#1028

In the Matter of Arbitration Between:

OHIO DEPARTMENT OF HIGHWAY SAFETY
DIVISION OF STATE HIGHWAY PATROL

and

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC.
BARGAINING UNIT 1

Re: 15-03-940808-0063-04-01
15-03-940811-0087-04-01
Tpr. David H. Plunkett

Hearing held January 19, 1995, in Columbus, Ohio

Decision issued February 10, 1995

APPEARANCES

State
Sergeant Robert J. Young, Advocate
Kim Browne, OCB
S/Lt. Richard G. Corbin, Witness

Union
Paul L. Cox, Esq., Attorney
Ed Baker, Staff Representative
David H. Plunkett, Grievant
Ronald Mornins, Labor Representative

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant is an Ohio State Highway Patrol Trooper. He reinjured his right shoulder and injured his wrist on March 12, 1994, in an altercation with a person resisting arrest. He worked the next two days but was unable to work March 15 and thereafter due to the injury. He visited Dr. Carlson, an orthopedic specialist, who completed a medical appraisal job capacity form certifying that Grievant was unable to work as a trooper. Between March and August, Grievant visited Dr. Carlson approximately once a month. The doctor continued to certify that Grievant was not yet able to return to work as a trooper but he was approved for light duty in May and did work light duty off and on thereafter. Grievant applied for Occupational Injury Leave and it was approved.

On June 9, 1994, Grievant was sent a letter by the State in which he was directed to a June 29 medical examination with Dr. Kalb, an orthopedics specialist in Toledo, to determine his fitness to return to duty. Dr. Kalb examined Grievant and furnished the State with a report bearing that date. Based on this report, Grievant was sent a July 13 letter cancelling his Occupational Injury Leave effective July 19. The letter also stated that, before his return to duty, Grievant must obtain "a full release to complete all job functions of an Ohio State Patrol Trooper by your Physician." Grievant asked to return to work and was told he could not until his doctor gave the OK. He

returned to work August 9 after being examined and cleared for work by Dr. Carlson on August 8, 1994.

Grievant filed a grievance on August 8 protesting the cancellation of his OIL and another grievance on August 11 protesting the fact that the 7 day OIL waiting period was not started until March 15. The parties processed both matters to arbitration and a hearing was held January 19, 1995 before the undersigned arbitrator.

II. ISSUES

The parties stipulated the issues to be:

As to grievance # 15-03-940808-0063-04-01:
Did the Employer violate Article 46 of the Unit 1 Labor Agreement by cancelling Occupational Injury Leave for the grievant effective July 19, 1994 at 4:00PM?
If so, what shall the remedy be?

As to grievance # 15-03-940811-0087-04-01:
Did the Employer violate Article 46 of the Unit 1 Labor Agreement by starting the waiting period on 03-15-94 instead of 03-12-94?
If so, what shall the remedy be?

At hearing, the State also raised an issue as to the timeliness of grievance 0087.

III. COLLECTIVE BARGAINING AGREEMENT

Article 46 of the collective bargaining agreement provides for occupational injury leave under O.R.C. 5503 and provides for 1500 hours occupational injury leave at the regular rate per independent injury incurred in the line of duty, with the approval of the Superintendent. Section 46.03 states that "occupational injury leave may not be used within seven (7) days of the date of the injury. Normal sick leave may be used during this time period." Section 46.05 states that authority to approve or disapprove requests rests with the Superintendent and adds that requests shall not be unreasonably denied.

## IV. POSITIONS OF THE PARTIES

The parties made a number of arguments at hearing. They are briefly summarized below.

### A. The Union

The Union argues that both grievances should be sustained. As to grievance 0087, the Union argues that the grievance was timely filed and that the Employer violated the collective bargaining agreement by starting the waiting period on March 15 instead of March 12. With regard to timeliness, the Union argues that Grievant was on approved leave of some kind or the other until August 8 and that the contract provides that the clock does not run for such periods. Grievant was not on notice of the delayed waiting period until August when he returned to work in the view of the Union. It also argues that Grievant's actions in the interim were consistent with those of a person who did not know that he was being charged sick leave for 2 additional days.

