

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 640

OCB GRIEVANCE NUMBER: 27-21-900202-0215-06-10

GRIEVANT NAME: COOLEY, SUE ET AL

UNION: SCOPE/OEA

DEPARTMENT: REHABILITATION & CORRECTION

ARBITRATOR: GRAHAM, HARRY

MANAGEMENT ADVOCATE: DURKEE, TED

2ND CHAIR: KITCHEN, LOU

UNION ADVOCATE: STEVENS, HENRY L.

ARBITRATION DATE: APRIL 30, 1991 (BRIEFS DUE 6/1/91)

DECISION DATE: JULY 23, 1991

DECISION: DENIED

**CONTRACT SECTIONS**

**AND/OR ISSUES:** DID THE EMPLOYER VIOLATE THE AGREEMENT WHEN IT DENIED PERSONAL LEAVE TO TEACHERS WHO WALKED OUT OF OCI DUE TO COLD CLASSROOMS?

**HOLDING:** "NO ONE CAN BELIEVE THAT THE SITUATION ON JAN. 23, 1990 WAS LIFE THREATENING. THE CLASSROOMS WERE COLD. THEY WERE NOT SO COLD AS TO BELIEVE THAT THE TEACHERS WERE ABOUT TO FREEZE TO DEATH." GRIEVANTS LEFT THE WORK SITE AT 7:45 A.M. KNOWING THAT AT 8:00 A.M. MANAGEMENT PERSONNEL WOULD ARRIVE WHO COULD MAKE A DECISION AS TO THE APPROVAL OR DENIAL OF THEIR "EMERGENCY" PERSONAL LEAVE REQUESTS. "AS THE CONTRACTUAL TESTS FOR UNSAFE CONDITIONS HAVE NOT BEEN MET THERE HAS NOT OCCURRED THE UNREASONABLE DENIAL OF LEAVE."

**COST:** \$581.13



#640

\*\*\*\*\*  
\*  
In the Matter of Arbitration \*  
\*  
Between \*  
\*  
State Council of Professional \*  
Educators \*  
\*  
and \*  
\*  
The State of Ohio, Department of \*  
Rehabilitation and Correction \*  
\*  
\*\*\*\*\*

Case Numbers: *Sue Cooley*  
27-21-(90-02-0)-215  
through 221-06-10  
Before: Harry Graham

Appearances: For State Council of Professional Educators:

Henry L. Stevens  
Labor Relations Consultant  
Ohio Education Association  
5026 Pine Creek Dr.  
Westerville, OH. 43081

For Department of Rehabilitation and Correction:

Thomas E. Durkee  
Labor Relations Administrator  
Department of Rehabilitation and Correction  
1050 Freeway Dr., North  
Columbus, OH. 43229

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on July 5, 1991 and the record was closed on that date.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the Employer violate the Collective Bargaining Agreement when it refused to grant personal leave on

January 23, 1990? If so, what shall the remedy be?

Background: There is no dispute over the facts that give rise to this proceeding. The Employer operates many penal institutions within the State of Ohio. Among them is the Orient Correctional Institution. That facility is part of a complex of three penal facilities located at Orient, OH.

The electric power, steam and water for the Orient facility is supplied by the power plant at one of the other facilities in the complex, the Pickaway Correctional Institution. The Pickaway power plant has experienced a good deal of mechanical difficulty. In particular, in the period January 18-23, 1990 power supply was intermittent. Consequently, buildings at the Pickaway complex were cold. Heat supply was often irregular.

On January 23, 1990 teachers arrived as scheduled between 7:00AM and 7:30AM. They immediately noticed their classrooms were cold. They then congregated in the faculty lounge to discuss their course of action. It was decided to apply for emergency personal leave. Upon completion of the requests they were given to a management official, Beverly Miller. Ms. Miller asked them if they would remain at the facility until the arrival of the Deputy Warden who was due in at 8:00AM. Their collective response was "no" and they departed at 7:45AM. Inmates were returned to their housing units.

At 8:00AM Deputy Warden Larry Green and Warden David Baker arrived at the facility. Upon learning of the departure of the teachers the Warden directed that temperature readings be taken in the classrooms. When that was done, it was found that they ranged from 51 to 74 degrees. The temperature was measured during the 9:00AM-10:00AM hour. Later that day another set of readings was conducted between 1:30 and 2:30PM. Temperatures were found to be between 55 and 71 degrees.

In due course the leave requests were rejected by the Warden. In order to protest what they regarded as a violation of the Agreement grievances were filed. They were not resolved in the procedure of the parties and the parties agree that they are properly before the Arbitrator for determination on their merits.

