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In the Matter of Arbitration	*	
	*	Case Number:
Between	*	
	*	02-10-970804-0041-01-00,
OCSEA/AFSCME Local 11	*	etc.
	*	
and	*	Before: Harry Graham
	*	
The State of Ohio	*	
	*	

APPEARANCES: For OCSEA/AFSCME Local 11:

Herman Whitter
OCSEA/AFSCME Local 11
1680 Watermark Dr.
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For The State of Ohio:

Michael Duco
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106 North High St., 7th Floor
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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. The record in this dispute was closed at the conclusion of oral argument in Columbus, OH. on February 23, 1999.

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, specifically Articles 27 and 29? If so, what shall the remedy be?

BACKGROUND: There is no dispute over the events prompting this proceeding. The State of Ohio has collective bargaining agreements with various unions. These unions represent different bargaining units. Each union may represent multiple bargaining units. Among the unions with whom the State has agreements are OCSEA/AFSCME Local 11 and Local 1199/SEIU. When the 1997 round of negotiations between the State and its various unions was conducted the State and all but one of the Unions had reached agreement. That Union was Local 1199. Under Chapter 4117 ORC Local 1199 was permitted to strike after completion of specific procedural actions. It completed those actions and on August 5, 1997 commenced a strike. As there is within ORC 4117 a 10-day notice of intent to strike provision the State was well aware of the pendency of the Local 1199 strike. It acted to ensure continuity of service to the citizenry. State agencies were directed to cancel or deny all discretionary leaves, eg. personal leave. Employees who sought to use sick leave on August 5, 1997 were required to supply medical verification for the leave in order to have it approved.

Of course, all unions representing employees in State service were aware of the imminent strike by Local 1199 as was the State. OCSEA/AFSCME Local 11 filed the requisite notice with the State (Jt. Ex. 4) indicating it would engage

in informational picketing on August 5, 1997. On that date the various grievants itemized on the stipulation provided the Arbitrator (Evelynn V. Wood et. al.) either sought to use personal leave or sick leave. Those who desired personal leave all called-in properly and gave the requisite 48 hours notice of intent to use the leave. That leave was denied. Those who sought sick leave were directed to submit medical verification in order to support its use.

These actions were regarded as constituting a violation of the Agreement by the Grievants. They independently filed grievances. These grievances were consolidated for purposes of this proceeding. The Union and Employer agree that all are properly before the Arbitrator for determination on their merits.

POSITION OF THE UNION: At Section 27.04 the Agreement addresses the question of use of personal leave. It provides that:

> Personal leave shall be granted if an employee makes the request with a forty-eight (48) hour notice. In an emergency the request shall be made as soon as possible and the supervisor will respond promptly. The leave shall not be unreasonably denied.

The Union points to the phrase "Personal leave shall be granted..." as supporting its position. The phrase incorporates the word "shall." That word is mandatory. No discretion is permitted the State concerning whether or not

it will permit use of personal leave. If an employee provides proper notice, and all concerned in this situation did, leave must be granted. As it was not, the Agreement was violated in this instance the Union insists.

On two prior occasions Arbitrators have had an opportunity to deal with similar situations involving Article 27. In 1990 Arbitrator Jonathan Dworkin was of the view that the sentence "The leave shall not be unresonably denied" applies to situations when the leave was requested less than 24 (now 48) hours in advance. In his view, the sentence did not refer to situations when leave was properly requested. In this situation, all grievants properly sought leave. Under the plain terms of the Agreement, it was it was improperly denied the Union insists. The Employer lacks discretion to act as it did in this instance according to the plain terms of the Agreement. As that is the case, the grievance must be sustained the Union contends.

Arbitrator Mollie Bowers came to consider the same sort of dispute in 1992. As did Arbitrator Dworkin, she found the granting of personal leave to be mandatory. There is no authority to deny personal leave that is properly requested according to Arbitrator Bowers. In the dispute before her, the Employer cited Section 13.02, dealing with "Work Schedules" in support of its claim it possessed authority to

deny personal leave. Arbitrator Bowers was not persuaded. In her view, there is no relationship between the two sections.

