration from BWC, the Grievant decided to have a third party to contact BWC and to request an unpaid leave of absence in her behalf. After unsuccessfully attempting to contact her stepmother by telephone, the Grievant enlisted the services of Mr. Williams. On October 13, 1999, at approximately 12:00 a.m., Mr. Williams telephoned BWC and asked the Service Office Manager (Mr. Hans Neugebauer) to grant the Grievant an unpaid leave of absence from October 13, 1999 to October 28, 1999, for personal reasons.[9] Mr. Neugebauer rejected Mr. Williams' request and apprised him of the proper procedures for requesting unpaid leaves of absence, including the need to reduce such requests to writing. In addition, Mr. Neugebauer asked about the Grievant's situation, which Mr. Williams declined to reveal.

Pursuant to Mr. Neugebauer's orders, the Grievant's immediate supervisor (Mr. Fred Butler) telephoned the Grievant's home at approximately 2:30 p.m., on October 13, 1999 and left a message on her answering machine, reminding her of the procedures for requesting leaves of absence. In further attempts to contact the Grievant, Mr. Butler telephoned her residence on October 14, 15, and 18, 1999. Mr. Williams reviewed those telephone messages and conveyed it to the Grievant on or about October 14, 1999.

On October 18—approximately five days after Mr. Williams last spoke to someone at BWC—he again telephoned Mr. Neugebauer to request the proper forms for obtaining an unpaid leave of absence. And

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[9] If granted, this leave apparently would have covered the Grievant's 15-day incarceration, which should have ended on October 28, 1999.

again Mr. Neugebauer denied the request and explained the proper procedures for requesting leaves of absence.

On or about October 18, 1999, BWC learned that the Grievant was incarcerated, immediately requested a predisciplinary hearing, and charged her with job abandonment—absence for more than three days without contacting BWC. At that time, approximately five days had elapsed since the Grievant had personally spoken to anyone at BWC.

On October 21, 1999, BWC received a letter—postmarked October 20, 1999—from the Grievant through the regular mail, requesting unpaid leave from 12:45 p.m., October 13, 1999 to 4:45 p.m., October 29, 1999.[10] The letter was dated October 15, 1999, one day after Mr. Williams told the Grievant of Mr. Butler's phone calls to her home, requiring a written request for unpaid leaves of absence. However, the fear of revealing her incarceration had prevented the Grievant from immediately mailing the letter from jail.

The predisciplinary hearing was held on October 28, 1999. On October 29, 1999, the Predisciplinary Hearing Officer sustained those charges. And on November 5, 1999, BWC terminated the Grievant's employment, effective November 8, 1999 for job abandonment because she failed to personally contact BWC from October 13, 1999 to October 20, 1999.[11]

Instead of responding to the Grievant's letter, BWC scheduled the Grievant's predisciplinary hearing for October 26, 1999. On October 22, 1999, BWC received from the Grievant a letter dated October 22, 1999 and hand-delivered by Mr. Williams, requesting a postponement of the predisciplinary hearing "due to circumstances beyond the Grievant's control."[12] The Grievant admits that she the letter was hand-delivered to conceal her incarceration. BWC rescheduled the predisciplinary hearing for October 28, 1999.

The Grievant lost at the predisciplinary hearing and filed a Step 3 grievance (Grievance # 34-03-

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[10] Employer Exhibit No. 1 at 1-2.

[11] Joint Exhibit No. 3 at 3.

[12] Joint Exhibit No. 4.

991115-111-01-09),[13] on November 15, 1999, causing a Step 3 hearing to be scheduled for December 16, 1999.[14] The Step 3 hearing was held as scheduled and Hearing Officer Nancy V. Kuss denied the grievance on December 21, 1999.[15]

III. Summary of Parties' Arguments

A. BWC's Arguments

1. Discharge was proper in this case because:
   a. The Gravamen of the Grievant's misconduct is her failure to "contact" BWC within the meaning of the work rules.
   b. Third party call-offs are permitted for emergency medical situations.
   c. Assuming arguendo that the Grievant properly contacted BWC, her request for leave still would have been denied for lack of a proper basis.
   d. The Grievant had no reasonable expectation of confidentiality and BWC had no duty to respect her confidentiality.
   e. BWC has neither a policy nor a practice of rejecting collect calls from its employees.
2. The settlement agreement is inadmissible.
   i. The "scope of use" clause bars any reference to the settlement agreement in the instant case.
   ii. Significant differences between the facts in the instant case and those in the reference case defeat the Union's claim of disparate treatment.

