

7.1; 101.1; 101.3: Grievant arrested on job & jailed. Paid vacation for next 8 days. Company terminated him on 1st day off work w/o pay; no 10-day notice. Grievant reinstated w/o backpay. Good discussion regarding 10 days off w/o pay before termination.



REVIEW COMMITTEE



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CASE CLOSED
FILED & LOGGED

INTERNATIONAL BROTHERHOOD OF
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R.W. STALCUP, SECRETARY

MARGARET A. SHORT, CHAIRMAN

- DECISION
- LETTER DECISION
- PRE-REVIEW REFERRAL

REVIEW COMMITTEE FILE NO. 1816

KELLY ADAMS
Company Member
Local Investigating Committee

FRANK SAXSENMEIER
Union Member
Local Investigating Committee

Subject of the Grievance

This case concerns the discharge of an Electric T & D Assistant for failing to report to work due to his incarceration. At the time of discharge, the grievant had 13 years of Service. He was discharged on September 25, 1997, for unavailability for work.

Facts of the Case

After work on Thursday, September 11, the police arrested the grievant at the service center. He testified that he was arrested following a miscommunication with his attorney which resulted in him failing to report to the Electronic Detention Center as ordered by the Court. On the following day, the grievant did not report to work and did not call. The grievant's mother phoned the OM&C Director that same day and informed him that her son was in jail and relayed his request to take vacation. The Director granted the request.

On the following Monday, September 15, the grievant's mother again phoned the Director to request vacation time off for her son. The Director responded that he would allow the grievant to use his remaining vacation, but that he only had 8 days left. When that time ran out, the grievant would be terminated.

On Tuesday, September 16, the Director sent a certified letter to the grievant at his home address and at the detention facility. The letter advised the grievant that his vacation allotment would expire on September 24, and that failure to return to work on September 25 would result in his termination. According to the record, the grievant received this letter.

The grievant worked a 9-80 schedule. Friday, September 19, was a regular day off. From the record, it appears the grievant was paid a combination of vacation and floating holiday through Wednesday, September 24, 1997. On September 25, 1997, the first day the grievant was absent without pay, he was terminated.

On October 2, the grievant showed up to work, stating that he had been released from jail the previous night. The Director reiterated to the grievant that he was discharged as of September 25, and dismissed him.

The Review Committee noted that, in February 1997, seven months prior, the grievant had been granted 10 days of unscheduled vacation because he was incarcerated. No discipline was taken at that time nor was the employee told that Company would not again grant unscheduled vacation due to incarceration. In addition, the Review Committee is aware that post-discharge, the grievant was again arrested and incarcerated for a similar offense.

At the time of discharge, the grievant had no active discipline.

Discussion

The question being asked in this grievance is whether the grievant was contractually entitled to 10 days of unpaid time off before his termination could occur. The Union argued that the termination was premature based on (1) a distinction between unpaid leaves in excess of 10 days and those for 10 days or less in Section 101.1, and (2) the practice of providing "ten day letters" to employees who are off without permission and without pay (3) that the vacation time had been granted and therefore, the grievant had not been off without permission prior to his discharge. Union noted that Subsection 111.12 addresses unscheduled vacation.

Referencing the language in Section 101.1 of the Agreement, Union noted that leaves of absence are in all cases for unpaid time off. Unpaid leaves for periods in excess of ten workdays require the completion of an application for leave. Absences without pay for ten consecutive workdays or less are also authorized under the same provisions, but do not require the completion of the form. Union opined that the time away from work that was paid as vacation and/or floating holiday was granted pursuant to the provisions of Sections 103.3 (Holidays) and 111.12 (Vacation). The Union believes that the provisions of Title 101 - Leave of Absence, come into play only following the exhaustion of paid time off. Once paid time off is exhausted, an employee then has the right to request a leave of absence which "shall be granted to regular employees, under the conditions set forth in this Title".

Company responded that the granting of vacation under these circumstances was an accommodation to the employee. In a situation like this, denying the vacation and ordering the employee to report for work would be pointless since he would not be able to comply. In addition, employees have varying amounts of vacation which could lead to disruptive extended work absences.