Position of the Union: The Union asserts that the Agreement has been violated in this situation. Article 7 of the Agreement deals with health and safety conditions. It provides that an employee will not be disciplined for a good faith refusal to work in a situation which is allegedly life-threatening, which presents a potential for serious injury or which is abnormal to the place of employment or the position filled by the employee. Section 7.2 of the Agreement proscribes reprisal for filing a report about an unsafe condition. When the Employer failed to grant leave it was

engaging in the sort of reprisal that is prohibited by the Agreement according to the Union. One day prior to this event the temperatures in the classrooms were so cold that teachers were sent home. When the teachers left the facility on January 23, 1990 there was no management person at the site to either approve or disapprove of their action. Their rooms were cold. They had been permitted to leave early the day prior. No reason exists for them to have been denied the leave they requested.

There is a Section of the Agreement, Article 9, which deals specifically with classroom temperature. The parties met to discuss the problem prior to this incident. When the management of the institution proved unresponsive, a grievance was filed to force it to rectify the problem of cold classrooms.

The personal leave section of the Agreement, Article 27 provides that in emergency situations personal leave may be granted upon short notice. Requests for leave shall not be unreasonably denied. When the teachers arrived at work on January 23, 1990 they found the temperature in their classrooms to be in the 40's. Under such circumstances, the Employer cannot deny the personal leave at issue in this case the Union asserts.

The Union points out that the Agreement requires that the Employer comply with occupational health and safety

standards as adopted by the State in Executive Order 83-62. That order requires the State provide work sites that are free from hazards and physical conditions which may cause death or serious harm to employees. Obviously the cold conditions might have caused serious harm to employees in the opinion of the Union.

The Employer was aware that the problem of classroom temperature was a concern to the Union. After meeting with it pursuant to the Agreement it adopted a policy to deal with the problem. It failed to implement its own policy.

Arbitrator Jonathan Dworkin has heard disputes over the heating problem. He has directed the Employer to rectify the situation. In spite of Arbitrator Dworkin's award, the problem reoccured during the January 18-23, 1990 period. When the teachers applied for emergency leave, they regarded the situation to be an emergency, covered by the agreement. The Employer unreasonably denied the requests for leave.

Standards for worksite temperature in Ohio call for it to be 60 degrees within one hour of start time. It should be 70 degrees for the bulk of the work day. The State did not comply with these standards. As a remedy for this breach of the Agreement the Union urges that the State be directed to grant the emergency leave requests at issue in this proceeding and make employees whole for any lost wages.

Position of the Employer: According to the Employer if the

position of the Union is sustained in this dispute employees will have authority to establish their own work schedules. In this case, employees reported for work and then departed on their own authority. That cannot be permitted to occur under the Agreement according to the State.

Under the Agreement, there is no right to take emergency leave. At Section 27.05 the Agreement provides that employees "may" be granted personal leave. The Employer may or may not grant the leave requested. Furthermore, Section 27.05 requires employees to submit a leave request in advance. That did not occur in this situation. While requests for personal leave may not be unreasonably denied, requests do not have to be honored.

In fact, the Grievants did not comply with the Agreement in the manner in which they took leave on January 23, 1990. No health and safety problem was reported to authorities. Furthermore, Section 7.06 of the Agreement specifies the circumstances under which employees may not be disciplined for refusal to work in allegedly unsafe conditions. The employee must have a good faith belief that working will place him or her in imminent physical danger. Employees must have brought the problem to the attention of the Employer, notified the Association representative and filed a grievance over the matter and have no time to remedy the situation through other mechanisms found in the Agreement. Those



requirements were not followed in this instance.

Moreover, the boiler had been repaired. It was operative. When the temperature in the classrooms was measured, some were well within the acceptable range. Others were cold. This was due to the fact that blower fans had been shut off. In fact, the Agreement does not set a standard for classroom temperature. It merely requires there be a Labor-Management Committee to recommend procedures to be followed during temperature extremes. Nowhere does the Agreement give employees the right to leave work without permission.

Employees were not harmed by the denial of leave at issue in this proceeding. At Section 27.07, the Agreement prescribes a conversion privilege for accrued personal leave. Employees may either continue to carry forward their leave balances to a maximum of 40 hours, convert the leave to accumulated sick leave or receive a cash payment. The Grievants retain their hours of leave for future use in a manner to be determined by them. One Grievant, Charlene Shiveley, has retired. When she did so, she converted 27 hours of leave to cash. No grievant was harmed in this instance. As no violation of the Agreement occurred in this situation, the Employer urges that the grievance be denied. Discussion: At Section 7.06 the Agreement provides that employees shall not be disciplined for a good faith refusal to work in situations which are allegedly life threatening,

present the potential for serious injury and which are abnormal to the place of employment. Further restrictions follow in Section A-D of Section 7.06.

