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In the Matter of Arbitration	*	
Between	*	Before: Harry Graham
Fraternal Order of Police-Ohio Labor Council	*	Case Number: 25-18-921202-0042-05-02
and	*	
The State of Ohio, Department of Natural Resources	*	

Appearances: For Fraternal Order of Police-Ohio Labor Council

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Introduction: As will be instantly apparent from the following text this is a very unusual dispute. The parties have in place a system for selecting hearing dates for grievances that are appealed to arbitration. This system operates so that hearing dates are selected several months in advance of the actual hearing date. The date on which a particular grievance is to be heard is known to the union, the employer, the grievant and the arbitrator. Relevant to this dispute is the fact that February 25, 1994 was the date upon which the grievance of Francis Gura, a Wildlife Officer

in the employ of the Department of Natural Resources, was to be heard.

On February 24, 1994 at approximately 2:30 p.m. a telephone message was received by this Arbitrator asking that a call be returned to the Union staff representative, Jack Holycross. This was done. Mr. Holycross told the Arbitrator that the State did not intend to appear at the arbitration hearing scheduled for 10:00 a.m. on February 25, 1994. He indicated that the State was of the opinion that the grievance scheduled to be arbitrated was considered by the State to be "frivolous" in nature. Hence, the State would not appear. At about 3:15 p.m. a telephone message was received from Brian Walton, an employee of the State of Ohio, Office of Collective Bargaining. Mr. Walton left a message that the case scheduled to be heard on February 25, 1994 was cancelled. He also advised that if there were any questions about this situation to call the Director of the Office of Collective Bargaining. This was done by the Arbitrator. The Director reiterated the view of the State that as the grievance was frivolous it would not appear at the hearing. He was informed that in the view of the Arbitrator, it was for the Arbitrator to determine whether or not this grievance had merit or was, as the State viewed it to be, frivolous. The Director of the Office of Collective Bargaining again indicated that as the State viewed the dispute to be

frivolous, it would not appear at the hearing. I informed the Director that unless the Union consented to withdraw its grievance or postpone the hearing that I would appear at the appointed time and place to hear the longscheduled dispute. I then called Jack Holycross of the Union and asked his view of this situation. Mr. Holycross forcefully reiterated the Union view that the hearing date had been for scheduled for several months and that the Union had a dispute it wished to be heard. I informed Mr. Holycross I would appear as scheduled. In fact, no representative from the State was present at the hearing on February 25, 1994. No evidence or testimony came from the State in support of its actions. The starting time of the hearing was delayed by the Arbitrator in order to ensure that the State was given full opportunity to appear. Prior to the start of the hearing an unsigned statement was provided to the Arbitrator setting forth the position of the State in this dispute. Commencing at 10:10 a.m. on February 25, 1994 the hearing in this matter began. At the direction of the Arbitrator the door to the hearing room was left open to afford any State representative who wished to appear full opportunity to do so. No appearance was made by any representative from the Employer. After taking testimony and evidence from the Union this hearing was closed at 11:05 a.m. on February 25, 1994.

The proceedings of the parties are conducted under the

Rules of the American Arbitration Association. Rule 27 provides that a hearing may be conducted in the absence of party who, after due notice, fails to be present or secure a postponement. The Rules also provide that "The arbitrator shall require the other party to submit such evidence as may be required for the making of an award." Operating under that provision of the Rules on February 28, 1994 I wrote the parties and directed that the State provide me with testimony and evidence relevant to its position on the merits of this dispute. According to my directive the hearing in this matter was reconvened on March 14, 1994. Over the strenuous and cogent objections of the Union I permitted the State to introduce such testimony and evidence as it deemed appropriate to justify its position in this case.

Issue: The issue in this case is:

> Did the Employer violate the Collective Bargaining Agreement which it denied the Grievants vacation request for January 5-9, 1993? If so, what shall the remedy be?

Background: The Grievant, Francis Gura, is a Wildlife Officer with 18 years of service with the State. On September 10, 1992 he properly applied to take vacation on January 5-9, 1993. On October 14, 1992 that request was denied. Mr. Gura viewed that denial to be improper under the Collective Bargaining Agreement and promptly filed a grievance. No claim of procedural irregularity is made and the dispute was scheduled for arbitration.