Regarding the merits of this grievance, the Union argues that the plain language of the section states that OIL may not be used within 7 days "of the date of injury" and that the Employer seeks to change the language by adding a requirement that OIL not be used within 7 days of the first day off work. The date of injury language was not amended by the Employer in negotiations despite negotiated changes to other parts of the waiting period language. The Union argues that this language is not ambiguous and that,

in any event, the Employer has provided no evidence of a past practice to which the Union acquiesced. The Union asks that the two days of sick leave be restored.

As to Grievance 0063, the Union argues that Grievant's OIL was unreasonably cancelled. The Union argues that the Employer had relied on Dr. Carlson's reports that Grievant's injuries rendered him unfit for duty and that Dr. Kalb's report was not credible in light of subsequent difficulties Grievant suffered from the injuries to his shoulder and wrist. The unreasonableness was demonstrated and intensified, in the Union's view, by telling Grievant that his leave was cancelled on grounds that he was not unfit for duty and then not allowing him to come back to work without going back to his own doctor (who had said he was unfit) to be certified as fit for duty. The Union asks that Grievant's sick leave time be restored and that he be awarded OIL from July 19 to August 8.

B. The State

The State argues that grievance 0087 was not timely and that, in any event, it lacks merit. The State points out that Grievant served 14 or 15 days of light duty and that he could have found out the status of his sick leave account by looking up the records. With regard to the merits, the State argues that Article 46 has remained much the same for 16 years with only minor changes. The 7 day waiting period has been handled the same way for OIL and disability leave. The State argues that it followed long standing past

practice to require a seven day waiting period beginning with the last day of work following the injury and that it does not have a duty to show specific examples. The State argues that the arbitrator should not improve a negotiated benefit and that the title of the section is "waiting period."

With regard to grievance 0063, the State argues that the Superintendent properly and reasonably exercised his authority to cancel the occupational injury leave. The State argues that it was not unreasonable to send Grievant to a doctor of its choice, a specialist, after he had been on OIL for 3 months. It stresses language in Dr. Kalb's report stating that "there is no abnormality by objective evaluation in the hand, wrist, fingers or shoulder" and that "from an orthopedic standpoint he could return to his work without restriction or limitation."

The State further sees Dr. Kalb's report as raising problems unrelated to the injuries for which OIL was granted such as weight and blood pressure and argues that it was not therefore unreasonable to require Grievant to obtain a release with regard to these problems. The State stresses its view that OIL cannot continue if a physician reports that the injury in question does not prevent the employee from returning. The State requests that the grievance be denied.

## V. ANALYSIS AND DECISION

The arbitrator has reviewed the collective bargaining agreement, the testimony of witnesses, the exhibits and the arguments of the parties in reaching a decision in this matter.

### A. Grievance 0087

#### 1. Timeliness Issue

After hearing arguments, the arbitrator took under advisement the issue of whether the grievance was timely filed and asked the parties to present evidence as to the merits as well. This was done because the evidence on the timeliness issue looked as if it would be intertwined with the evidence on the merits and a decision on timeliness could not be promptly rendered. Having now reviewed the contract and evidence on this issue, the arbitrator finds the grievance timely. This ruling is based on a number of considerations.

The most important is that there was no evidence presented that Grievant "knew or reasonably should have had knowledge of the event giving rise to the grievance" before he filed his grievance. Section 20.07 requires that a grievance be presented within 14 days of such knowledge and the arbitrator found Grievant's testimony credible that it was only after he returned to duty in August that he went over his records and discovered that his 7 day waiting period had been computed as beginning on the first day he missed work rather than from his date of injury. Grievant's

actions were consistent with his belief that the waiting period was to begin on the date of injury. Management exhibit 2-A, for example shows that on April 28, 1994, Grievant applied for 24 hours sick leave for the duty days in the period 3-15 to 3-20. This document was submitted to complete the necessary documentation for leave already taken and is consistent with a belief on his part that the period ending 7 days after the injury was different than the period thereafter, for which separate forms were submitted.

