#1192

VOLUNTARY ARBITRATION PROCEEDINGS
THE GRIEVANCE OF GREGORY V. RIGGS

STATE OF OHIO	:	
	:	
The Employer	:	
	:	
-and-	:	OPINION AND AWARD
	:	
THE FRATERNAL ORDER OF POLICE OHIO LABOR COUNCIL, INC. UNIT 2	:	24-14-940926-1120-05-02
	:	
The Union	:	

APPEARANCES

For the Employer:

Carolyn Borden-Collins, Advocate
Georgia Brokaw, Chief, Labor Relations, MRDD
Angie Plummer, DAS
Brian Henry, Human Resources, MRDD
Fannie Farmer, Personnel Officer, Warrensville
Ruby Holman, Labor Relations, Warrensville

For the Union:

Paul L. Cox, Chief Counsel
Gregory V. Riggs, Grievant
Renee Engelbach, Paralegal
Darell Birmingham, Witness
John M. Williams, Witness
Elliott Turner, Witness
Joel R. Barden, FOP/OLC Staff Representative

MARVIN J. FELDMAN
Attorney-Arbitrator
1104 The Superior Building
815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216/781-6100

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on March 7, 1997, in Columbus, Ohio, at the conference facility of the employer, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that the witnesses should be sworn and sequestered and that post hearing briefs would not be filed. The employer questioned the arbitrability of this issue. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS

The grievant was employed as a security guard by the State of Ohio at its Warrensville Heights, Ohio, facility. The grievant had a rather long absence due to an industrial injury received at the facility. He was absent for the period of April 9, 1988, to September 13, 1994.

The evidence revealed that the grievant obtained temporary total disability payments from the State of Ohio through the Bureau of Worker's Compensation for those periods of time. A medical report was finally received by the facility under date of receipt of September 13, 1994 and that medical report over the signature of Dr. Fabio Ochoa revealed the following:

> To Whom It May Concern:
>
> Mr. Gregory Riggs is now able to go back to a

gainful occupation, since recovered from his original injury = 100%.

Sincerely,

Fabio Ochoa, M.D."

The evidence further revealed that during the time in which the grievant claimed temporary total disability, the grievant also took a test for a police officer position on August 22, 1992, at the City of Warrensville Heights, Ohio. He was placed third on the examination list relevant to that test. In September of 1992, the grievant took a test for a police position in the City of Maple Heights, Ohio, and he ranked forty third on that test. Another test was given to the grievant on September 6, 1991, relevant to the grievant's application for a police position at the University Circle Police Department in Cleveland, Ohio. In December of 1992, the grievant also applied for an application for the position of parol officer in Franklin County, Ohio. The grievant also applied in February of 1992, for a police officer position in the Township of Hudson, Ohio. The grievant also applied for a position of police officer on June 11, 1992, in the City of Twinsburg, Ohio. The grievant also applied to become a special agent for the Norfolk and Southern Railroad in December of 1991. The grievant also applied for a position of police officer at Woodmere, Ohio, under date of February, 1993. During that entire period of time he received temporary total disability payments.

It might be noted that the grievant applied for a full time regular position as police officer in those jurisdictions during the same period of time he told his employer he was totally disabled. There was no

light duty on the security force at the Warrensville Developmental Center nor was there any indication of an accommodating workload at any of the jurisdictions at which the grievant applied. Thus, it can be said by virtue of the evidence in this case that the grievant applied for full time, full duty position at several jurisdictions all during the time he was obtaining temporary total compensation. It might be noted that under Ohio law temporary total compensation is paid while an injured employee is certified by a physician to be unable to work and who in fact is not working nor is receiving wages while disabled. The definition further revealed that the injured worker has not reached the treatment plateau or the maximum medical recovery that the individual has, which is not permanent in nature.

In March of 1989, the grievant's work station at the facility was subjected to a job abolishment program. Mr. Riggs' position was one of many jobs that were taken by those with more seniority than the incumbent job holder. Thus, while the grievant was on Worker's Compensation leave, the grievant was found not to have a position by virtue of the March of 1989, job abolishment program of the employer and the bargaining procedures thereunder. Later that year, namely on September 22, 1989 and September 29, 1989, the grievant was contacted by his employer because of a job opening. The grievant notified the employer that he could not return because of his medical condition.

From all of that it was determined that the grievant's position was swallowed by a more senior bid and the grievant had no job ever since March of 1989. It might be noted for the record that the grievant already grieved his job abolishment and that matter was settled. The

present grievance that was filed revealed the following:

> "On Sept. 13th 1994 at 10:05AM I attempted to return to work after being released to return to work by my Doctor. I was advised by my Human Resource Director that I have been laid off."

That grievance was filed on September 20, 1994, or at a time consistent with the treating physician finally releasing the grievant from any further treatment. It might be noted that the receipt of such notice from the treating physician was under date of September 13, 1994. As an aside, it is noted that the total benefits received through date of hearing, from the Bureau of Worker's Compensation for the injury relevant to the grievant amounted to $153,102.90. Thus the grievant had a large share of benefits under the Worker's Compensation Act of Ohio.