Position of the Union: According to the Union there occured several violations of the labor agreement when the Employer denied the vacation request of Mr. Gura. Section 37.04 1 of the Agreement provides that vacations may be taken "only at times mutually agreed to by the Employer and the employee." Obviously the State did not agree to the vacation time chosen by the Grievant. It provided no reason why that agreement was not forthcoming. It merely disapproved the dates selected by Mr. Gura. In fact, he had taken vacation at about the same time in three of the previous four years without any problem. The one year he had not taken vacation in early January he had not applied to do so. When Mr. Gura applied to take vacation in January, 1993 he arranged for colleagues to cover for his absence. Two Wildlife Officers, Rick Staugh and Jack Whitehair, and an Investigator, Allen Hamilton, agreed to fill-in for him. Such coverage had been arranged in past years. In the Union's view, the State would not be inconvenienced by Mr. Gura's absence. No reason existed for the State to have denied the vacation requested by the Grievant. The concept of mutuallity referenced in the Agreement at Section 34.04 1 requires provision of a reason why a vacation request is denied according to the Union. The Employer must act reasonably. In this situation it cannot be determined why the Employer acted as it did. Hence, the requested vacation was improperly denied in the Union's view.

Section 34.04 3 of the Contract requires that the State notify an applicant for vacation "within two (2) weeks of the submission of the request" whether or not it is approved or not. In this case the request was made on September 10, 1992. It was disapproved on October 14, 1992. This is more than four (4) weeks after the date the request was made. Hence, the Agreement was violated once again by the State.

Obviously the dates that the Grievant wished to take off work have passed. This does not render the grievance moot. The State violated the Agreement according to the Union. The appropriate penalty is money. The Union urges a back pay award be made at the rate of time and one-half. (1 1/2T). This figure is derived from Section 37.04 5 of the Agreement which provides that if an employee is called back from vacation pay will be made at the time and one-half rate. As that rate is referenced in the Agreement to compensate for the inconvenience of disrupted vacation it should apply to this situation as well the Union insists.

Position of the Employer: As referenced above, the position of the State in this dispute was conveyed to the Arbitrator by way of a five sentence anonymous position statement. No human being appeared at the hearing on February 25, 1994 to advance the position of the State in this dispute. Nor was any evidence proffered by the Employer in support of its position. The position of the Employer in its entirety as

presented on February 25, 1994 is:

> The issue in arbitration is not a contractual grievance in the true sense of the word. The issue being raised is a complaint about the way a contract article works.
>
> The employee had no mutual understanding or agreement that the days off would be granted. There is no long standing past practice which should be considered as a reason for granting the complaint.
>
> There are no time violations of contractual provisions which should impact on any decision in this matter.

At the reconvened hearing on March 14, 1994 the Employer amplified its position. It pointed out that the vacation time sought by the Grievant in January, 1993 was during the primitive weapon deer hunting season. Obviously this is a busy time for the Department. Its resources are stretched thin. It simply could not carry out its responsibilities and permit the Grievant to take off the time he desired. In an effort to reconcile the desires of the Grievant and the needs of the Department it proposed to permit him to take vacation on January 5, 6 and 8, 1993. January 7 and 9 were expected to be particularly busy days and were not approved by the Employer. This proposal represented a reasonable accommodation. It was rejected by the Grievant.

The State points out that when Mr. Gura submitted is application for vacation to be taken in January, 1993 he submitted another vacation request as well. It was for the period September 21-25, 1992. That request was filed outside of the proper 21 day advance request period specified by the

Agreement. Nonetheless it was granted. In essence, the State did the Grievant a favor. It overlooked a procedural defect in his application. To assert as does the Union that the vacation in January, 1993 should be awarded due to the State's late rejection is a form of dirty pool that should not be countenanced by the Arbitrator the State asserts. Accordingly, it urges the grievance be denied.