More importantly, Grievant's Request for Occupational Injury Leave dated March 26, 1994, states 3/12 as the date of injury, 3/20/94 as the "requested date for injury leave" and the "total number of sick leave days to be used" as 3 days. This request was approved on April 12, 1994. There appear to have been no letters, memos or conversations on or off the record in which Grievant was advised he would be charged 5 days sick leave rather than the 3 requested or that the OIL began later than the 3/20 date seemingly approved on his request. Thus, the arbitrator finds it credible that he did not know and had no reason to know of the change until he actually returned to work on a full duty status and, after a long leave, checked his leave balances. For this reason, the arbitrator does not reach the issues dealing with whether the light duty days worked would count as "days" or if the Union's argument that, under Section 20.11, all approved leave with pay should constitute an automatic time extension. The arbitrator rules that the

grievance was timely filed in August because only in August did Grievant have notice of how his leave had been handled.

2. The Merits

As noted above, the March 26, 1994 Request for Occupational Injury Leave which was approved April 12 did list 3/20/94 as the requested date for injury leave and did list "3 days" as the total number of sick leave days to be used. The arbitrator rules that, under the particular circumstances of this case, these were the appropriate dates and the grievance should be upheld.

The parties are in substantial disagreement over the meaning of Section 46.03, "Waiting Period," which states that "(o)ccupational injury leave may not be used within seven (7) days of the date of injury. Normal sick leave may be used during this time period...." The Union argues the plain language, asserting that OIL should begin seven days after the date of the injury. The State argues a practice of beginning OIL seven days after the first day of missed work.

Arbitrators do consider evidence of past practice when, for example, construing ambiguous contract terms. There is a foundation issue as to whether the contract is ambiguous. The terms "within seven days of the date of the injury" seem pretty explicit. Even if it could be argued that the heading "waiting period" combined with language suggesting use of normal sick leave during "this period" creates an ambiguity (because sick leave is only needed for days off

work), the existence of a past practice has not been established.

Although the State witness was knowledgable and the arbitrator has no reason to question his credibility, an arbitrator cannot find a past practice in a contested case like this without evidence of particular cases dealing with similar situations. To find a past practice, arbitrators generally look for evidence that the practice was (1) unequivocal, (2) clearly enunciated and acted upon and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. See Fairweather's Practice and Procedure in Labor Arbitration, (3d edition, Schoonhaven, Ed., BNA) pp. 182-183 and cases there cited. Evidence of particular incidents helps the arbitrator decide whether the practice asserted evidences a mutual understanding of the term in question. Without evidence of particular incidents, the arbitrator cannot determine if both parties acceded to a practice, what is the scope of the practice and if the instant case falls within such scope.

Thus, lacking evidence of the specific incidents necessary to prove the alleged past practice, having a contract that, in the absence of a proven practice, allows OIL within seven days "of the injury," and having a request for occupational injury leave form which seems to have been approved for OIL beginning seven days after the injury, the arbitrator sustains the grievance on the merits.

B. Grievance 0063

The State clearly has the authority to send an employee on occupational injury leave to a physician for an independent evaluation of his condition. Article 46 states that OIL shall be governed in part by Ohio Revised Code 5503. That statute provides that the superintendent is to provide for periodic medical examinations, "by a physician he selects, of patrol officers who are using occupational injury leave" and that such physician shall report progress made in recovering and whether or not the independent injury prevents the patrol officer from attending work. The statute states that a patrol officer is not entitled to continue to use occupational injury leave if the examining physician reports that the independent injury does not prevent him from attending work. Although the medical reports submitted by Grievant's doctor, Doctor Carlson, which find Grievant unable to perform full duty up until August 1, could be accepted for this purpose, the terms "a physician selected by the superintendent" seem to give the Superintendent discretion to discontinue reliance on Dr. Carlson's reports and rely on Dr. Kalb.

