Jane Jones

STATE OF NEW YORK TIME AND ATTENDANCE DISCIPLINARY PANEL

IN THE MATTER OF THE TIME AND ATTENDANCE DISCIPLINARY BETWEEN

THE CIVIL SERVICE EMPLOYEES ASSOCIATION, UNION

and

STATE OF NEW YORK, OFFICE OF PARKS, RECREATION and HISTORIC PRESERVATION, EMPLOYER

GRIEVANT: [redacted]

CASE NO: [redacted]

DECISION

On June 22, 2017 a Time and Attendance disciplinary hearing was held in [redacted] New York before the undersigned Permanent Umpire to review a grievance filed by [redacted] in connection with a Notice of Discipline dated May 18, 2017 charging Grievant with unauthorized absence. Grievant was represented at the hearing by CSEA Contract Administration Specialists Carisa Guild. The Employer was represented by Director of Employee Relations [redacted]

Background

Grievant is a Park Worker 3, Grade 9. This is Grievant's first Time and Attendance discipline. The Notice of Discipline recites one unauthorized absence occurrence of twenty (20) consecutive workdays from April 20 2017 - May 17, 2017. The Employer has proposed termination.

Employer Position

Grievant was hired as a seasonal employee in 1995 and became a permanent employee as of November 15, 2007. Grievant is currently assigned to the [redacted] State Historic Site in the [redacted] Region. Grievant has not been to work since April 15, 2017 when, after working from 6:30 a.m. – 11:15 a.m., she cleaned out her locker and left work without prior approval. Grievant left a leave slip for that Saturday as well as for the following two days on which she was scheduled to work. Initial supervisory attempts to contact Grievant by phone and email were unsuccessful.

More than once prior to April 15, Grievant expressed dissatisfaction with her assignment to the [redacted] Historic Site and her desire to be reassigned elsewhere. In March 2017 Grievant was offered an opportunity to transfer laterally in her current Park Worker title to work with a journeyman crew alongside the agency's carpenter, with the goal of gaining needed experience to qualify for a Grade 12 Carpenter title. That offer was made by [redacted] in an email to Grievant dated March 17, 2017. On March 18 Grievant accepted this opportunity in a return email to [redacted] On April 13 in an extensive communication to [redacted]

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Grievant expressed concern regarding the length of time it was taking for her to be moved to her new assignment. Grievant wrote that prior to receiving [redacted] offer she had set a "walk off" date for herself which Grievant still considered "active" given the delay in her being transferred. Grievant ended that communication requesting to be in the new position by April 20.

On April 14, [redacted] met with Grievant in person at [redacted] and explained the delay in finding a seasonal fill for the [redacted] assignment.[1] Later that same day Grievant sent [redacted] another communication stating only *"I'm sorry but I'm done,"* followed less than an hour later by another message to [redacted], in relevant part *"...If you want and need me then I can start the 20th. Other than that I will have to decline your offer...."*

On April 20, Historic Site Manager [redacted] emailed Grievant, referencing Grievant's failure to call in for that day, the events of April 15, and Grievant's statements as [redacted] had heard from others to the effect that Grievant was not waiting for the carpentry job and leaving State employment. [redacted] then stated: *"...if you really intend to leave or believe you have left I need you to turn in your copies of the site keys...."* [redacted] received an email response from Grievant dated April 20, 2017 6:31 PM stating: *"Keys were mailed yesterday to [redacted]."*

On April 21, [redacted] again reached out to Grievant, seeking confirmation that Grievant was resigning from her job. On April 25, 2017 Grievant emailed a lengthy letter to [redacted] copying others both in the Agency and outside, relaying among other things, a long list of reasons why she would not return to work at her current assignment [redacted] and stating that she would not accept direction from [redacted] again. Grievant's three page letter concluded with the statement *"You go ahead and do what you have to do."* Being copied on this letter, Assistant Labor Relations Director [redacted] forwarded it to the Director of Labor Relations, [redacted]

By letter to Grievant dated May 3, 2017 Director [redacted] noted Grievant's continuous absence since April 20 and stated: *"If it is your intention to resign from State service, you must send us a signed letter formally resigning your position. If it is not your intention to resign, you must report to work at [redacted] Historical Site at your normal starting time. **You must take one of these actions by Monday May 8, 2017.** Failure to act will subject you to disciplinary action which may result in a penalty up to and including dismissal from State service"* [Underscoring supplied.]