Discussion: Article 20, Section 20.08 provides that the arbitration proceedings between the parties shall be held according to the Rules of the American Arbitration Association. Those Rules, in effect as of January 1, 1992, provide at Rule 27 that:

> Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. .... The arbitrator shall require the other party to submit such evidence as may be required for the making of an award.

In this situation the requirement of due notice was met. The hearing date had been agreed upon by the parties months in advance of February 25, 1994. It was known to all concerned. The record of telephone conversations between the Arbitrator and the parties set forth above can leave no doubt that the State was aware that a hearing was scheduled to occur in this matter. It deliberately chose to absent itself. Under the Rules of the Arbitration Association there is no question that the hearing may properly proceed in these circumstances. It was in order to permit the State to

extricate itself from the untenable position into which its misguided refusal to appear at the February 25, 1994 hearing placed it that my letter of February 28, 1994 was written.

The novice student of industrial relations is aware that the defense raised by the Employer to its non-appearance in this situation was squarely rejected by the United States Supreme Court more than 30 years ago in the Steelworkers Trilogy. Whether or not a dispute has merit is up to the arbitrator to determine. That is the purpose of the grievance procedure and arbitration. If the Employer may unilaterally determine that a dispute lacks merit and decline to participate in the grievance procedure it requires no stretch of imagination to understand that the fundamental purpose of the grievance procedure will be frustrated.

In this case the State asserts that as the Agreement requires mutual agreement on the time at which a vacation may be taken and the State did not agree to the time desired by the Grievant that it acted properly. It would seem that mere courtesy if nothing more would prompt the State to proffer a reason for denying the vacation days requested by the Grievant. In this case the conclusion is inescapable that the State has resorted to managerial fiat, exercising authority it believes it enjoys under the Agreement. The facts before the Arbitrator indicate that arrangements had been made to cover for Mr. Gura in his absence. This procedure had been

satisfactory in the past. Nothing is on the record to indicate why it would not have sufficed in January, 1993. In addition, vacation at the same time of year had been approved on the three most recent occasions when it had been requested by Mr. Gura.

In this situation it is not necessary that the Arbitrator determine whether or not the State is required to provide a reason for denying the requested vacation. That is because the State has violated Section 37.04 3 of the Agreement. It notified the Grievant of its decision to deny his vacation more than two weeks late. The State may regard this to be a minimal violation of the Agreement which should be disregarded by the Arbitrator. It may also regard the late rejection to be proper as it granted Mr. Gura's late request for vacation in September, 1992. That position represents erroneous reasoning. The Agreement confers both substantive and procedural rights upon members of the bargaining unit. The State has committed itself to acting in a certain manner with respect to informing employees whether or not their chosen vacation days are granted. In this situation the State did not comply with the provision requiring notice be provided "within two (2) weeks of the submission of the request" found at Section 37.04 3 of the Agreement. The assertion of the State in its position paper that no time violations exist in this situation is in error. This is

indicated by the testimony of the Grievant and Union Exhibit 3 in this proceeding. That Exhibit is Mr. Gura's vacation request which shows the day it was submitted and the date it was returned to him. That Exhibit was not rebutted by the Employer and is accepted as fact by the Arbitrator. The State acknowledged its error at the hearing on March 14, 1994. The evidence conclusively shows a violation of the prescribed time lines specified in the Agreement. That fact can lead to only one award in this case.

Award: The grievance is sustained. The Grievant is to receive pay at the rate of time and one-half (1 1/2) for the vacation days improperly denied to him. This rate is based upon the Agreement of the parties at Section 37.04 5 which references time and one half (1 1/2) for those instances in which an employee is called back to work from vacation. The Employer is directed to respond to vacation requests in the time period specified by the Agreement.

Signed and dated this 22nd day of March, 1994 at South Russell, OH.

Harry Graham
Arbitrator

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In order to clarify the award in case No. 25-18-92/202-0042-05-02 the pay to be made to the Grievant, Richard Tuna, should total 5 days at time and one-half (1½T). This requires that an additional ½ 5 days pay at one-half (½) time be made to the Grievant.

Harry Graham 4/21/94