B. Union's Arguments

1. The Employer failed to conduct a fair and objective investigation.
2. BWC has previously recognized the capacity for third parties to contact BWC in behalf of a BWC employee.
3. Personal reasons fall within the scope of reasons listed under Article 30.01.
4. The Grievant is a victim of disparate disciplinary treatment.
5. The facts and circumstances leading to the settlement agreement are admissible.

IV. Relevant Contractual Language

Article 31 Leaves of Absence

31.01—Unpaid Leaves

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

* * * *

D. Other Unpaid Leave

The Employer may grant unpaid leaves of absence to employees upon request for a period not to exceed one (1) year. Appropriate reasons for such leave may include, but are not limited to education, parenting (if greater than ten (10) days), family responsibilities, or holding elective office (where holding such office is legal).

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[13] Joint Exhibit No. 3 at 5.

[14] Joint Exhibit No. 3 at 6.

[15] Joint Exhibit No. 3 at 13.

31.02—Application for Leave

A request for a leave of absence shall be submitted in writing by the employee to the agency designee. A request for leave shall be submitted as soon as the need for such a leave is known. The request shall state the reason for and the anticipated duration of the leave of absence.

Article 24 – Discipline

24.01 — Standard

Disciplinary Action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action.

24.02 — Progressive Discipline

The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense.

24.05 – Imposition of Discipline

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

V. The Issue

Whether the Grievant was terminated for just cause, and, if not what shall the remedy be?

VI. Discussion and Analysis

The Grievant sought to negotiate the proverbial "tightrope"— preserving BWC's ignorance of her incarceration on the one hand, while providing BWC with proper notification of her leave request, on the other.

A. Grievant's Duty to Contact BWC

Section (c) of BWC's Bargaining Unit Work Rules (Work Rules) on attendance provides for removal where an employee accumulates "Three (3) or more consecutive days without *contact* (considered job abandonment)."[16] The Union does not challenge the legitimacy of these Work Rules, and nothing in the record suggests that the Grievant lacked either actual or constructive knowledge of those rules. Nor does the record show that the Grievant was unaware of how to request an unpaid leave of absence. In fact, the record establishes that procedural ignorance probably was not a factor in the Grievant's attempts to obtain a leave of absence.

Although the Work Rules do not specifically define contact, evidence in the record affords some

[16] Joint Exhibit No. 8 at 4.

guidance in that respect. First, telephone calls presumably constitute proper contact because BWC admits that the Grievant's telephone call to Mr. Wrestler, on October 13, 1999, was proper contact. Additionally, letters from employees requesting leaves of absence also constitute appropriate contact, as evidenced by Article 31.02 which provides in relevant part, "A request for a leave of absence shall be submitted in writing by an employee to the Agency designee."[17] Finally, the record reveals that communications from third parties also constitute proper contact, at least for emergency sick leave.

The Grievant did not properly contact BWC on October 14, 15, & 19, 1999. Although the letter of October 21, 1999 was apparently written on October 15, 1999, BWC did not credit that day as one in which a proper contact occurred. The Arbitrator agrees. One cannot reasonably deem the date on which a letter is drafted as a proper contact, where, as here, notification is the ostensible reason for requiring contact in the first instance. Consequently, under these conditions, "contact" is made only when the Employer actually receives the communication or has reason to be aware of its existence—constructive notification.[18]

BWC apparently did not deem Mr. Williams' telephone call on October 18, 1999 to be a proper contact, since October 18 is one of the four days in which the Grievant allegedly failed to contact BWC.[19] The only issue remaining is whether Mr. Williams' discussion with Mr. Neugebauer on October 18, 1999 constituted a contact.

It did not. As mentioned earlier, the record shows that the Employer grants employees' requests for leaves of absences through third parties only where the request is based on emergency sick leave. Nothing in the record establishes that, on October 18, 1999, Mr. Williams requested sick leave for the Grievant, even though the Grievant alleged that she was ill on or about that date. Instead, Mr. Williams offered only

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[17] Joint Exhibit No. 1 at 126.

[18] Parenthetically, BWC did not charge the Grievant with failure to contact it on October 20, 1999, the date the letter was postmarked. Presumably then, BWC viewed the postmark as the date of proper contact.

[19] Joint Exhibit No. 3 at 3.

personal reasons as the bases for his request for the Grievant's sick leave. Ultimately, then, the Arbitrator holds that the Grievant failed to make proper contact with BWC for four consecutive days in violation of BWC's Work Rules.

