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| In the Matter of Arbitration | * | |
| Between | * | Case Number: |
| Fraternal Order of Police-Ohio Labor Council | * | 25 12 930913 0013 05 02 |
| | * | Before: Harry Graham |
| and | * | |
| The State of Ohio, Department of Natural Resources | * | |

Appearances: For Fraternal Order of Police-Ohio Labor Council

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For Department of Natural Resources:

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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 case. They were exchanged by the Arbitrator on November 11, 1994 and the record in this dispute was closed.

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

> Did the State properly deny the Grievant's disability request for period of August 17, 1992 through January 12,

1993 or should it have been approved?

Background: The Facts of this controversy are not a matter of dispute. The Grievant, Jolene McAllister has been employed as a Park Officer with the Ohio Department of Natural Resources since May, 1985. She is assigned to work at the Buck Creek State Park.

In August, 1992 Ms. McAllister became pregnant. Her physician, Dale Drollinger, was aware of her condition and advised that she: 1. wear maternity clothing; 2. avoid violent situations; 3. limited her to lifting no more than 25 pounds; 4, she was not to wear a tight belt. On August 21, 1992 Ms. McAllister informed her supervisor, Assistant Park Manager David Brugger, of these restrictions. Upon learning of the limitations advised upon Ms. McAllister, the Park Manager, John Schwarm, did not permit her to work. She was told not to come to work over the weekend and to use accrued vacation leave for the time off work. The following Monday Ms. McAllister reported to work. She was not permitted to work. She was informed that she would not be allowed to work until free of medical restriction. Ms. McAllister was placed on a leave of absence without pay.

In September, 1992 Ms. McAllister filed application for disability leave benefits. Such application was made under Article 43 of the Agreement. Those benefits were denied to her for the period August 17, 1992 through December 14, 1992.

They were granted from January 12, 1993 through May 17, 1993 after Ms. McAllister had served the obligatory 28 day waiting period.

In order to protest what she regarded as a violation of the Agreement Ms. McAllister filed a grievance. It was processed through the procedure of the parties without resolution and is now before the Arbitrator for determination on its merits.

Position of the Union: The Union points to Article 43 of the Agreement which deals with disability leave and insists it has been violated in this circumstance. It points out that during the period under review the 1989-1992 Agreement was in effect. Under the terms of that Agreement there was a fourteen day (14) waiting period. When Ms. McAllister was determined to be pregnant her physician placed her on the restrictions outlined above. Article 43 of the Agreement provides among other things that a bargaining unit member "is eligible for disability leave benefits" if

> 3. A pregnant employee is unable to perform the substantial and material duties of her position because it would endanger her health or the health of the unborn child.

When Dr. Drollinger placed restrictions upon the Grievant it was obvious she could not perform the "substantial and material duties of her position because it would endanger her health or the health of the unborn child" according to the Union.

Ms. McAllister is a law enforcement officer. She carries a weapon and has arrest powers. Buck Creek State Park has within it many areas of water. Ms. McAllister may be called upon to rescue people from the water. Furthermore, as a law enforcement officer Ms. McAllister wears a belt. It holds her gun, mace, handcuffs, a flashlight, knife and radio. She also wears a bullet proof vest. When Ms. McAllister reported to work and informed the employer of her condition she wanted to work. The Employer prohibited her from doing so. The Ohio State Bureau of Employment Services found that to be the case when it approved her application for unemployment compensation. It is beyond doubt that the Employer viewed Ms. McAllister as being unable to perform the duties associated with her position.

The State cannot make a bona fide claim that the Grievant was able to perform the duties of her position. They sent her home. it was the State that denied to her the opportunity to work. The State in this instance denied her the ability to work and then denied her disability benefits. That situation is improper under Article 43 of the Agreement the Union insists.

The State has defended its action in this case by pointing out that it was willing to let Ms. McAllister wear a shoulder holster and a uniform of larger size as her pregnancy progressed. According to the State the Grievant

registered disapproval of the idea with her facial expression. Since when is facial expression taken to determine managerial action the Union asks rhetrorically. The Grievant never refused to wear a shoulder holster or larger uniform. Nor was she ever directed to do so.

When the Department of Administrative Services denied Ms. McAllister's claim for disability benefits it did so with the erroneous belief that she had been offered the shoulder holster and larger uniform. This was testified to by the Disability Claims Specialist who reviewed her claim. It is also reflected in DAS correspondence to her. Finally, the third party physician who reviewed her file was also informed by DAS that she had rejected the opportunity to wear a shoulder holster and larger uniform. This was simply not true according to the Union. She was never either offered or directed to utilize those modifications to the standard issue equipment.

Dr. Dale Drollinger was Ms. McAllister's physician during her pregnancy. He made an independent determination to impose restrictions on her for her benefit and the benefit of the fetus. As the person responsible for the health of both mother and fetus during the pregnancy the determination of Dr. Drollinger must be given great weight in this proceeding. In other arbitration proceedings involving the State of Ohio and the Union that principle was clearly enunciated. No

reason to depart from it exists in this situation according to the Union.

