

American Arbitration Association

Before ARBITRATOR SANDRA SMITH GANGLE

In the Matter of the Arbitration)
between)
)
WASHINGTON FEDERATION OF STATE) Case No. 75 390 00364 07
EMPLOYEES,)
Association,)
) **DECISION AND AWARD**
and)
)
STATE OF WASHINGTON, DEPARTMENT) Hughes Suspension Grievance
OF SOCIAL AND HEALTH SERVICES,)
Employer)
)
_____)

Hearing Conducted: May 22, 2008

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Arbitrator: Sandra Smith Gangle, J.D.
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P.O. Box 904
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Date of Decision: July 18, 2008

BACKGROUND

This matter came before the arbitrator pursuant to a collective bargaining agreement between the parties effective between July 1, 2005 and June 30, 2007 (Jt. Ex. #1).¹

The parties were unable to resolve this matter through the initial steps of the contractual grievance procedure. They selected Sandra Smith Gangle, J.D., through selection procedures of the American Arbitration Association, as labor arbitrator to conduct a hearing and render a decision in the matter.

A hearing was conducted on May 22, 2008 in a conference room of the Washington Attorney General, Spokane, Washington. The parties were thoroughly and competently represented by their respective attorneys throughout the hearing. The State was represented by Rachelle Lee Wills, Assistant Attorney General, assisted by Alicia Ozanich, Assistant Attorney General. The Association was represented by Gregory M. Rhodes, Esq., of Younglove, Lyman & Coker, Attorneys at Law, Olympia, Washington.

A court reporter from the office of Bridges Reporting & Legal Video of Spokane, WA was present and made a verbatim record of the proceeding. The court reporter submitted the hearing transcript to the arbitrator and the parties by e-mail transmission on June 9, 2008.²

There were no objections to procedural or substantive arbitrability of the grievance. The parties were each afforded a full and fair opportunity to present testimony and documentary evidence in support of their respective positions. Three witnesses appeared and testified under oath or affirmation and were subject to cross-examination. They were as follows:

¹ Joint exhibits are identified herein as Jt - #, State (Employer) exhibits as R-#. The Association did not offer exhibits of its own, but stipulated to Ex. R-1 through R-8, R-10 through R-12, R-14 and R-18 through R-23.

² Citations to specific pages of the transcript are referenced herein as Tr. #.

(a) **For the State:** Terrie Moore and Harold Wilson; (b) **For the Association:** Jackie Hughes (Grievant). A support person was permitted to be in the hearing room when Ms. Moore testified. Two other persons, who had intended to observe the hearing, were excluded on motion of the Association.

Written briefs were submitted by both parties in lieu of oral closing argument. The arbitrator officially closed the hearing and took the matter under advisement upon receipt of the parties' briefs, by electronic transmission, on June 27, 2008.

The arbitrator has considered all the testimony and evidence submitted by the parties at the hearing. She has weighed the evidence and has given careful consideration to the arguments of the parties, as contained in their briefs and supported by arbitral authority and applicable case law.

STATEMENT OF THE ISSUE

The parties agreed that the issue before the arbitrator in this matter is as follows:

Was there just cause, pursuant to the collective bargaining agreement, to discipline Ms. Hughes? If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 12 SICK LEAVE

* * *

12.5 Sick Leave Reporting and Verification

An employee must promptly notify his or her supervisor on the first day of sick leave and each day after, unless there is mutual agreement to do otherwise. If the employee is in a position where a relief replacement is necessary, the employee will notify his or her supervisor at least one (1) hour prior to his or her scheduled time to report to work. If the Employer suspects abuse, the Employer may require a written medical certificate for any

sick leave abuse. In addition, an employee returning to work after any sick leave absence may be required to provide written certification from his or her health care provider that the employee is able to return to work and perform the essential functions of the job with or without reasonable accommodation.