The Grievant did not respond to the Director's May 3 letter. An interrogation was scheduled for May 18 at which time Grievant appeared and union representation was present. Grievant did not deny her absences or her failures to call-in commencing with April 20; nor did she have any medical documentation covering said absences. Grievant was given the Notice of Discipline at the interrogation. Grievant also said that she would return to work the next day. Grievant did not appear for work on May 19. Instead an application for approval of a seven week FMLA leave (May 19 - July 7) was received. Supplemented by a May 30 doctor's letter setting forth a specific diagnosis, Grievant's seven week FMLA leave application was approved on June 2, 2017.

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[1] The plan was to hire a season replacement for Grievant at [redacted] at which time Grievant would leave her [redacted] assignment and move to another location to join the Journeymen crew.

The Employer provided extensive documentation to support its proposed penalty of termination, including copies of Grievant's LATS reports, performance evaluations, prior medical documents, various relevant emails from and to Grievant, the Director's May 3 directive, and the recent FMLA leave paperwork.

Union Position

Grievant has ten years of service as a permanent employee, with satisfactory performance evaluations. This is her first Time and Attendance discipline. This case is not about Time and Attendance. It is about Grievant's assigned worksite. For more than three years, Grievant complained to management several times about what Grievant believed to be mistreatment on the job, discrimination and a hostile work environment. Grievant suffered two on-the-job injuries due to job assignments beyond Grievant's physical abilities. Despite her injuries, Grievant continued to work to the best of her ability to perform her assigned work well. When in March 2017 Grievant was promised a different position that would enable her to move away from the [redacted] work location and be trained for a carpenter position, Grievant was hopeful, believing that she had finally been heard. Grievant was told that she only had to await the backfilling of her assignment and then she could move to the new assignment. After waiting another month and making several inquiries as to a start date, Grievant decided that she could no longer work at her assigned location.[2] Grievant returned the site keys because she had received an email containing a supervisory directive to do so.

Grievant had been complaining to her supervisors and managers for at least three years regarding what Grievant believed to be improper treatment by her colleagues and supervisors, including age and gender discrimination. The Employer was aware of Grievant's concerns and had encouraged her to "take classes on communication" and "seek counseling." Grievant loves working for the Office of Parks, Recreation and Historical Preservation; her issue has always been with her worksite, due to what Grievant believes to be is a hostile work environment. Despite three and a half years of trying to get her Employer's attention on these issues, Grievant was very hopeful about the opportunity to transfer to the new position. But, after a month of awaiting that transfer, Grievant came to feel that the prolonged delay was just more of the same hostility she had been experiencing all along.

The Union has raised a procedural issue, noting that Grievant was not given a copy of her interrogation, as required pursuant to Article 33.2 subdivision c of the parties' agreement. The Union requests the Permanent Umpire to "resolve a claimed failure to follow the procedural provisions" of Article 33 pursuant to Article 33.5 subdivision b.

Grievant provided copies of her correspondence regarding the hostile environment at her current work assignment, along with emails sent and received both before and after April 20.

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[2] Grievant advised [redacted] by email dated April 13, 2017 that just before receiving the offer to relocate Grievant had "set a 'walk off' date for myself" and that she wished to start the new assignment on April 20. This email was copied to Park Manager [redacted] who immediately advised Grievant that [redacted] would be at [redacted] the very next day and would talk with Grievant.

Discussion

This is a Time and Attendance case involving one twenty-day unauthorized absence. While there may well have been a long period of difficulty for Grievant, her workplace issues are not within the jurisdiction of this Permanent Umpire.[3] There is no question of fact with respect to the actual days of unauthorized absence, leaving only one question that can be addressed here: is termination the appropriate penalty?