In the course of review of Ms. McAllister's claim for benefits the State submitted documentation to Dr. Christopher M. Copeland for independent judgement. He was of the view that the restrictions placed upon her by Dr. Drollinger were unreasonable. The Union points out that Dr. Copeland was selected by the State. He was paid by the State. He did not examine Ms. McAllister. Rather, he reviewed documentation provided to him by the State. Under such circumstances the Union urges greater weight attach to the conclusions and recommendations of Dr. Drollinger, Ms. McAllister's personal physician.

When Ms. McAllister was denied disability leave benefits she was required to reimburse the State $1,137.27 for insurance premium payments that had been made on her behalf. As the Agreement at Section 43.10(3) provides that during the period an employee is receiving disability insurance benefits the Employer will pay the entire cost of such premiums and those premiums were improperly paid by the Grievant, the Union urges that they be reimbursed to her.

In addition to the issues raised above, the Union points to a problem with the timing of this dispute. Prior to the 1992-1994 Agreement there existed a fourteen (14) day waiting period for disability benefits. That was extended to twenty-

eight (28) days in the 1992-1994 Contract. This case arose under the prior Agreement. Ms. McAllister was disabled on August 17, 1992. The 1992-1994 Agreement was executed on August 27, 1992. This was after Ms. McAllister became disabled. Hence, the 1989-92 Agreement which provided for a 14 day waiting period governs this dispute according to the Union. As that is the case, the Employer required an excessive waiting period when it ultimately determined benefits were due to the Grievant. As part of an award, the Union urges that the Grievant be made whole for an additional 14 benefit days.

Position of the Employer: The State points out that during the events under review in this proceeding the waiting period for receipt of disability benefits was changed. During the 1989-1992 Agreement there was a 14 day waiting period. This was extended to 28 days in the 1992-1994 Agreement. That Agreement was signed on August 27, 1992. It was made retroactive to February 1, 1992. Bargaining unit members received the benefit of the negotiated wage increases back to that date. The escalator goes both ways in the State's view. As the Agreement was made retroactive, all its terms were made retroactive. This includes the 28 day waiting period for disability benefits according to the State.

The Employer doubts that on the day Ms. McAllister informed her supervisor of her pregnancy that she was

desirous of working. She normally reported to work in uniform. When she told park management of her condition she had arrived in civilian clothes.

As the State relates the events under review, it offered to accommodate to Ms. McAllister's condition. Testimony was received from park management that they offered to permit her to wear a shoulder holster and to permit her to outfit herself in larger uniforms as her pregnancy developed. Ms. McAllister did not request such accommodation be made.

During the course of the Grievant's employment with the State she had been pregnant on a prior occasion. When that occurred she worked to the eighth month of pregnancy without incident. Then she presented her physician's request for restrictions on her activity. She then requested and was granted light duty. In this situation, Ms. McAllister immediately moved to request disability benefits. In both of her pregnancies Ms. McAllister experienced no difficulties. Both were normal. The State finds it incomprehensible that restrictions were placed on her during the first trimester in her second pregnancy and during the eighth month in her first pregnancy.

In the opinion of the State it acted reasonably in this situation. Considering the restrictions placed upon Ms. McAllister's activity by her physician the State found itself exposed to liability if she or the fetus were harmed during

the pregnancy. Similarly, if Ms. McAllister were unable to perform the tasks associated with her position it would expose the State to liability as well. Unlike the situation during her first pregnancy, no light duty was available during the course of Ms. McAllister's second pregnancy.

The protest under review in this proceeding does not concern itself with the actions of the Department of Natural Resources. The grievance refers to a claim of violation of Article 43 of the Agreement which deals with disability. Yet the Union argument in this case deals with what the Union asserts to be violations of the Agreement perpetrated by ODNR. That position is improper according to the State.

Denial of Ms. McAllister's claim for benefits was reasonable under these circumstances. The State's reviewing officer is experienced in dealing with such claims. The limitation referenced by Dr. Drollinger regarding a 25 pound lifting weight limit is inconsistent with guidelines issued by the American Medical Association. The denial was confirmed by a physician engaged by the State, Dr. Copeland. The State urges that his findings be given greater weight than those of Dr. Drollinger. In fact, as the State urges Dr. Drollinger's findings be interpreted, he never unequivocally stated that Ms. McAllister was incapable of performing the tasks associated with her position.

During the course of Ms. McAllister's absence from work

she applied for unemployment compensation benefits. Her application for benefits was ultimately granted by the Unemployment Compensation Board of Review. The State urges its conclusions be given little weight in this proceeding. That agency does not apply the contractually negotiated standards. It also found that the Grievant was capable of working during the initial stages of her pregnancy. That is the period under review in this proceeding.

Section 43.21 of the Agreement provides that employees who are not eligible for disability leave benefits are eligible for leave. Ms. McAllister did not make any such application.