ARTICLE 15

FAMILY AND MEDICAL LEAVE

15.1 A. Consistent with the federal Family and Medical Leave Act of 1993 (FMLA), an employee who has worked for the state for at least twelve (12) months and for at least one thousand two hundred fifty (1,250) hours during the twelve (12) months prior to the requested leave is entitled to twelve (12) workweeks of FMLA leave in a twelve (12) month period for any combination of the following: * * * (2) Personal medical leave due to the employee's own serious health condition that requires the employee's absence from work: * * *

* * *

15.7 Personal medical leave or serious health condition leave covered by the FMLA may be taken intermittently when certified as medically necessary.

* * *

15.9 The employee will provide the Employer with not less than thirty (30) days' notice before the FMLA leave is to begin. If the need for leave is unforeseeable thirty (30) days in advance, then the employee will provide such notice when feasible.

ARTICLE 27

DISCIPLINE

27.1 The Employer will not discipline any permanent employee without just cause.

27.2 Discipline includes oral and written reprimands, reductions in pay, suspensions, demotions, and discharges. . . .

* * *

27.4 All agency policies regarding investigatory procedures related to alleged staff misconduct are superseded. The Employer has the authority to determine the method of conducting investigations.

ARTICLE 29

GRIEVANCE PROCEDURE

* * *

29.4 C. Selecting an Arbitrator

The parties will select an arbitrator by mutual agreement or by alternately striking names supplied by AAA and will follow the Labor Arbitration Rules of the AAA unless they agree otherwise in writing.

D. Authority of the Arbitrator

1. The arbitrator will:
 - a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;
 - b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;
 - c. Not make any award that provides an employee with compensation greater than would have resulted had there been no violation of this Agreement;
 - d. Not have the authority to order the Employer to modify his or her staffing levels or to direct staff to work overtime.
- * * *
3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant.

E. Arbitration Costs

1. The expenses and fees of the arbitrator, and the cost (if any) of the hearing room, will be shared equally by the parties.

**ARTICLE 35
MANAGEMENT RIGHTS**

Except as modified by this Agreement, the Employer retains all rights of management, which, in addition to all powers, duties and rights established by constitutional provision or statute, will include but not be limited to, the right to:

* * *

- F.** Develop, enforce, modify or terminate any policy, procedure, manual or work method associated with the operations of the Employer;

Jt. Ex. #1

STATEMENT OF FACTS

The Grievant is a Psychiatric Security Attendant (PSA) at Eastern State Hospital, a mental health facility in Medical Lake, Washington. A State employee for the past 27 years and a PSA since 2000, she has been assigned to Eastern State Hospital since 2005.

When the events occurred that gave rise to the instant grievance, the Grievant worked on graveyard shift, which had a starting time of 2245 (10:45 p.m.).³ She was assigned to the Forensic Security Unit (FSU), where the patients have been judged Not Guilty by Reason of Insanity for felonious conduct. Her supervisor was Terrie Moore, RN 3. The Hospital's Chief Executive Officer was Harold Wilson.

The mission of the FSU is to stabilize the 20-28 patients who are housed there. All patients have been declared dangerous to themselves or others because of their mental health condition and the criminal-type behaviors they have committed in the community.

The Grievant's specific role, as a PSA, is to ensure that the patients in FSU have a safe environment. She is responsible for monitoring patient locations and making sure the doors are locked. She also assists the registered nurses with bathing the patients and providing for their basic needs. Three PSA's work on the FSU ward, as well as three Psychiatric Security Nurses (RN 2's), who handle medication issues, and the RN3 Supervisor. All seven employees in FSU also serve as "floaters", which means they sometimes are assigned to the Adult Security and Geriatrics Units.

The Grievant's Annual Review for 2005-06 shows that she was performing adequately in many aspects of her position at that time. Her supervisor included positive comments about the Grievant's communication skills and behavioral interaction with patients, her appropriate use of documentation and her proficient use of computers in preparing forms. See Ex. R-21, p. 4.

