

STATE OF NEW YORK TIME AND ATTENDANCE DISCIPLINARY PANEL

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IN THE MATTER OF THE TIME AND ATTENDANCE DISCIPLINARY BETWEEN

THE CIVIL SERVICE EMPLOYEES ASSOCIATION, UNION

and

STATE OF NEW STATE OF NEW YORK OFFICE FOR PEOPLE WITH DEVELOPMENTAL DISABILITIES

[REDACTED], EMPLOYER

GRIEVANT: [REDACTED]

CASE NO: [REDACTED]

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DECISION

On May 16, 2017 a Time and Attendance disciplinary hearing was held at [REDACTED] New York before the undersigned Permanent Umpire to review a grievance filed by [REDACTED] in connection with a Notice of Discipline dated March 8, 2017. The Notice of Discipline charges Grievant with unauthorized absence. Grievant appeared at the hearing and was represented by CSEA Contract Administration Specialist Carisa Guild and CSEA Local [REDACTED]. The Employer was represented by Human Resources Specialist [REDACTED].

Background

Grievant is a Direct Support Assistant, with over fifteen years of service. Grievant has no prior absence disciplines. The Notice of Discipline cites seven unauthorized absence occurrences between February 11, 2016 and January 19, 2017 and ranging in duration from one to thirteen consecutive workdays. The Employer seeks termination.

Employer Position

In support of its proposed penalty, the Employer submitted extensive documentary evidence including copies of 2016 and 2017 (to 3/13/17) Time Sheet Reports, 2016 and 2017 (through 3/8/17) call-in logs, 2016 and 2017 FMLA approvals, Grievant's 2015 Performance Evaluation, medical documentation requirements, sign-in sheets, relevant medical documentation provided by Grievant, counseling memoranda (most recent dated 2/28/13), medical documentation requirement memoranda (most recent covering period from 12/3/15 to 3/3/16), a November 16, 2016 request for FMLA recertification, a December 8, 2016 Article 36 notification letter, and the January 23, 2017 Interrogation notes covering absence dates back to September 2015.

At the hearing, the Employer advised that after the Interrogation, Grievant "called-out" again for five days (Feb. 9-16), for two days (March 10-11), and for three days (April 4, 7 and 8). On April 6 Grievant

was approved for intermittent FMLA for 2017. As of March 13, 2017, Grievant went on Workers' Compensation leave.

#### Union Position

The Union cites Section 33.3 a.2 of the parties' collective bargaining agreement which provides that *"an employee shall not be disciplined for acts except those which would constitute a crime, which occurred more than one (1) year prior to the notice of discipline."* Applying this language to this March 8, 2017 Notice of Discipline, the first and second cited absence occurrences (February 11-15, 2016 and March 7, 2016) must be dismissed.

Grievant is a fifteen year employee and this is her first Time and Attendance discipline. Grievant's performance evaluations have been satisfactory. Five years ago, Grievant was diagnosed with [REDACTED] for which she had FMLA coverage in 2016. Grievant has complied with medical documentation requirements when applicable and she has called-in for all her absences. As approved in April 2016, Grievant's need for intermittent FMLA leave, as estimated by her doctor, would be for up to five days per episode, with one to two episodes per month. Grievant's single day undocumented absence on January 19, 2017 was for a [REDACTED]. Given that this is a first discipline and the cited absences primarily stem from a known serious health condition, the Union argued for a lesser penalty.

#### Discussion

Based on the language in the parties' collective bargaining agreement (Article 33.3 a.2), the Union's argument that the February 11-15 and March 7, 2016 absence dates are stale must prevail.

With respect to the remaining five absence occurrences, the record evidence demonstrates that Grievant provided medical documentation for the two absences that involved five or more consecutive days, i.e., her thirteen day absence in November 2016 and her earlier five day absence in March 2016. For the other three absences (March 24-25, April 4, 7-8, 2016, and January 19, 2017) medical documentation was not required under the parties' agreement. Additionally, there is no record evidence of any other medical documentation requirement covering that period of time. The most recent non-contractual 'medical documentation requirement' as imposed on Grievant covered the period from December 3, 2015 to March 3, 2016.<sup>1</sup>

The question before this Permanent Umpire is whether the proposed penalty of termination is the appropriate penalty. For this Permanent Umpire, the answer to that question is "no." Without

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<sup>1</sup> As an aside, the Grievant's post hearing submission included the same medical documentation as the Employer's submission, with the addition of documentation for the three day April 2016 absence. This April medical documentation is from the same provider [REDACTED], in the same format as eight other medical notes from that same provider as included in the Employer's submission. While there is no explanation as to how this documentation may have gone astray, it was not "required" medical documentation under the facts herein.

more, unscheduled absences covered by medical documentation when required, do not, per se, provide a basis for disciplinary action. Nor do two or three shorter-duration unscheduled absences for which there was no documentation requirement. Herein, there has been no suggestion or proof that the medical documentation that was provided was not authentic. Nor has there been any suggestion or proof that a handful of undocumented absences (whether including the April 2016 occurrence or not) were not due to personal illness as stated at the time of Grievant's call-in on each occasion or, otherwise, were not a proper use of sick leave.<sup>2</sup>

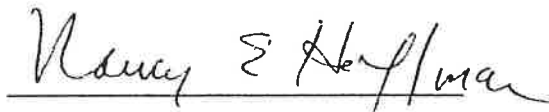
Findings

The cited absences that were more than a year old as of the date of this Notice of Discipline are dismissed for untimeliness.

With respect to the remaining five cited absence occurrences, Grievant met her medical documentation requirements for the two absences involving five or more consecutive workdays. The remaining three unscheduled absences were not subject to any documentation requirements and did not otherwise constitute an improper use of sick leave.

Accordingly, Grievant is not guilty of unauthorized absence and/or improper use of sick leave as charged in the Notice of Discipline and the Notice of Discipline dated March 8, 2017 is hereby dismissed.

Albany, New York  

Nancy E. Hoffman, Permanent Umpire

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<sup>2</sup> In fact, for each of these occurrences (March 24-25, April 4, 7-8, and January 19) sick leave was charged for only part of said absence. Time Sheet Records show that, in each case, other accrued leave and "lost time" were charged as well, all with supervisory authorization noted thereon.