B. Propriety of the Grievant's Reasons Under Article 30.01 (D)

Because the Grievant failed to make proper contact for four consecutive days, her reasons for not contacting the Employer become largely irrelevant. Nevertheless, in the interest of thoroughness, the Arbitrator will address those reasons. Clearly, embarrassment is at least one reason that the Grievant's did not contact BWC earlier. Indeed, she admits that her incarceration was embarrassing and that she did not want her coworkers to know of her circumstances. The Grievant states that because inmates could make only collect calls from the jail, she would have revealed her incarceration had she attempted to call BWC from jail. Thus, she did not wish to make a call from the jail because the call would be identified as coming from the county jail.

This raises the issue of whether embarrassment or the general desire to conceal her incarceration from either BWC or her fellow employees constitutes a legitimate reason for failing to contact BWC. Any reasonable person would readily understand, if not sympathize with, the Grievant's position here. Nevertheless, nothing in the Collective-Bargaining Agreement either implicitly or explicitly recognizes confidentiality as a reason for not contacting the Employer. And the Arbitrator lacks authority to amend the Collective-Bargaining Agreement by creating such recognition out of whole cloth.

The Grievant's second reason for untimely contacting BWC is that it allegedly had a policy of not accepting collect calls. Although Mr. Neugebauer and Mr. Butler were unsure about either a practice or an unwritten policy of rejecting collect telephone calls, they were certain that no such written policy existed. Nor could the Grievant produce such a policy, even though the Third-step Grievance Hearing should have alerted her to the importance of discovering and adducing that policy before the Undersigned in the instant

case.[20] Furthermore, the Grievant perhaps could have preserved her confidentiality by having someone hand-deliver a proper written request for unpaid leave on October 14, 199, when Mr. Williams apprised her of the need to reduce such a request to writing. She had a letter hand delivered to BWC on October 22, 1999, and the Arbitrator finds no reason preventing her from a timelier use of that avenue of delivery.

C. The Grievant's Refusal to Specify Her Reason(s) for a Leave of Absence

The parties also addressed the scope of Articles 30.01(d) and 31.02 and whether the Grievant's reasons fall within that scope. However, two reasons convince the Arbitrator that the arbitral record strips this issue of any relevance it might have had. First, even assuming, arguendo, that the Grievant's reasons were proper, the fact remains that she waited for more than three consecutive days to reveal those reasons by properly contacting BWC. In short, proper contact is a precondition for considering the propriety of any reasons for leaves of absence. Second, excluding her telephone call, on October 13, 1999, the Grievant offered reasons for her requested leave of absence on two other occasions: October 21, 1999 and October 22, 1999.[21] However, BWC did not charge her with a failure to contact on either of those dates. Those dates were not factors in the decision to discipline her and, therefore, are not relevant to this dispute.

D. Disparate Treatment

1. Admissibility of Union Exhibit No. 1—the "Brenn Facts"

The Union alleges the Grievant was subjected to disparate disciplinary treatment and to establish its allegation proffered evidence from an earlier dispute between the parties in which William Brenn was the Grievant (Brenn Grievance).[22] This evidence covers the facts and circumstances which triggered the dispute and, ultimately, Mr. Brenn's grievance ("Brenn Facts").

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[20] The Third-Step-Grievance Hearing Officer addressed this allegation in her opinion (Joint Exhibit No. 3 at 10-13). Therefore, one can reasonably conclude that the Grievant raised it and, consequently, had reason to recognize the importance of such a policy to her allegation and ample opportunity to adduce it if she could.

[21] The Grievant also offered reasons at the predisciplinary hearing (Joint Exhibit No. 2 at 7-10) which, for obvious reasons, is not considered here.

[22] Union Exhibit No. 1.

The Employer strenuously objects to admitting the "Brenn facts" because the Brenn Grievance was the subject of a settlement agreement, containing a "scope of use" clause that states: "[T]his agreement shall not be introduced, referred to, or in any other way be utilized in any subsequent arbitration, litigation, or administrative hearing. . . ."[23]

According to the Employer, admitting this evidence into the arbitral record will chill the parties' efforts to settled future grievances. In contrast, the Union discounts the Employer's chilling-effect argument. The Union emphasizes that only those facts leading to the dispute—as distinguished from the settlement agreement itself—are being offered into evidence. The Arbitrator admitted the "Brenn Facts" together with the "scope of use" clause to determine whether the latter encompasses the former. If so, then the "Brenn Facts" would be excluded from the arbitral record in this dispute.