During the first few minutes of a shift, each PSA in FSU must perform a ward check. That means he or she must carefully survey the ward, checking the doors and locks and

³ She transferred to swing shift in March 2007, after the events giving rise to this grievance had occurred.

accounting for the location and safety of all patients. Tr. 29. The outgoing shift employees share critical information with the arriving PSA's at that time, such as patients' medication needs, care assessments and behavioral issues that might have arisen during their shift. The supervisor makes specific assignments to the arriving staff. Id.

Patients have a tendency to act up during the shift-changing time. According to a witness, patients have attempted to commit suicide during such periods and assaults have occurred. Tr. 97-8.

The Hospital has a long-standing policy in place that requires employees to call in at least one hour before their shift is to begin, if they will be absent or late. Tr. 33, 120-21; Ex. 12. The call-in policy is known as Nursing Standard 206. The policy is referenced in the parties' collective bargaining agreement at Article 12.5, the Sick Leave provision.

The call-in requirement allows Hospital staff to provide adequate coverage for patients' needs during the critical transition period between shifts. When a supervisor learns that an employee is going to be absent or will be arriving late, he or she must reassign the remaining staff, in order to cover the shift's needs appropriately, or must call in substitute staff from the Spokane area. The available substitutes must travel up to 40 miles to get to the hospital in Medical Lake.

The Grievant has a history of arriving at work late, or being absent, without having called in at least one hour in advance. Her Annual Review for 2001-02 shows that she was expressly warned at that time to "[f]ollow hospital procedure for use and reporting of unscheduled leave". Ex. R-23. Her 2004-05 Annual Review shows that she attended a "formal meeting in March, 2005, addressing her unscheduled leave usage and how [it] impacts delivery of quality patient

care.” Ex. R-22. She was reminded at that time of the reporting policy. Id. Her 2005-06 Annual Review shows that her unscheduled leave pattern continued to be an area of concern and she was reminded to “follow policy/expectations for reporting intended usage of unscheduled leave”. Ex. R-21, p. 4.

In May of 2006, the Grievant received a Letter of Reprimand for her “pattern of use for unscheduled leave and failure to consistently follow [the call-in policy] to notify Central Nursing Office of tardiness and absenteeism, . . . a chronic performance problem”. Ex. R-8. The reprimand acknowledged thirty incidences of unscheduled leave, including two no-call/no-shows and twelve tardinesses. She had failed to call in at least one hour before her absences or tardiness on six dates between January 10 and March 29 of 2006. Id.

On November 6, 2006, the Grievant was disciplined for fourteen incidences of unscheduled absences or tardiness, without at least one hour’s advance notice. Those violations had occurred during the four-month period between the issuance of the May reprimand and September 19, 2006. As discipline for those violations, her salary was reduced by ten percent (10%) for a six-month period. Ex. R-7. The Salary Reduction was initially grieved by the Union, but that grievance was eventually withdrawn. Id at p. 12.

On April 13, 2007, the Grievant received a Notice of 21-day Suspension (three weeks) for “unauthorized absence, insubordination and neglect of duty arising from fifteen alleged incidences of failing to follow prescribed notification procedures for unscheduled absences and tardiness during the period from October 15, 2006 through March 26, 2007.” Ex. R-6. The dates of those new infractions were listed as follows: In 2006: October 15, November 25, December 13 and 25; and, in 2007: January 2, 9, 13, 14, 15, 24, 30 and 31, February 3 and 19

and March 26. Id., at p. 2. The document was signed by Harold Wilson, Chief Executive Officer, and contained the following rationale for the suspension:

Your continued purposeful ignoring the requirements of your position, even after they have been consistently reiterated to you by both your first and second level supervisors via counseling sessions and reprimands, and my previous disciplinary sanction for very similar violations under which you are still serving, amounts to blatant disregard for the mission of the hospital. . . . Any further failure to adhere to these directives will be considered insubordination and will subject you to further discipline which could include dismissal.

Id., at page 3.

The Union grieved the April 13, 2007 Suspension Notice. It is that grievance that is before the arbitrator in this matter.

