175

ARBITRATION
BETWEEN

G 87-0859
Hearing 8/4/87

OHIO STATE HIGHWAY PATROL

and

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

Appearances:

For the Patrol:
Captain John M. Demaree
Executive Officer

For the F.O.P.
Paul L. Cox
Chief Legal Counsel

OPINION AND AWARD OF THE ARBITRATOR

FRANK A. KEENAN
PANEL ARBITRATOR

Statement of the Case:

This case involves the sick leave provisions of the parties' contract. The sick leave claimant, and the Grievant in the case, is Trooper James D. Brink. Trooper Brink is assigned to the Patrol's West Jefferson Post located in Franklin County, which embraces the State's capital city of Columbus. It's a busy Post. The facts in the case are not in dispute, and are correctly set forth succinctly in the Patrol's post-hearing brief, as follows:

> "On about January 20, 1987, Trooper Brink submitted a vacation request for February 9 and February 12-15, 1987. The vacation request was submitted for the purpose of being off with his sixteen month old son entering the hospital on February 9, 1987, for hernia surgery. Trooper Brink advised Sergeant Brown, at the time he submitted his vacation request, that he and his wife had made plans to take his son to his in-laws in Hubbard, Ohio, following surgery, to aid in the recovery. On the morning of January 21, 1987, Sergeant Brown advised Trooper Brink his vacation request for February 9th and 12th, 1987, would not be approved. This request was denied due to the post not having a dispatcher scheduled to work on the 9th, and another officer from the same work shift already on approved vacation leave for February 12, 1987. Trooper Brink then advised Sergeant Brown he would be submitting sick leave requests for February 9 and 12,

1987. On January 21, 1987, Trooper Brink submitted sick leave request forms for February 9 and 12, 1987, and an additional vacation request for February 13-15, 1987.

At the end of Trooper Brink's shift on January 21, 1987, he was advised by the Post Commander, Lieutenant R. N. Grooms, that his sick leave request would be approved, with the stipulation that he stay near his residence and not leave the area. The rationale behind this decision, as related to Trooper Brink by Lieutenant Grooms, was if the child was well enough to travel and no longer hospitalized, it would not be needed or granted.

The grievant, agreeing to the stipulation as set forth by Lieutenant Grooms, was granted his sick leave request. On February 1, 1987, the grievant filed the grievance at hand. He requests that procedure be clarified in writing concerning the use of sick leave, and questions the Post Commander's authority to advise a unit who is using sick leave, for a family member, when and how that sick leave may be used."

By way of elaboration, the Grievant noted in his grievance that Post Commander Lieutenant R. N. Grooms advised him that the condition to his sick leave that he remain in the Post area would stand ". . . due to the fact that if the child was well enough to travel that no such leave would be needed or granted."

It is additionally noted that Trooper Brink is one of three troopers assigned to work a permanent "midnight" shift at the West Jefferson Post. This is a result of the bidding process as outlined in Article 26, of the labor agreement.

On February 9, 1987, Trooper Brink and one other trooper were scheduled to work, with the third midnight trooper being on scheduled time off. The midnight dispatcher was on scheduled time off, it necessitating a uniformed officer to sit desk. In order to accommodate Trooper Brink's sick leave request, schedule adjustments were made whereby Trooper Harter, ordinarily scheduled to work the 8 p.m. - 4 a.m. shift, was reassigned to the midnight shift, to handle dispatcher duties.

On February 12, 1987, it was again necessary to make schedule adjustments to accommodate Trooper Brink's sick leave request. With one officer on vacation, and one on scheduled time off, Trooper Harter was again scheduled to work the midnight shift and was the only officer working during this eight hour period.

The most pertinent contractual sick leave provision is set forth at 48.04(1)(e), which provides that:

> "With the approval of an employee "Post Commander or equivalent supervisor, sick leave may be used by the employee for the following reasons . . .:
>
> (e) Illness, injury, or pregnancy-related condition of a member of the employee's immediate family where the employee's presence is reasonably necessary

for the health and welfare of the employee or affected family member."

It is noted that Article 48 - Sick Leave and Bereavement Leave was finalized by Fact Finder Graham, and the language contained in Section 48.04 was not a subject of dispute. No specific mention was made during the negotiation process with respect to restrictions by management on the use of sick leave.