The State also points out that the Agreement is between the Union on the one hand and various State agencies, including ODNR, on the other. The Department did not deny the Grievant disability benefits. That was done by the Department of Administrative Services. Nothing in the Agreement references the Department of Administrative Services. Hence, even if there was a violation of the spirit of the Agreement, with which the State does not agree, there is no remedy as the violator was a party that is not a party to the Agreement.

Discussion: The governing contractual language for this dispute is Article 43, Section 43.01, 3. As is well known to the parties the language found there provides that:

> A pregnant employee is unable to perform the substantial and material duties of her position because it would endanger her health or the health of the unborn child.

When that situation prevails the employee is entitled to disability leave benefits under the Agreement. Union Exhibits 2 and 4 in this proceeding are the initial recommendations of Dr. Dale Drollinger concerning the need for accommodation to Ms. McAllister's condition during her pregnancy. On August 18, 1992 he indicated she should wear maternity type clothing, that exposure to violence should be minimized and that she should have imposed upon her a weight lifting limitation of 25 pounds. Dr. Drollinger also opined that she not be required to wear any tight clothing or tight belt. These recommendations were reiterated on September 14, 1992. In his letter of September 14, 1992 Dr. Drollinger correctly noted that in the course of her duties Ms. McAllister might be required to lift more than 25 pounds and might be confronted with a violent situation. The assertion of the State that as Buck Creek State Park does not have a history of violent incidents and consequently Ms. McAllister's risk was low is a defense against contractually provided benefits is rejected. That violence at Buck Creek may be less frequent than at some other facility cannot serve to exculpate the Employer in this instance. If a situation demanding action on Ms. McAllister's part were to have arisen during her pregnancy the Employer would have been justifiably concerned

had she walked away and sought to shirk responsibility due to her pregnancy. In this situation the State defends its position by indicating that Buck Creek State Park is not among those facilities noted for a high incidence of violence. That defense is rejected. Ms. McAllister is a law enforcement officer. By the terms of her position description she is expected to cope with potentially violent situations. The generic position description under which she works, Joint Exhibit 4, indicates that she is expected to issue citations, serve warrants, make arrests, assist in emergency situations and administer first aid. The State does not seriously suggest that such activities involve a stroll in the woods. In the course of her daily activities as a law enforcement officer Ms. McAllister faces the potential for confrontation with the public. The analogy may be made between her position at Buck Creek, a tranquil facility, and that of a police officer in a small suburban jurisdiction. That officer may not be exposed to the violence facing his colleagues in urban jurisdictions. Nonetheless, he or she is expected to be able to respond to such situations should they arise. The same expectations attach to Ms. McAllister.

At the arbitration hearing in Columbus on September 23, 1994 Dan West, the Assistant Chief of Parks, testified on behalf of the Employer. Chief West indicated that light duty was unavailable to Ms. McAllister in this situation. He

further testified that light duty was available to her during her prior pregnancy. This represents a significant difference in circumstances between the two events and makes comparison between them inapplicable. Under cross-examination Chief West testified that Ms. McAllister could not perform the duties associated with her position in 1992-1993 due to exposure to violent situations. That conclusion, enunciated by a management spokesman, clearly satisfies the contractual test of an employee being "unable to perform the substantial and material duties of her position because it would endanger her health or the health of the unborn child."

Aspects of this dispute have been considered in other proceedings. In three arbitration disputes, Case Nos. 15-03-921106-0106-04-01, 15-03-920924-082-04-01, 15-03-920722-0065-04-01, Arbitrator Mitchell Goldberg gave great weight to the medical opinion of the personal physician of the Grievant in reaching a decision. He credited the opinion of physicians who had examined the claimants over those who had reviewed documentation. Arbitrator Goldberg's rationale is worthy of respect on this point. Dr. Drollinger was the attending physician in this instance. He was acquainted with Ms. McAllister's condition and the tasks she was expected to perform on a daily basis. He placed restrictions on activity upon the Grievant. The Department could not accommodate to those restrictions nor would it approve disability leave for

her. In this situation, Catch 22 is alive and well.

Article 68 of the 1992-1994 Agreement provides that "The effective date of this Agreement shall be the 1st day of February, 1992, as approved by the parties hereto." While the Agreement was executed on August 27, 1992 its terms were made retroactive. Those terms include the waiting period for receipt of disability leave benefits. The proper waiting period is that found in the 1992-1994 Agreement, 28 days.

Award: The grievance is sustained. Ms. McAllister is to receive disability leave payments per the 28 day waiting period found in the 1992-1994 Agreement. The parties are to meet and recompute the amount of payment due from Ms. McAllister, if any, for health insurance premiums made on her behalf as set forth in Union Exhibit 6 in this proceeding. The Arbitrator will retain jurisdiction for 30 days from the date of transmittal of this decision for the limited purpose of resolving any dispute over the amount of payment due from Ms. McAllister.

Signed and dated this 6th day of December, 1994 at South Russell, OH.

Harry Graham
Arbitrator