The Grievant suffers from recurrent migraine headaches. The condition was reported to the Employer in November of 2006. The Grievant's medical professional provided the opinion that intermittent leave would be needed "for flare-up of medical condition". Ex. R- 18. On November 20, 2006, the Employer authorized the Grievant to take intermittent leave, as needed, for her chronic condition, pursuant to the Family Medical Leave Act (FMLA).

POSITIONS OF THE PARTIES

The Employer: The State contends it had just cause, as required by the parties' collective bargaining agreement, to suspend the Grievant for three weeks, based on her failure to provide one hour's call-in notice to the Hospital on twelve of the fifteen unscheduled absences and incidents of tardiness that were listed on the April 13, 2007 Notice of Suspension.⁴ The State emphasizes that, for any of the dates that involved FMLA leave requests, the discipline was based solely on the Grievant's failure to call in at least one hour prior to her shift start time of

⁴ The State acknowledged at the hearing that three of the listed dates – December 13, January 24 and January 30 –

2245 (10:45 p.m.). She was not disciplined for exercising her right to take FMLA leave at any time.

Given the Grievant's previous disciplinary history, which showed repeated instances of failing to call in as required, and the Grievant's failure to correct her behavior following the implementation of a six-month salary reduction for such violations, the State contends that termination would have been justified. The State's decision to issue a lesser penalty in the form of a three-week suspension was clearly appropriate and should be upheld by the arbitrator.

The Association: The Association contends the State did not have just cause for the suspension action. The Association asserts that most of the Grievant's absences were excused by her use of FMLA leave, which had been authorized on November 20, 2006, for her chronic condition of intermittent migraine headaches. Ex. R-18. The Association argues further that, whenever the Grievant failed to call in one full hour before her shift starting time, it was either because she had taken medication for a migraine and had failed to wake up in time to make the call or she had encountered an unforeseeable emergency such as a flat tire or dead battery.

The Association points out that Article 15 of the collective bargaining agreement expressly incorporates the FMLA, a federal law, by reference. Section 15.9 of the contract provides that, when an employee's need for FMLA leave is unforeseeable, the employee only needs to provide such advance notice to the employer as is "feasible". This contractual requirement, says the Association, meets with the Federal requirement that, in unforeseeable situations, notice be given "as soon as practicable under the facts and circumstances of the particular case." Citing, 29 CFR Section 825.303(a).

According to Federal law, it is discriminatory for an employer to discipline an employee

for taking FMLA leave, for which the employee is eligible. The Federal law trumps the Hospital's call-in policy, in the Association's view.

The Association argues further that the Employer failed to make an adequate investigation before issuing the suspension. If the Employer had investigated, it would have learned that it had not been feasible for the Grievant to meet the Hospital's one-hour call-in deadline.

For those reasons, the Association contends the discipline was not for just cause. It asks the arbitrator to grant the grievance and make the Grievant whole for her losses.

ANALYSIS AND DECISION

The arbitrator's role is to interpret and apply the parties' collective bargaining agreement and resolve the grievance at hand. In this case, the issue is whether the State had "just cause", as required by Article 27, to discipline the Grievant, by issuing a three-week suspension.

A. Standard of Just Cause:

For many years, arbitrators defined the disciplinary standard of "just cause" by reference to the "seven tests", or questions, which Arbitrator Carroll R. Daugherty theorized to be its essential attributes. *See, for example, Enterprise Wire Co.*, 46 LA 359 (1964). If the answer to any of the seven questions was no, the arbitrator could conclude that the Employer had lacked just cause to take the disciplinary action. In recent years, however, arbitrators have moved away from a mechanical implementation of the seven Daugherty tests. While most still rely on the principles that are contained within those tests, they frame the principles in a more concise manner, requiring the Employer to prove the following, by clear and convincing evidence:

1. That the Grievant was guilty of the wrongdoing that was charged;
2. That the Employer provided due process, including prior warning that the type of misconduct the Grievant allegedly committed would lead to discipline, and that a reasonable and fair investigation was conducted before the decision was reached; and,
3. That the penalty the Employer imposed on the Grievant was appropriate, considering the proven circumstances, the Grievant's past record and any mitigating or aggravating circumstances.