The Patrol's Position:

The Patrol takes the position that "the Grievant's main purpose for going to Hubbard (Ohio) was for his in-laws to aide in his son's recovery. There was no testimony presented at the hearing that indicated the grievant's presence,while in Hubbard (some 3 1/2 hours distant from the Grievant's home) was reasonably necessary. Therefore, there was no justification for him to utilize sick leave while there. . . . Lacking any contractual proscription, management retains the right to place reasonable stipulations on the use of sick leave. (Here, the Grievant's sick leave was granted with the stipulation he remain within the boundaries of his home area for possible emergency call-back). This is amplified by Article 4 - the Management Rights clause. . . . The Grievant . . . wanted to remain in Hubbard, at his in-laws, while utilizing sick leave. This would have been a clear violation and abuse of sick leave. Management did not act in an arbitrary, discriminating, or unreasonable manner by placing stipulations on the Grievant's sick leave usage. There has been no violation of the letter or intent of Article 48 of the collective bargaining agreement."

By way of elaboration, the Patrol asserts that "management maintains the right to deny or approve sick leave. Lacking any contractual proscription, management further maintains the right to place reasonable stipulations on the use of sick leave. . . . (M)anagement has a contractual right to effectively manage the work force."

It is the Patrol's position that "the question that must be decided in this case is whether the grievant's presence, while in Hubbard, Ohio, was reasonably necessary for the health and welfare of the affected family member, thereby negating the employer's right to impose stipulations on said sick leave."

Management contends that "the fact the Grievant's sixteen month old son was having a hernia operation would certainly qualify the Grievant for sick leave usage. However, once the employee's presence is no longer necessary for the health and welfare of the affected family member, it is no longer legitimate, and therefore becomes an abuse of sick leave.

It is the Patrol's position that ". . . management has an inherent right to monitor the use of sick leave, to assure its use is legitimate and not being abused. Nowhere in the contract does it state that bargaining unit members have an unrestricted right to use sick leave as a 'tool' to obtain leave. Sick leave is meant to be used for specific instances, as specified in the contract; it is not to be used in place of vacation, personal leave, or other leave."

In any event it is the Patrol's position that "Section 48.04 is . . . clear with respect to sick leave usage, and gives the Post commander the discretion to grant or deny sick leave, relevant to the provisions of Article 48 of the contract."

So it is that the Patrol urges that the grievance be denied.

The F.O.P.'s Position:

The F.O.P. takes the position that the sick leave provisions of the parties' contract ". . . made no major changes (except where the specifically negotiated language was changed) in the sick leave laws and rules in effect at the time of negotiation of (the) contract," and that hence, "(the) whole issue must be resolved on the basis of the law as it has always been applied to sick leave usage." In this regard it is the F.O.P.'s position that Ohio Revised Code Section 124.38 ". . . sets forth the permissible uses of sick leave. Once an employee has earned sick leave credits they become his vested right and he can use his sick leave as he so chooses subject to the stated purposes of the statute. The employer can neither expand nor restrict (an) employee's use of his accumulated sick leave. However, he can spell out procedures to be followed by the employee to insure against abuse. The burden of proof is on the employer to show abuse, when denying sick pay. If the employee has followed proper procedures with regard to sick leave and in the absence of direct proof of abuse, the employer is prohibited from denying sick leave."

The F.O.P. contends that the Employer cannot restrict the employee who is on sick leave to take said leave in a certain location. It is the F.O.P.'s position that "an employee may take sick leave for the reasons stated within the provision of R.C. 124.38. Ohio (courts have) held that the rights of the employer under R.C. 124.38 are limited to insuring that the requirements of the statute are properly followed by the employee. South Euclid Fraternal Order of Police v. D'Ameco, 13 Ohio App. 3d 46 (1983). Thus, an employer may prescribe a procedure that an employee must comply with in order to take sick leave. In this case this procedure has been reduced to writing in a contract between the employer and the employee by means of a sick leave provision contained therein. If the employee properly requests sick leave for one of the purposes listed in . . . the labor agreement, the employer cannot add any additional requirements after the fact. . . . (U)nless the contract allows for it, the employer may not require an employee who is on sick leave to take it in a certain location. Following the law of Ohio as reduced to contract language by this contract, the Highway Patrol cannot place restrictions on its employees as to where sick leave may be taken."