Again, Union disagreed with Company's interpretation of the agreement. The granting of time off for vacation and/or Floating Holidays is subject to the scheduling language in the respective sections of the Agreement. By virtue of the negotiated language, Company may refuse to grant unscheduled vacation and/or Floating Holiday under certain circumstances such as where the allotted number of employees scheduled to be on vacation (Subsection 111.13(2)) or Floating Holiday (Section 103.3) are already off; or where the employee's presence at work is required due to operational need; or where the payment of overtime to another employee to replace the vacationing employee would be required. Where those circumstances are not present, Company may not refuse the employee's vacation or Floating Holiday request. In Union's view, granting an employee's request to take paid time off on vacation and/or Floating Holiday is an "accommodation" only when Company grants such request in circumstances where the employee would otherwise not be contractually entitled to the time off. In the case at hand, there is no indication in the record that the grievant was not contractually entitled to be granted the vacation and floating holiday days off requested.

In P-RC 1251, the parties addressed the issue of the appropriateness of granting formal leaves of absence (those in excess of 10 days) as a result of incarceration. In that case, the parties concluded that "...the provisions of Section 101.1 have never been interpreted to be appropriate for incarceration". The same language in Section 101.1 governs both leaves in excess of 10 days and leaves for 10 days or less. As such, the Company believes that language which has been interpreted to preclude leaves for incarceration, cannot not be interpreted differently simply because the leave is for 10 days or less. As an actual matter of fact, the issue is not the length of time but whether authorization is to be granted for an absence caused by incarceration. It is clear to the Review Committee that incarceration is not an urgent or substantial reason as contemplated under Section 101.1.

Union believes that there is a long standing past practice of allowing unauthorized absences for up to ten consecutive workdays without regard to the reason before termination for unavailability to report for work, with the exception of instances where the individual is already under active positive discipline for attendance related issues.

The RC also discussed the practice of issuing 10 day letters to employees who are absent without permission (i.e. without pay as opposed to vacation, holiday, etc.). The

primary purpose of such letters is to advise the employee of the consequences of failing to return to work. A reasonable amount of time is allowed so the employee may be aware of the consequences before being terminated. In Company's opinion, there is no contractual requirement to provide 10 days prior to termination, however, the parties agree that the Company must make reasonable efforts to deliver written notice to the employee prior to termination.

Union conceded that the language of Title 101 does not explicitly state that an employee is contractually entitled to a period of up to ten consecutive workdays of unpaid absence before termination would occur, but also opined that there is a very long standing past practice of granting such prior to termination. Union pointed out that numerous examples have been in evidence before the Pre-Review Committee, the Review Committee and in arbitration. The RC reviewed several examples of terminations resulting from employee absences due to incarceration. It appears that in most instances vacation was granted prior to the issuance of the 10 day letter.

According to the LIC Report, the grievant was terminated when he did not report back to work on the ninth workday of his absence. The time off up until his termination was charged to his remaining vacation and floating holiday time. The grievant was given advance written notice of the consequences of his failure to report to work. The grievant was not available to report until the 14th workday following the start of his absence.

Decision

The Review Committee in resolving this case agrees that in the future employees who are incarcerated that do not report for work may be denied vacation or Floating Holiday time consistent with the provisions of the labor agreement. In such case, the incarcerated employee will immediately be placed on unauthorized absence and at the end of ten consecutive workdays will be terminated. In addition, if the employee does return to work within the 10 day period, discipline for the unauthorized absence may be taken. Discharge, rather than disciplinary action, may result for employees with active Positive Discipline in the attendance category at the time of the incarceration.

If at the time of incarceration, vacation is granted based on existing conditions and those conditions change, then the unscheduled vacation may be discontinued and the incarcerated employee placed on unauthorized absence status. The employee will be notified in writing of his status and the consequence of failure to return to work. Again, should that unauthorized status exceed ten consecutive workdays, the employee will be terminated.

An employee who is granted unscheduled vacation due to incarceration may also be disciplined.

With respect to the instant case, the Company proposed to reinstate the grievant without backpay at the Written Reminder step in the attendance category of Positive Discipline. Although the Union argued that there is no justification for denial of backpay given the facts present, inasmuch as the grievant expressed a strong desire to get this matter behind him and return to work, Union members of the Review Committee agree to close this case on the basis of Company's offer. Union, however, reserves the right to make the same argument with respect to backpay should a future similar situation arise.

Any further instance of absence due to the grievant's incarceration within three years of his reinstatement will result in his immediate discharge with redress through the grievance procedure only to confirm the period of incarceration. As an Electric T&D Assistant, the grievant is DOT covered and therefore must be drug screened prior to return to work.

If the grievant is incarcerated and unavailable to return to work immediately, then the discharge is sustained.

On the basis of the foregoing, this case is closed.

For the Company:

Margaret A. Short
Kenneth E. Lewis
William G. Mc Loughlin
Michele A. Silva

By: Margaret Short
Date: 7/8/98

For the Union:

Roger W. Stalcup
William R. Bouzek
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