See, e.g., Lankford, Levak and Nelson, *"Did He Do It? Employer Handbook 'Just Cause' Meets the Collective Bargaining Agreement"*, in Arbitration Under Oregon's PECBA (University of Oregon LERC Monograph #17, 2003); See also *Albertson's, Inc.*, 115 LA 886, 891 (Arb. Gangle, 2000); *Smurfit-Stone Container Corp.*, 113 LA 870, 876 (Arb. Greer, 1999).

The Employer points out in its brief that the Washington Supreme Court defined the "just cause" standard in the following manner in *Baldwin v. Sisters of Providence in Washington, Inc.*, 112 Wn.2d 127, 139, 769 P.2d 298 (1989):

We hold "just cause" is a fair and honest cause or reason, regulated by good faith on the part of the party exercising the power. We further hold a discharge for "just cause" is one which is not for any arbitrary, capricious or illegal reason and which is one based on facts (1) supported by substantial evidence and (2) reasonably believed by the employer to be true.

The arbitrator is not persuaded that the *Baldwin* standard of just cause supersedes the arbitral standard. The arbitral standard requires more of the Employer than *Baldwin* requires. The arbitrator will therefore determine whether or not the Employer's reason for issuing the three-week suspension to the Grievant was arbitrary, capricious or illegal, and will require proof of the following specific components of just cause: (1) that the Grievant was guilty of the

charged offenses; (2) that the Grievant was accorded due process; and (3) that the penalty assessed was reasonable, considering the seriousness of the offenses, the Grievant's past record and any mitigating or aggravating circumstances.

B. Proof of Charges:

The April 13, 2007 disciplinary letter cited fifteen dates on which the Grievant allegedly failed to call in at least one hour before her starting time to report an unscheduled absence or tardiness. At the hearing, the Employer stipulated that there were actually twelve chargeable incidents, not fifteen.

Four of those twelve (October 15, November 25, January 2 and January 13) did not involve allegations of illness related to the Grievant's FMLA condition. Therefore, the arbitrator will consider those first. The remaining dates involved allegations related to the medication the Grievant was taking for her FMLA condition. Those will be considered separately.

October 15, 2006: The evidence shows the Grievant arrived at 0045 (12:45 a.m.), two hours after her shift starting time, on this date. See Ex. R-16, p. 2. She had not called in and Hospital staff had called her at home because she was "NCNS" (No Call/ No Show) when her shift began at 2300 (11:00 p.m.). Returning the staff's call at 2330 (11:30 p.m.), the Grievant had reported a problem with her "alarm". Ex. R-16, p. 3. When she arrived 45 minutes later, however, she wrote "family emergency" as the reason for her NCNS on her leave slip. Ex. R-17, p. 2. Oddly, she did not mention any alarm malfunction.

The Association points out that the October 15 incident occurred prior to the implementation of the Grievant's six-month salary reduction. Therefore, the Association believes the Employer should not have listed that infraction in the April 13, 2007 disciplinary

letter. The arbitrator does not agree. The October 15 incident was not included in the list of infractions that gave rise to the salary reduction action. More significantly, it was the first of a succession of similar incidents, showing a pattern that was continuing, in spite of the issuance of the Employer's strong corrective action for similar past violations of the call-in policy.

November 25, 2006: The evidence shows that Grievant called in at 2240 (10:40 p.m.), five minutes before her shift was to begin, to report that she would be arriving late for work due to "car problems". Ex. R-16, p. 2. She actually arrived at work at 2250 (10:50 p.m.), just ten minutes after the call and five minutes beyond her start time. On her leave slip she wrote "trouble starting car due to weather and battery". Ex. R-17, p. 3.

January 2, 2007: The Grievant again called in at 2240 (10:40 p.m.), five minutes before her shift was to start. This time she reported that she had had a flat tire en route and needed to change the tire. Ex. R-16, p. 2. She arrived at work at 2247 (10:47 p.m.), just seven minutes after calling in and two minutes beyond her starting time. She reported on her leave slip that she had changed her tire and had waited for a "long train" as well. Ex. R-17, p. 6.