In this situation there was an assuredly a good faith refusal to work. The decision by employees not to meet their classes as scheduled was based upon the temperature of their classrooms which they perceived to be cold. One of the tests specified in Section 7.06 of the Agreement was met by the teachers. Other tests must be met as well. No one can believe that the situation on January 23, 1990 was life threatening. The classrooms were cold. They were not so cold as to believe that the teachers were about to freeze to death. Granted they were uncomfortable. There is a long way to go between discomfort and threat to life. The same is true with respect to the situation posing a potential for serious injury. No such potential was present in this case. There is, however, no doubt that the situation was abnormal to the work site. The Grievants met one of the tests specified by the first paragraph of Section 7.06 Agreement. That test "is subject to the following conditions" in the terminology of the Contract.

There must be a good faith belief that performing the task would place the employee in "imminent physical danger." That test is a two-pronged one. Employees must have a good faith belief that work would place them in imminent physical danger. As noted above, there existed the good faith belief.

That belief must be supported by objective fact that "imminent physical danger" existed. That is not shown by the Union. The rooms were cold. They were above the freezing mark. It is not reasonable to believe that the teachers were in imminent physical danger. They were uncomfortable. They were not in danger. The test crucial to the Grievants has not been met.

At Section 7.06 the Agreement indicates that employees will not be disciplined for refusal to work in allegedly life threatening conditions. There is no discipline at issue in this proceeding. Leave was denied. Neither a reprimand nor a suspension was issued to the Grievants.

Section 7.02 of the Agreement ensures that employees be free from "restraint, interference, coercion, discrimination or reprisal" for filing a report over an unsafe condition and participating in health and safety programs. The Union asserts that there has been reprisal for their leaving work on January 23, 1990. That is not covered by the Section cited by the Union. Reprisal, coercion, discrimination and interference are prohibited for filing a report or participating in health and safety programs. Those actions are not at issue in this proceeding.

At Article 27, the Agreement deals with personal leave. Section 27.05 is specific to notification and approval of use of personal leave. Employees may be granted use of personal

leave on 48 hours notice. That notice did not occur in this case due to the immediate nature of the problem faced by the Grievants. Inquiry then turns to the remainder of Section 27.05. It provides that "In emergency situations requests may be granted with a shorter notice." (Emphasis added).


Employees do not have a right to take personal leave in emergency situations. The employer may grant such leave, subject to the proviso that leave "not be unreasonably denied." In this situation, the classrooms were undeniably cold at the start of the day on January 23, 1990. However, unbeknownst to the Grievants, the boiler had been repaired. Operating temperatures would improve, though not all classrooms would reach the temperate zone during the day. Without waiting for supervision to arrive at the facility the Grievants departed. Their departure was shortly before top administrators of the facility were scheduled to start their work day. In the bright light of hindsight, it would have been a simple matter for the Grievants to wait approximately 15 minutes to secure directions from management. They were not in danger of freezing to death. Notwithstanding that fact, employees left the facility. By their precipitate departure, they deprived the Employer of the opportunity to make a decision concerning the necessity for leave at 8:00AM on January 23, 1990. Based upon the record of events submitted to the Arbitrator, the retrospective decision of

the State to deny leave is not unreasonable.

The Agreement directs the State to be in compliance with Executive Order 83-62 dealing with health and safety for employees of the State. Section II directs departments to furnish employees a working environment free from hazards and physical conditions likely to cause death or serious physical harm to employees. It is unlikely that death would have occurred had the Grievants waited 15 minutes before departure. Similarly, the likelihood of serious physical harm being visited upon the Grievants by waiting 15 minutes was small. Supervision was on the scene at 8:00AM and able to make a determination of whether or not to grant leave. By failing to wait for a decision, the Employees opened themselves to the possibility that leave would be denied. As the contractual tests for unsafe conditions found at Section 7.06 of the Agreement have not been met there has not occurred the unreasonable denial of leave contemplated in Section 27.05.

Award: The grievance is denied.

Signed and dated this 23<sup>rd</sup> day of July, 1991 at South Russell, OH.

  
\_\_\_\_\_  
Harry Graham  
Arbitrator