The question arises as stipulated by the party as to whether or not there is a threshhold issue. That threshhold issue as stipulated revealed the following:

> "#24-14-(09-26-94)-1120-05-02
>
> Threshhold Issue
>
> Did the grievant have a contractual right to file this grievance? Is the issue on the merits raised by this grievance arbitrable?
>
> /s/Carolyn S. Borden-Collins
> Carolyn S. Borden-Collins, PHR
> Advocate
> State of Ohio, Department of MR/DD"
>
> /s/Paul L. Cox
> FOP/OLC
> Representative
> Paul Cox

It might be noted under chapter 123:1-41 of the Ohio Administrative

Code that the following language appears:

> "(B) Period of eligibility on layoff lists. An employee's name shall remain on the appropriate list for a period of one year from the date the employee was first laid off or displaced from his original classification. These recall lists shall be thereafter administered by the director. Recall lists shall be utilized by the appointing authority only within a layoff jurisdiction."

The 1986 contract was entered into in June of 1986. It is noted in that contract at page 116 that that was the sign off date. That contract triggered the use of the above cited Ohio Administrative Code section. It is noted at article 35 of the 1986-1988 contract that the Ohio Revised Code and the Ohio Administrative Code in effect at the time of ratification of the agreement shall be used for the purpose of determining the procedures in which the employer may reduce its work force. See article 35 of the 1986-1988 agreement which stated the following:

> "ARTICLE 35 - REDUCTION IN FORCE
>
> In the event that it becomes necessary for the Employer to reduce its work force, the Employer shall follow the procedures outlined in the Ohio Revised Code and Ohio Administrative Code in effect as of the date of the ratification of this Agreement."

In the 1989-1992 agreement paragraph 35.04 revealed the following:

> "§35.04 Recall
>
> Employees on layoff shall have recall rights for a period of eighteen (18) months with the most senior recalled first within the applicable jurisdiction. Notification of recall shall be by

> certified mail to the employee's last known address. If the employee fails to report for work within five (5) days following receipt of notification, he/she shall forfeit recall rights."

Thus, the 1986-1988 contract had twelve months for recall rights pursuant to the code and in the subsequent contract, eighteen months in the contract itself was indicated to be the recall right. The 1989-1992 contract was entered into in March of 1989. The effective date of that contract was January 1, 1989. The parties however had agreed that the earlier contract would continue until the period of the subsequent contract was signed off. Thus, in actuality the 1986-1988 agreement covered the first three months of 1989. Thus it can be seen that the union has indicated and stated that the right of recall was for a period of eighteen months and the State of Ohio has indicated and stated that the period of recall was twelve months relevant to this grievant. It is noted that the grievance form itself in this particular case was filed on September 20, 1994 and the employer has now claimed that the grievance itself was untimely. It might be noted that in the 1992 to 1994 contract the recall rights of the employees were raised to twenty-four months. Article 35.04 revealed the following in that regard:

> "35.04 Recall
>
> Employees on layoff shall have recall rights for a period of twenty-four (24) months with the most senior recalled first within the applicable jurisdiction. Notification of recall shall be by certified mail to the employee's last known address. If the employee fails to report for work within five (5) days following receipt of notification, he/she shall forfeit recall rights."

It might be noted that in the 1994 to 1997 contract the same

twenty-four months is in use. Thus, the twenty-four month recall right was apparently in use at the time the grievance was filed.

It was upon these facts that this procedural issue came before this arbitrator for the purpose of opinion and award.

III. OPINION AND DISCUSSION

It is apparent that the recall provision for this grievant was twelve months. He was off for the period of April 9, 1988, to September 13, 1997. His job was abolished in March, 1989.

It is apparent that under these conditions that the twelve months ran pursuant to the terms of the 1986 agreement. However, even if the eighteen month recall period or even if the twenty-four month recall period were used under the 1992 to 1994 agreement or the 1994 to the 1997 agreement, it is apparent that the grievant was unable to work during that entire period of time. If the grievant was unable to work because he was totally disabled then it is apparent that the recall rights are forfeited. The grievant couldn't work. He was collecting temporary total disability from the Bureau of Worker's Compensation which by very definition is an inability of the obtainer of that fund to work. By definition the injured worker has not reached a treatment plateau or maximum medical recovery. Simply put, the grievant wasn't able to work during this entire period that he was off because he pleaded that he was temporarily and totally disabled during that entire period as indicated.

Furthermore, the grievant was the recipient of an offer to work in

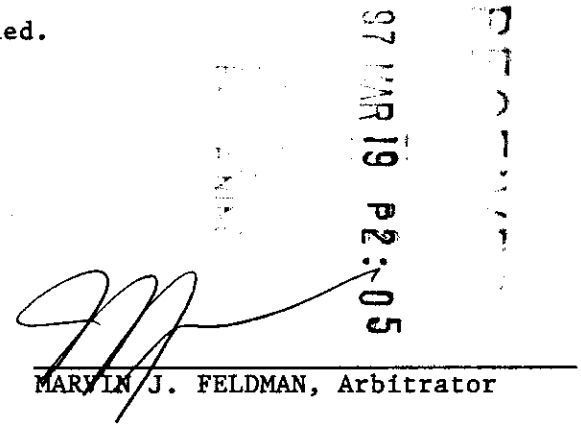
September of 1989, but the grievant denied that recall on the basis that he wasn't able to work. There is no evidence that there were other recalls available, at least none that clearly showed that such was the case. There was some evidence that the State of Ohio had not fully complied in that they did not recall the grievant, allegedly, but such evidence wasn't present.

By reason of the grievant being disabled for the period of April, 1988, to September, 1994, it is apparent that the procedural issue must be granted. Simply put, the grievant couldn't work and if he couldn't work he can't win this case because the recall benefits were exhausted.

This grievance therefore must be denied.

IV. AWARD

Grievance denied.



MARVIN J. FELDMAN, Arbitrator

Made and entered
this 17th day
of March, 1997.