January 13, 2007: The Grievant called in at 2245 (10:45 p.m.), her shift starting time, and reported that she had a dead battery. Ex. R-16, p. 1. She arrived at work ten minutes later, at 2255 (10:55 p.m.). Ex. R-17, p. 8. On her leave slip, she listed "all pipes in house frozen and dead car battery". Id.

In its brief, the Employer expresses doubt that the Grievant was truthful in reporting that she had suffered car trouble on the three occasions: November 25, January 2 and January 13. The Employer opines that it is unlikely the Grievant could have obtained a jump start or changed a tire in the space of seven to ten minutes on each of those dates.

The Grievant testified that she lives on a gravel street and experiences flat tires frequently. She also said the weather had been cold and she didn't have a garage. Since cell phone transmission is not good in her neighborhood, it is not easy to call in from her vehicle.

The arbitrator concludes it is more likely than not that the Grievant reported car trouble as an excuse on November 25, January 2 and January 13, when she realized that she was going to be late for work. Such excuses, if untrue, are clearly unacceptable. Employees have a duty to be truthful with their employers.

Even if the Grievant did have car trouble on those dates, however, she was not excused from her responsibility to notify the Employer of the problem one hour in advance of her shift starting time. In other words, she should have checked her car before 9:45 p.m. each evening to make sure it would be capable of getting her to work on time. Most importantly, she was responsible for getting to work on time, regardless of her transportation difficulties. See, e.g. *Universal Stainless & Alloy Products*, 116 LA 90, 95 (Arb. Franckiewicz, 2001); *Rockwell Int'l Corp.*, 86 LA 120, 125 (Arb. Feldman, 1985); *Peabody Coal Co.*, 79 LA 433, 436 (Arb. Mittelman, 1982).

The arbitrator now will consider the eight dates on which the Grievant contended that her failure to call in on time was related to her FMLA-covered condition of migraine headaches. Those dates were **December 25, 2006; January 9, 14, 15 and 31, 2007; February 3 and 19, 2007; and March 26, 2007**. On five of those dates, the evidence shows that the Grievant called in five to fifteen minutes before her starting time. On one date, she called in 45 minutes before her shift was to start. On the remaining two dates (January 14 and February 19) she was NCNS until well beyond her shift starting time. Ex. R-16.

At the hearing, the Grievant's explanation for failing to call in on time was that she had failed to awaken in time to make the call. She said the prescription medicine she was taking had a sedating effect that "knocked her out" for over ten hours at a time. Tr. 164-65. She said her physician was trying to find an effective medication that would eliminate the pain of her migraines without preventing her from waking up, but so far he had been unable to do so. Id.

The Grievant acknowledged that twice during the period -- on January 2 and again on February 28, 2007 -- her supervisor had met with her to discuss the importance of following the call-in policy. An Association member was present at each of those meetings. It appears the Grievant asked for a transfer to the afternoon shift (3-11 p.m.) in order to deal with a "sleep apnea" problem. See Ex. R-14. Curiously, however, she did not address the migraine medication issue during those meetings. Tr. 94. If she had, she would have learned from her supervisor that she could call in when she first took her medication on any days that she felt a migraine coming on, even if that was many hours before her shift would start. Armed with such notice, the Employer would have the benefit of knowing the Grievant might be late or absent that night and could take appropriate steps to ensure adequate coverage on the ward. Id. Most importantly, the Grievant would have met her obligation under the call-in requirement.

The Association points out that, on one of the NCNS dates (February 19), the Grievant's migraine was so painful that she asked her son to take her to the Emergency Room. She testified that she had waited for more than an hour to have a shot for her migraine, but was too sick to call her Employer. Tr. 169. Curiously, she did not explain why she had failed to ask her son or an ER staff person to call her Employer.