The broadest, exclusionary language in the "scope of use" clause prohibits the settlement agreement from being "utilized" "in *any other way* . . . in any *subsequent arbitration*, litigation, or administrative hearing. . . ."[24] Standing alone, that language sweeps within its ambit not only the substance of the settlement agreement itself but also the pre-settlement discussions or negotiations as well as any other facts or circumstances that might reasonably have influenced the settlement of the Brenn Grievance.

Nevertheless, scrutiny of the "Brenn Facts" reveals that they are indeed limited to the facts and circumstances which triggered the dispute. And the "scope of use" clause neither explicitly nor implicitly bars the parties from introducing those facts and circumstances into subsequent arbitral hearings. In other words, the "Brenn Facts" are entirely severable from the settlement agreement or any of the factors listed above. Admitting that evidence into the arbitral record is, therefore, highly unlikely to threaten the integrity of the settlement agreement itself or to chill the parties' enthusiasm for settling future grievances. Consequently, the Arbitrator holds that the "Brenn Facts" are admissible and appropriate for assessing the

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[23] Joint Exhibit No. 9 at 2.

[24] Joint Exhibit No. 9 at 2.

validity of the Union's allegation of disparate disciplinary treatment. The task now is to assess the Union's allegation of disparate treatment in light of the "Brenn facts."

2. Elements of a Disparate Treatment Claim

To establish its claim of disparate treatment, the Union must adduce preponderant evidence in the record as a whole that: (1) the Grievant and Brenn are similarly situated as to the type of demonstrated misconduct in both cases as well as any other relevant circumstances surrounding their misconduct, (2) the Grievant was disciplined more severely than Brenn, and (3) that disciplinary disparity is so incongruous with any relevant difference between these two cases as to be unreasonable, arbitrary, or capricious.

a. Degree of Required Similarity

The degree of required similarity between the Brenn dispute and the instant one spans not only the type of misconduct in which the Grievant and Mr. Brenn engaged but also other relevant circumstances that adversely affect their fitness for employment and BWC's interest in accomplishing its mission. First, both the Grievant and Mr. Brenn requested leaves of absence. Mr. Brenn requested sick leave and vacation time.[25] The Grievant requested an unpaid leave of absence. Second, both the Grievant and Mr. Brenn sought to conceal the real reason for their absences from work—their unexpected incarcerations. Third, the Grievant attributed her absences to personal reasons; Mr. Brenn alleged illness and the more general reason of "emergency situation crisis situation."[26] Fourth, both employees enlisted third parties to request leaves of absence in their behalf. The Grievant had Mr. Williams to request unpaid leave in her behalf; Mr. Brenn had his father request sick leave for him. Fifth, several days elapsed between the times that either employee contacted BWC. Approximately six days elapsed between Mr. Brenn's personal contacts with BWC,[27] four

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[25] Union Exhibit No. 2 at 1.

[26] Union Exhibit No. 2 at 8.

[27] Union Exhibit No. 2 at 1.

separated the Grievant's. Finally, both employees failed to report to work as they had promised.[28] Mr. Brenn requested sick leave on May 4, 1999, promising to return that afternoon, but not returning until March 10, 1999.[29] On the morning of October 13, 1999, the Grievant promised to report for that afternoon.

While striking similarities tend to rivet these two cases together, substantive distinctions tend to pry them apart. Some differences aggravate the Grievant's misconduct, thereby justifying a harsher penalty and weakening the Union's claim of disparate treatment. Other disparities mitigate her misconduct, thereby contraindicating stronger discipline and strengthening the Union's disparate treatment claim. Mitigating distinctions include the Grievant's 17 years of service as compared to Mr. Brenn's approximately seven years of seniority. Mr. Brenn failed to corporate during BWC's investigative interview and lied to BWC.[30] In contrast, the Grievant never lied to BWC, she simply refused to specify the exact reason(s) for her absence. Specifically, she labeled her reasons personal and characterized them as beyond her control. Due to Mr. Brenn's misrepresentations—not to mention his father's—BWC has some grounds for distrusting him. That is not so in the Grievant's case.

In contrast, although only one dissimilarity between the cases aggravates the Grievant's misconduct, it is a serious dissimilarity. The Grievant's disciplinary record is substantially worse than Mr. Brenn's. When she was terminated, the Grievant had seven active disciplines on her record;[31] Mr. Brenn had none.[32]

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28 Union Exhibit No. 2 at 1.