As is set forth below, the State contends the Grievants were "wildcat strikers," acting in support of co-workers. This is not the case in the Union's view. OCSEA/AFSCME Local 11 represents approximately 38,000 State employees. There are about 11 Grievants involved in this proceeding. It is impossible to characterize them as wildcat strikers. There is no evidence they picketed. As a percentage of those represented by the Union (.00028) the Grievants are so small as to be negligible. There was no wildcat strike in this instance. Hence, the mandatory commandment of the word "shall" must be enforced by the Arbitrator the Union insists.

Turning to those situations when sick leave was sought, the Union points out that Article 29.04, III A provides that an employee "may be required to provide a statement from a physician who has examined the employee or the member of the employee's immediate family, for all future illness." If the employee did not see a physician, a statement cannot be secured. Further, if an employee is to secure physician's verification for future absence (impossible in this situation) the employer must order the employee to do so in writing, using a "Physician's Verification" form, with a copy placed in the employee's personnel file. That was not done in

this situation. The Employer cannot show it directed any employee provide the Physician's Verification from or that it gave any employee the form as required by the Agreement. The Union insists that both the personal leave (Article 27) and Sick Leave (Article 29) provisions of the Agreement have been violated by the Employer in this situation. It seeks an award of eight hour personal or sick leave as appropriate for each Grievant.

POSITION OF THE EMPLOYER: The State points out that the events around August 5, 1997 were unique in its labor relations history. Since the advent of collective bargaining between the State and various Unions there had never been a strike in State service. In addition to the issues prompting Local 1199 to strike, the State was aware that numerous other employees were unhappy with the course of negotiations. Various groups of State employees represented by OCSEA/AFSCME Local 11 had made that unhappiness manifest. "Sickouts" and "blue flu" had been rumored to occur in conjunction with the 1199 strike. It is against that background that the State acted to prevent mass absence accompanying the 1199 action.

The State relies on the award of Arbitrator Dworkin to support its action in this situation. In his customary eloquent phraseology Arbitrator Dworkin indicated:

> The Award will be limited to the facts presented. It should not be interpreted as approving a wildcat strike

> through personal leave applications. Such strikes are illegal and contrary to the Agreement. It is apparent beyond debate that the Bargaining Unit cannot accomplish something by indirection that it is prohibited from doing directly. .... When and if Article 27 is used to support such action, there is no doubt that the State and any member of its panels of arbitrators will deal with that problem appropriately.

In reality what occurred with members of the bargaining units represented by OCSEA in August, 1997 was a wildcat strike. Article 41 clearly represents the agreement of the Union not to strike during the life of the Agreement. It was breached on August 5, 1997. Arbitrator Dworkin anticipated that situation in his award and clearly indicated that use of Article 27 would not protect a wildcat strike. The Union cannot hide behind the shield of Article 27 in the face of its agreement not to strike in Article 41 and the contract violation its acquiesced in on August 5, 1997 the State contends.

Article 29, III A deals with "Physician's verification." It provides that at the discretion of the Agency Head or designee the employee may be required to provide a statement from a physician to support a claim for sick leave. That is what it did in this instance. It may do so under the provisions of Article 29 the State contends.

It may be that the State comes to be regarded as having breached the provisions of Article 27 concerning grating of sick leave. If so, such a breach is de-minimus in nature.