The evidence is overwhelming that the Grievant knowingly and repeatedly violated the

call-in policy, as alleged by the Employer. The Grievant's record was deplorable, considering the strong need of the Employer to have advance notice of a PSA's absence or tardiness during the critical period at the beginning of her shift, when the safety of the patients on the Psychiatric Security Unit, who have been determined dangerous to themselves or others, as well as the safety of her staff colleagues, is at stake. Clearly, the Grievant had had many warnings of the importance of meeting her call-in obligation. Even though she had an FMLA-approved medical condition that would justify intermittent absences from work, she knew she had an obligation to provide a full one-hour notice to her employer that she would be absent or late. The fact that she violated the policy twelve times in five months, without finding some practical way of notifying her Employer that she was taking medication that might prevent her from waking up before 9:45 p.m., baffles the arbitrator.

The Grievant's counsel argues in his brief that the Grievant is excused from following the call-in policy because she has a FMLA-approved medical condition. In his brief, the attorney asserts that advance notice of an absence related to the covered illness needs only be given "when feasible" if the covered illness is intermittent and requires that leave be taken unforeseeably. The Counsel points to Article 15.9 of the parties' collective bargaining agreement and the Federal regulations governing FMLA leave, in support of his theory. According to the regulations, notice of such leave must only be given "as soon as practicable under the facts and circumstances of the particular case".⁵ Also, the regulations provide that, "advance notice pursuant to an employer's internal rules and procedures may not be required

⁵ 29 CFR Section 825.303(a).

when FMLA leave is involved”.⁶

The Employer argues that the Union’s reliance on Article 15.9 of the labor contract and the Federal regulations governing notice of FMLA-covered illness is misplaced. In its brief the State argues as follows:

Article 15.9 covers the period of time before an employee is *approved* to take FMLA qualifying leave at all. When an employee wants to be approved to take leave under FMLA, Article 15.9 requires the employee to give 30 days notice, or as much time as is feasible when the need for such leave is unforeseeable, so that the employer can begin processing the paperwork for FMLA, which may include medical verifications, follow up questions, and, ultimately, approval. Tr. at 157. Article 15.9 recognizes that employees will not always know 30 days in advance that they will need to be qualified under FMLA, thus allowing employees to notify employers of their anticipated need for FMLA authorization “when feasible.” The Article does not purport to control the process for reporting isolated intermittent absences once an employee has already been designated as FMLA-qualified.

In this case, Ms. Hughes was already approved for FMLA. Ex. 18. Thus, Article 15.9, which requires employees to report as soon as feasible the “need” for FMLA, simply does not apply to Ms. Hughes’ situation. * * * *

This interpretation is consistent with the Family Medical Leave Act and implementing regulations. Article 15.9 of the CBA is basically a mirror of 29 C.F.R § 825.302(d), which requires employees to give employers 30 days notice before leave is to start or, “as soon as practicable.” Theoretically, this 30-day window allows the medical verification and approval process to be completed before the employee starts taking leave. 29 C.F.R § 825.305(b) (“When the leave is foreseeable and at least 30 days notice has been provided, the employee should provide the medical certification before the leave begins.”). The regulations also specifically allow an employer to require the employee to comply with the employer’s “usual and customary notice and procedural requirements for requesting leave.” 29 C.F.R. § 825.302(d).

The language of the CBA and FMLA make clear that Article 15.9 does not apply to each and every individual intermittent FMLA absence, once employees have been approved to take FMLA leave. Rather, employees must provide such notice under Article 15.9 when they initially want to be approved to take leave under FMLA, and, once employees are FMLA-qualified, they must follow the employer’s “usual and customary notice and procedural requirements for requesting leave” if the schedule was not already agreed upon in the FMLA approval process. 29 C.F.R § 825.302(d). The exception is that

⁶ Id.

employers may not withhold or delay the use of FMLA just because an employee fails to follow the employer's internal policy. 29 C.F.R § 825.302(d). However, this provision makes clear that employers are still entitled to enforce their leave notification and request policies, even when such leave is designated as FMLA.

See Brief of Employer at p. 15-16.