In support of its position the F.O.P. contends that ". . . other sections of this contract support (the F.O.P.'s) construction.

"Personal Leave in Article 45 (45.06) is specifically made subject to denial upon reasonable grounds by the Employer. Vacation Leave in Article 43 must be mutually agreed to by the employee and the Employer, and is subject to minimum staffing levels established at various facilities. This type of restrictive language, found in these two articles, is specifically not placed on the use of sick leave in Article 48.

The language of Article 48 supports the Grievant's argument. It already contains restrictions and procedures for the legal use of sick leave. Section 48.04(3) specifically provides:

'An employee who fails to comply with this Article shall not be allowed to use sick leave for time absent from work under such noncompliance.'

Clearly, the contract sets up a test to determine when an employee may be paid for sick leave. The employee must comply with Article 48 and failure to comply with Article 48 will cause the employee to lose the paid sick time when he is off work due to allowed conditions. But the clause also requires that when the employee does comply with Article 48 his sick leave time will be paid (to the extent of his accumulation).

The Employer's requirement that the employee remain at his residence in order to get paid sick leave is <u>not</u> contained in Article 48. Therefore, it cannot be an enforceable requirement for the use of paid sick

leave. If the Arbitrator holds otherwise, he will be amending Section 48.04(3) and adding the requirement that the Employer's rules, which it may from time to time promulgate or change, must also be complied with in order to qualify for paid sick leave. The Arbitrator should not do this. Article 48 does not contain any restrictions on the location of employees to qualify for paid sick leave and the Arbitrator should not permit the Employer to unilaterally impose such restrictions.

. . . (T)he use of accumulative sick leave is a right of each employee covered by the contract subject to the restrictions contained in the contract and restrictions not contained in Article 48 may not be enforced."

The F.O.P. also asserts that management's original denial of the grievance "was based on the exercise of medical judgment by the Grievant's Sergeant that 'if the child was well enough to travel from Columbus to the Hubbard, Ohio area, then Trooper Brink shouldn't be needed to care for the child," . . . (a medical judgment management) has no business making and cannot legally support."

In light of the foregoing, the F.O.P. urges that the grievance be denied.

The Issue:

The F.O.P. perceives the issue to be:

"Can the Employer unilaterally impose a requirement that an employee must remain in the vicinity of his assigned Highway Patrol Post to use sick leave when: the use requested by the employee is explicitly permitted by the contract; there is no evidence of abuse or misuse of sick leave; and nothing in the contract permits or requires a restriction such as that imposed by the Employer?"

The Patrol perceives the issue to be:

"Was the Employer is violation of Article 48, Section 48.04(1)(e) of the Collective Bargaining Agreement by requiring the Employee to remain in the vicinity of his home area while on approved sick leave? If so, what shall the remedy be?"

In my view, the issue presented is more properly framed as follows:

"Did the Patrol's grant of sick leave to the Grievant on February 9 and 12, 1987, violate paragraph 48.04(1)(e) of the contract, and if so, what is the appropriate remedy?"

Discussion and Opinion:

In all candor this case has proven to be most vexatious to the Arbitrator. In the abstract, much of the F.O.P.'s analysis is appealing. At the same time, from the outset the "facts" have struck the undersigned as supportive of the Patrol's action. So it was that the case was approached time and again, and in each instance the supporting rationale seemed wanting.

Simplifying, management asserts it has a right to impose stipulations on the use of sick leave and simply did so here; the F.O.P. contends no such right exists. However, in my view insight into the proper analysis to be applied leading to the appropriate resolution of the parties' dispute is hindered by this concept of "stipulations" or "restrictions." In my judgment, and for the reasons more fully articulated hereafter, close scrutiny of the record evidence will not support a finding that "stipulations" were placed upon the Grievant's use of sick leave. Hence the parties' respective views as to the Patrol's authority to impose "stipulations" on the use of sick leave cannot be reached in this case. In arbitration the Arbitrator is a prisoner of the facts presented. Under paragraph 20.07-6., any interpretation of the contract's provisions must of necessity rest upon the foundations of the peculiar facts presented. To reach beyond these foundational facts because the parties mutually desire a resolution of their conflicting views, which views are not triggered and do not come into play by the underlying facts, would do violence to the sound principle of

arbitral restraint, and, more importantly, would transgress the limits of the Arbitrator's authority.