The workplace is not a "self-help" environment. For the most part, employee work assignments are not matters subject to individual employee refusal. In this matter, Grievant's options with respect to her work assignments and/or locations are controlled by her Employer, except as may be modified by applicable terms of the relevant collective bargaining agreement and/or statutes. Avenues and procedures for redress with respect to perceived workplace improprieties are available for aggrieved individuals, whether by contract grievance, employer complaint procedure, and/or statutory administrative or legal proceeding. Prolonged failure to appear for work is never a sanctioned option, if an employee expects to keep their job. In many environments such a failure may be treated as insubordination and/or job abandonment. In the Grievant's work environment, the Employer has an alternative option, i. e., the contractual Time and Attendance disciplinary procedure used herein.

The Time and Attendance forum was not negotiated for the investigation, adjudication and/or resolution of the particular workplace issues underlying Grievant's decision to remove herself from her assignment as she did herein. Nor can this Permanent Umpire give much weight to unproven allegations of workplace hostility and/or discrimination when assessing the Employer's proposed penalty against the standard of "appropriateness" under the applicable contractual language herein.[4]

Under the parties' collective bargaining agreement, allowable discipline for an unauthorized absence of eight or more consecutive workdays ranges from a $300 fine to termination. Whether the maximum allowable penalty should be sustained in a particular disciplinary case will depend on varying factors, including the employee's length of service and their prior Time and Attendance history. Besides these two factors, an employee's actual conduct as relates to his/her absence is considered. Here, Grievant has ten years of permanent service and this is her first attendance-related discipline, generally positive factors weighed in a Grievant's favor when looking at an Employer's proposed penalty. That being said, the following factors do not line up favorably for this Grievant so as to serve in mitigation with respect to the proposed penalty: (1) Grievant's action in cleaning out her locker on April 15 when leaving the worksite mid-shift; (2) Grievant's failure on more than one occasion to respond directly to supervisory inquiries as to whether her April 15th conduct should be construed as an intention to resign; (3) Grievant's self-imposed "walk off" date of April 20 if she was not in a new assignment by then; (4) Grievant's April 25 written excoriation of her supervisor,

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[3] At the hearing, the Permanent Umpire explained the Time and Attendance process to Grievant, including the limited jurisdiction of the Umpire's review.

[4] The result in this forum does not preclude Grievant from pursuing her allegations of hostile workplace and/or discrimination in other—appropriate—forums. Nothing in this Decision should be construed as addressing any of those issues/complaints.

concluding with the statement ""*You go ahead and do what you have to do*"; (5) Grievant's failure to respond to and/or comply with the Director [redacted] May 3 directive to either formally resign or to report to work by May 8; and (6) Grievant's failure at any time after her May 18 receipt of the Notice of Discipline to retract or otherwise withdraw her enunciated "walk off " date of April 20, 2017.

Grievant may have had legitimate reasons for seeking a different work assignment/location. However, Grievant's decision to stop reporting to her current work assignment as of April 20, 2017 carried with it the potential and serious risk of a negative consequence: i.e., that Grievant's time demand to be in a new assignment was not or could not be met. Grievant's conduct and statements as established by the record evidence herein fail to provide any basis upon which this Permanent Umpire can take issue with the appropriateness of the Employer's proposed penalty of termination.

Findings

Grievant is guilty of unauthorized absence for eight or more consecutive workdays when she failed to report for work from April 20 through May 17, 2017.

The Employer's failure to provide the Grievant with a copy of the any stenographic record (verbatim transcript) and/or tape recording made of the Employer's May 18, 2017 Time and Attendance interrogation of Grievant is inconsistent with the Employer's obligation pursuant to Article 33.2 subdivision c of the parties' collective bargaining agreement.

Penalty

The Employer's proposed penalty of termination is appropriate under the facts of this case and, accordingly, is hereby upheld.

Dated: [redacted]

Albany, NY

Nancy E Hoffman, Permanent Umpire