The arbitrator agrees with the Employer's analysis. There is no provision, in either Article 15.9 of the collective bargaining agreement or in the federal regulations governing FMLA-approved leave, suggesting that an employee can exercise intermittent leave related to a pre-approved chronic illness, while not complying with an employer's reasonable and well-communicated policy requiring advance notice of each particular absence.

Arbitrator Ildiko Knott reached the same conclusion in a 1997 decision, in which he found a policy requiring the calling-in of absences to be consistent with FMLA. His reasoning is as follows:

The issue is that the grievant failed to call in on the dates in question as required by a legitimate and reasonable policy. **There is nothing in FMLA or the collective bargaining agreement which would relieve the grievant of his obligation, under very specific internal rules, to notify the employer that he would not be at work. * * * *** There is simply no FMLA based exemption from well known requirements under the Employer's Attendance Policy that an employee give notice that he won't be at work. Common sense dictates that to do otherwise would create chaos in the workplace * * * * [T]he employee does not get greater benefits than the employee who has worked continuously. The whole point of a FMLA leave is that the employment relationship continues and the attendant policies continue to apply. **While a specific protection prevents that FMLA leave time be counted against an attendance policy, no exemption to a call in procedure can be inferred from the law.**

In Re Manchester Plastics, 110 LA 169, 179 (Knott, 1997) (emphasis added).

The arbitrator finds that the Employer proved that the Grievant failed to comply with the call-in requirement on eleven of the twelve occasions that are claimed by the Employer. One of the twelve dates should have been excused for the reason that the Grievant was in the hospital and receiving treatment at the time the notice would have been given.

C. Due Process: The evidence shows that the Employer clearly and frequently communicated the need for the Grievant to comply with the one-hour call-in requirement. Meetings were conducted on January 2 and February 28 between the Grievant, her Supervisor and a Association Representative to try to resolve the matter without further discipline. Warnings, reprimands and even a six-month salary reduction action had been implemented as progressive steps of corrective discipline.

The arbitrator finds that the Employer made reasonable attempts to get the Grievant to improve her behavior before implementing further discipline. A pre-disciplinary hearing was conducted on April 10, 2007, with her Association representative present, in order to allow the Grievant an opportunity to offer evidence in her defense. See Ex. R-6, p. 2.

Based on the foregoing, the arbitrator finds that proper due process protections were provided to the Grievant before the decision to issue a three-week suspension was reached.

D. Reasonable Penalty: The Employer alleged in its suspension letter that the Grievant had violated the call-in provision on fifteen dates between October 15, 2006 and March 26, 2007. Subsequently, three of the dates were dropped from the list. One of the twelve remaining dates should have been excused for the reason that the Grievant was in the hospital and receiving treatment at the time the notice would have been given. The Employer proved that the Grievant violated the call-in policy on the remaining eleven dates.

The evidence shows that the Grievant had received repeated corrective actions for the same offense. Her behavior had not improved. The Employer considered terminating the Grievant, but decided on the less serious penalty of a three-week suspension.⁷

Aside from her attendance record, the Grievant was a satisfactory employee. Her annual evaluations showed that she was performing well in her role as a PSA. She had worked for the

⁷ There is also evidence in the record showing that the Grievant's request to change her shift assignment has been granted. This accommodation should be a help to her in adjusting her medication to her work and sleep schedule.

state for 27 years. A mitigating factor was the Grievant's health condition.

The arbitrator finds that, under the circumstances, the penalty of a three week suspension was reasonable, in that it was not arbitrary, capricious or illegal and it met the arbitral standards of just cause.

E. Conclusion: The grievance is denied.

AWARD

For the reasons set forth in the preceding analysis and decision, the arbitrator has determined that the Employer had just cause to issue the three-week suspension to the Grievant.

The grievance is denied.

Pursuant to Article 29.4 E (1), the parties shall share equally the fees and expenses of the arbitrator.

DATED this _____ day of July, 2008.

SANDRA SMITH GANGLE, J.D., Arbitrator