Dr. Kalb's report contains a number of parts. As stressed by the State, it states "based solely upon his objective findings he could return to work without restriction from the orthopaedic standpoint." If this were the only opinion given, this would be an easier case. The report also states, however, that "his subjective complaints

are the rate limiting step in his return to work. It is my opinion that if he has not had resolution of his subjective symptoms to allow return to work during the next month, he will then have reached maximum medial improvement." (The arbitrator does not know if the term "medial" is used to indicate some form of mid-point or is a mistyping of the word "medical." The difference would not be determinative in this case.) The "subjective symptoms" discussed relate to the doctor's findings that Grievant had subjective discomfort in his wrist and shoulder on the right side. The report states "He could carry out all of the job requirements on the medical appraisal job capacity form with the exception of the 2 items which I have circled, ie. subdue violators and respond to riot." This language, combined with the discussion of subjective pain and discomfort and the "return to work during the next month" language, casts doubt on the State's argument that Dr. Kalb's report unequivocally reports that the injury does not prevent Grievant from attending work. In addition, Dr. Kalb reports on page 1 that part of his examination included a grip strength dynamometer test on which Grievant scored only 41 on the right dominant (and injured) side as compared to 70 on the left side and discusses Grievant's concerns about using his right hand for power gripping or firing his weapon.

Dr. Kalb did not clear Grievant to return to work. Rather, he states that Grievant is unable to perform two of

the job functions, including the important function of subduing violators. The State argues, however, that this inability was based on Dr. Kalb's findings that Grievant had a weight problem and a blood pressure problem that rendered him unfit for these duties and not on his wrist and shoulder injuries. The problem with this argument is that Dr. Kalb does not so clearly distinguish between the occupational injuries and the weight. Right before opining that Grievant cannot carry out two of the job functions, Dr. Kalb states "Clearly his weight is a significant impairment in his physical ability, in my opinion, as much as, if not more than, his subjective weakness and subjective discomfort in the wrist and shoulder on the right side respectively." Stating that the weight is "as much as" an impairment as the pain from the injury is not the same as stating that the injury does not still cause an impairment. Indeed, it seems to say that the pain is still causing a "significant" impairment. Given the ambiguities of the report, it seems reasonable to go to Dr. Kalb's bottom line which speaks of resolution of subjective symptoms to "allow return to work during the next month...."

Thus, the arbitrator believes that Dr. Kalb's report would have allowed the State to discontinue benefits after a month but that it was not reasonable to read it as finding Grievant's injury to have healed enough to allow a return to work by the July 19 date ordered. Interestingly enough, this is consistent with Dr. Carlson's July 7 examination

report indicating that Grievant should be able to return to work by August 1. (The State was apparently not provided this report until at least July 14.) The arbitrator's decision is based on Dr. Kalb's report, however, and not on Dr. Carlson's July 7 report. Nor is the arbitrator's decision based on the reports submitted by the Union detailing Grievant's continued difficulties and medical treatment for the condition in September and November, 1994.

Ultimately, the arbitrator does not read Dr. Kalb's report as providing sufficient indication that Grievant's injury related inability to return to work would cease by July 19. The doctor found that Grievant was not yet able to perform all pre-injury job functions. For this reason, the arbitrator finds that Grievant should have been allowed to stay on OIL until August 1, the approximate date set for his return by both Dr. Kalb and Dr. Carlson. As of August 1, either or both of these reports could be used as a reason to terminate Grievant's occupational injury leave status. As to requested remedies after August 1, the arbitrator does not believe them appropriate.

## VI. AWARD

Grievance 0087 is sustained. The Employer is directed to make Grievant whole by restoring his sick leave balance to what it would have been if the seven day waiting period had been calculated beginning at the date of the injury.

Grievance 0063 is sustained in part. The Employer is directed to make Grievant whole by restoring his sick leave balance to what it would have been if the Grievant had been found eligible to return to work from occupational injury leave August 1, 1994. The request for remedies past this date is denied.

Douglas E. Ray
Arbitrator

February 10, 1995
Sylvania, Ohio, County of Lucas