Under paragraph 48.04(1)(e), sick leave is justified if a family member is ill, such as was the Grievant's son, and "the employee's presence is reasonably necessary for the health and welfare of the employee or affected family member." This concept of "reasonably necessary" by definition calls for a value judgment. In the absence of any express guiding language to the contrary, and there is no such language here, logic dictates that the parties assumed that this value judgment was to be made in the first instance by management, subject to challenge as to the reasonableness of said judgment in the grievance procedure.

Close scrutiny of the record evidence reflects that certain "circumstances" led the Grievant to seek approval of sick leave for February 9 and 12, pursuant to paragraph 48.04 (1)(e). These "circumstances" were that his son was being operated upon on February 9th and hence the Grievant perceived his presence was "reasonably necessary" for both the Grievant's and his son's health and welfare. As for February 12th, the Grievant intended to bring his son to his parents-in-law in Hubbard, Ohio, some three hours distant from his home and the Post Area, there to render assistance to his wife and in-laws with the care of his ill son and his twin sibling. When these "circumstances" were made known to management, the Grievant's sick leave application was denied on the basis of the value-judgment that the Grievant's presence in Hubbard, Ohio was <u>not</u> "reasonably necessary." This

judgment in turn was essentially based upon the view that if the child was well enough to travel, he was not sufficiently ill to warrant the Grievant's presence in Hubbard, Ohio. As has been seen, the Union challenges this judgment as an unwarranted usurpation of a judgment to be made by a physician only. In my view this challenge is without merit since nothing in 48.04(1)(e) indicates that the judgment therein called for of necessity requires the expertise of a medical doctor. Indeed, if such were the case, many circumstances would doubtless fail to pass muster under the "reasonably necessary" standard. The F.O.P. urged construction is simply too restrictive. In any event it is clear that unlike the situation at home, sufficient people would have been on hand to assist the Grievant's wife in Hubbard, Ohio, and hence the Grievant's presence would not have been "reasonably necessary;" the point being that in the final analysis management's judgment that given the circumstances of the Hubbard, Ohio scenario, the Grievant's presence was not reasonably necessary and therefore sick leave was not warranted, was correct. Nonetheless, management indicated that the Grievant's sick leave request would be granted if he stayed in the vicinity of his home and of the Post. As has been seen both parties characterize this as a condition or stipulation imposed by management. In my view this characterization is inaccurate. In my judgment the Patrol merely recognized that sick leave would be warranted pursuant to 40.04(1)(e) in the changed circumstances of the Grievant's wife having to care for the ill son and his twin

sibling alone, which so far as management was aware was what would be required. In this changed "circumstance," varying as they do from the Hubbard, Ohio circumstances with which the Patrol was initially confronted, it could be found, and indeed the Patrol did so, that the Grievant's presence was "reasonably necessary" to assist his wife, for the health and welfare of the ill child, the "affected family member."

There remains then for consideration the apparent expectation that the Grievant might possibly be called back off of sick leave in an emergency situation. To the extent that the F.O.P. argues that this "expectation" was yet another condition, restriction, or stipulation (and it's not clear that they so contend) suffice it to say that it may well be that in a true emergency an employee's sick leave rights may well have to give way to orders to report for duty. The point to be made is that this possibility of being called off of sick leave existed whether or not management had it in mind and expressly articulated it, so that it cannot fairly be characterized as a "condition" or "stipulation" imposed by management.

In sum then the holding here is a narrow one. As more fully set forth above, the foundational underlying facts will not support the more broad based divergent rationales both parties respectively urge. In the particular circumstances present here, management did not violate the contract. The grievance, therefore, must be denied.

Award

For the reasons more fully set forth above, the grievance is denied.

Dated: April 8, 1988

Frank A. Keenan
Panel Arbitrator