29 Union Exhibit No. 2 at 1.

30 Union Exhibit No. 2 at 1.

31 Joint Exhibit No. 5 at 1.

The Grievant's Active Disciplinary History		
Discipline	Violations	Dates
Verbal	Attendance (a) Tardiness	04/12/1995
written	Attendance (a) Tardiness	05/11/95
written	Attendance (a) Tardiness	03/21/96
written	Attendance (g) Unexcused Absence Neglect of Duty	03/28/96

The final discrepancy between the two cases must fall on BWC's shoulders. For some reason, BWC failed to charge Mr. Brenn with job abandonment, even though his misconduct falls as clearly within that classification as does the Grievant's. Mr. Brenn and the Grievant were charged with failing to contact BWC for approximately four [33]days, and Mr. Brenn missed May 6, 7, 8, & 9, 1999; The Grievant missed October 14, 15, 18, & 19, 1999.[34] The Arbitrator can discern absolutely no reason in the record for favoring Mr. Brenn in this manner, especially when the first episode of "job abandonment" warrants discharge under BWC's penalty table.[35] Clearly, this case is tainted with disparate treatment. Had BWC charged Mr. Brenn with job abandonment, he too could very well have been fired, or at the very least been given a stiff suspension.

One-day Suspension	Attendance (a) Tardiness Neglect of Duty (d) sleeping on duty	02/13/97
2 Day Suspension	Neglect of Duty (c) Work Production Failure to meet work standards	07/15/97
Removal	Attendance (c) Job Abandonment	11/08/99

[32] Union Exhibit No. 2.

[33] Joint Exhibit No. 2 at 1.

[34] Joint Exhibit No. 3 at 3.

[35] Joint Exhibit No. 8 at 4.

Bureau of Workers Compensation Penalty Table Attendance				
Violation	1st	2nd	3rd	4th
a) Three (3) or more consecutive days without contact (considered job abandonment	Removal			
d) Being away without leave when time has been requested but not approved	Verbal/Written	Minor Suspension	Major Suspension	Removal
e) Being away without leave with no contact	Written/suspension	suspension/removal	Removal	

VII. Penalty Assessment

However, that cannot be the final consideration here. Ultimately the issue of penalty assessment must be addressed. Penalty assessment focuses on whether the Grievant's termination is unreasonable, arbitrary, or capricious. Although the foregoing disparity in charging the Grievant and Mr. Brenn is prejudicial with a vengeance, it must be balanced against the major substantive differences between the Grievant's case and Mr. Brenn's. For example, even if BWC had charged the Grievant with "Being away without leave with no contact,"[36] instead of job abandonment, BWC still could have disciplined the Grievant more severely than Mr. Brenn without slipping into the realm of unreasonableness, arbitrariness, or capriciousness. As pointed out above, the Grievant's long disciplinary history, without more, still would have justified a substantially heavier measure of discipline relative to that imposed on Mr. Brenn.

Nevertheless, the Arbitrator is convinced that, in the instant case, discharge is unreasonable, arbitrary, and capricious, given that BWC did not contemplate any discipline more serious than a suspension of approximately three days for Mr. Brenn. Mr. Brenn lacked the disciplinary history of the Grievant. On the other hand, the Grievant's seniority, lack of misrepresentation, and her relative corporative attitude should have figured prominently in her favor. When these factors are added to the inexplicable disparity in BWC's failure either to lower the charge against the Grievant to "Being away without leave with no contact," or to charge Mr. Brenn with "Job abandonment" tips the scale decidedly in the Grievant's favor.

VIII. The Award

For all the foregoing reasons, the grievance is **SUSTAINED IN PART AND DENIED IN PART.** BWC is hereby ordered to reduce the Grievant's removal to a one-month suspension and to reinstate the Grievant forthwith. Furthermore, the Grievant is to receive full back pay from December 8, 1999—to the date of her *reinstatement* pursuant to this award, *minus* any earnings she could have secured by exercising due diligence during that *same* period. Finally, the Grievant's seniority and accompanying rights and

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[36] *Id.*

benefits shall remain *unmitigated* and *unaffected*, as if her termination *never occurred.*

Notary Certificate

State of Indiana)

)SS:

County of Marion

Before me the undersigned, Notary Public for Hendricks County, State of Indiana, personally appeared Robert Brookins, who swears under oath and under penalty of perjury that the contents of this document are true and accurate and were prepared solely by Robert Brookins who hereby acknowledges the execution of this instrument this 5th day of December, 2000.

Signature of Notary Public: Susan K. Agnew

Printed Name of Notary Public: SUSAN K. AGNEW

Notary Public, State of Indiana
County of Hendricks
My Commission Expires 11/13/2006

My commission expires: _____

County of Residency: _____

Robert Brookins

Robert Brookins