Arbitrators have commonly overlooked minimal contract violations or placed them in the context in which the occurred. (Citations omitted). In this instance, the State was confronted with the possibility of mass absence. Many of the Grievants work in the Department of Rehabilitation and Correction. They are Correction Officers. The State cannot do without their services, even for a short time. They are responsible for safeguarding society against the depredations of various miscreants. Given the serious consequences that could result from mass absence in the prison system of the State, any violation of the Agreement should constitute an exception to the mandatory nature of the requirement that personal leave "shall" be granted the State contends. If, for instance, all 38,000 bargaining unit employees represented by the Union sought personal leave for August 5, 1997 the chaotic consequences for the citizenry of Ohio are obvious. Under these circumstance, the State urges the grievance be denied.

DISCUSSION: The language of Article 27, Section 27.04 is mandatory. "Personal leave <u>shall be granted....</u>" (Emphasis supplied). The Employer has no discretion concerning the grant of personal leave that has been properly requested as was the case in this situation. Such leave must be granted. Arbitrators Dworkin and Bowers found as much. There is simply

no question that the Agreement requires the Employer to grant personal leave upon proper request.

The situation presented in this case is not that of a wildcat strike. There are eleven named Grievants on page 2 of the stipulation submitted to the Arbitrator. There was no massive withholding of services of the sort associated with a wildcat strike. There were an infinitesimally small number of people who sought personal leave. It cannot be concluded that there was a work stoppage on August 5, 1997 in violation of the no-strike, no-lockout clause of the Agreement, Article 41. Eleven potential absentees in a workforce of 38,000 represented by the Union scarcely can be termed a concerted withholding of labor by OCSEA/AFSCME Local 11 members in support of their bretheren in Local 1199/SEIU.

The observations of Arbitrator Dworkin are well-founded. Were it to be the case that a wildcat strike occurred neither this nor any other arbitrator would have the slightest hesitation to determine that a violation of the Agreement on the part of the Union existed. The Union is not permitted to accomplish under the protection of Article 27 that which it may not accomplish under the clear and unexceptional terms of Article 41. That did not occur in this instance. Eleven requests for personal leave cannot be termed a wildcat strike by the most fevered stretch of the imagination.

At Section 29.04 the Agreement reflects the policy of the State with respect to granting of sick leave. Section II defines "Misuse of sick leave" as "Use of sick leave for that which it was not intended or provided." The State has not produced any evidence to show any Grievant who used sick leave on August 5, 1997 (eg. Grievant Keith Profitt) acted improperly. None of the itemized examples of "Pattern Abuse" set out in Section D was shown to be present in use of sick leave on August 5, 1997.

Section III of Section 29.04 provides for the "Procedure" by which a physician's verification may be required by the State to support use of sick leave. It provides the Employer may require "a statement from a physician, who has examined the employee or the member of the employee's immediate family, <u>for all future illnesses."</u> (Emphasis supplied). That does not bear upon this situation. There were no "future illnesses" involved in sick leave used on August 5, 1997 based upon the record provided the Arbitrator. Further, there was no showing that any employee was provided the requisite "Physician's Verification form" to substantiate the validity of any future illness. When Grievant Proffitt called-in and used sick leave he did so appropriately. However, the record reflects that he was denied personal leave and then resorted to use of sick leave. The denial of personal leave was

improper under the terms of the Agreement.

Had the membership of OCSEA/AFSCME Local 11 engaged in a large-scale withholding of their services on August 5, 1997 the provisions of Article 41, the no-strike, no lockout provisions, would control the outcome of this dispute. There would not be any reluctance to enforce them against the Union by this Arbitrator or any other. The circumstances of this proceeding indicate that a wildcat strike did not occur in August, 1997. Had there been such, the exception asserted to exist to the word "shall" in Section 27.04 would be found to exist. A very few Grievants are involved in this proceeding. Under the plain terms of the Agreement, with which they complied, they must be provided personal leave.

AWARD: The grievance is sustained. All Grievants are to be credited with eight (8) hours personal leave. All Grievants who used sick leave in lieu of personal leave on August 5, 1997 are to have their sick leave balances credited appropriately.

Signed and dated this 5th day of March, 1999 at Solon, OH.

Harry Graham
Arbitrator