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In the Matter of Arbitration *
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Between * Case Number:
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Fraternal Order of Police-Ohio * 25-17-042898-01-05-02
Labor Council *
* 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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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. The record in this case was closed at the conclusion of oral argument in Columbus, OH. on February 26, 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 when it ordered the Grievant not to report to work? If so, what shall the remedy be?

BACKGROUND: The facts prompting this proceeding are not in dispute. The Grievant, Sherrie Hustead, is a Watercraft Officer Specialist. She has worked for the Department of Natural Resources for approximately 12 years.

In 1997 the Department received complaints from the boating public and some of Ms. Hustead's co-workers concerning her on-the-job behavior. She was sent for a psychological evaluation on February 5 and March 19, 1998. As a result of those evaluations she was placed on Disability Leave on April 21, 1998. She was not permitted to work.

In order to receive pay Ms. Hustead applied for and was granted sick leave and vacation time for various periods of her time off duty. In due course Ms. Hustead was re-evaluated by other mental health practitioners. On July 2, 1998 Dr. Eddie E. Myers indicated to the Department his opinion that Ms. Hustead was fit for duty as a Watercraft Officer Specialist. She was restored to her normal duties upon receipt of Dr. Myers' report.

Officer Hustead did not agree with the Department's action relieving her of duty and the consequent necessity of her having to use various forms of leave to receive pay. A grievance protesting that action was filed. It was processed through the procedure of the parties without resolution and

they agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE UNION: At Article 19 the Agreement indicates that a bargaining unit member may not be "reduced in pay or position...except for just cause." In the Union's view, Ms. Hustead was "reduced in pay or position" without just cause. In this instance, the Grievant was required to use various leaves, eg. sick and vacation, in order to maintain her income. Dr. Stratton's report indicated that she had "no severe psychological problems" (Jt. Ex. 2, p. 5). Notwithstanding, she was prohibited from working. When Ms. Hustead was examined by health care providers other than those retained by the State no reason for her to be off-duty was found. The Employer was informed of those findings. She was not returned to work. In essence, according to the Union, there was no reason for Ms. Hustead to be denied the opportunity for work.

The rationale above is secondary to the Union's major point in this dispute; that the Employer cannot put an employee on disability leave without a request. There was none in this instance. The Grievant stood ready and willing to work at all times. The Employer lacks authority to act as it did in this instance. There is nothing in the Agreement permitting the Employer to take the initiative and put an

employee off duty for a reason other than discipline. No discipline is involved in this instance. Hence, the Union urges the grievance be granted and the appropriate leave balances be restored to the Grievant.

POSITION OF THE EMPLOYER: Article 28, Section 28.01 permits the Employer to send an employee for a psychological examination. Under the explicit terms of Article 28.01 it may act as it did in this instance. There is no discipline involved in this situation as the Employer views it. Ms. Hustead was off duty per the recommendation of Dr. Stratton. When she was directed off duty Ms. Hustead had a number of options to maintain her income. She utilized them by applying for vacation time and sick leave. She was granted the leaves she applied for and paid. There is no violation of the Agreement in this situation.

Ms. Hustead could not be placed on Administrative Leave per Section 19.02 of the Agreement. The language found there limits its use "for the purpose of investigating the event or condition." There was no investigation in this instance as the Employer knew about the Grievant's condition from the report it received from Dr. Stratton.

The State acknowledges it received conflicting reports on Ms. Hustead's condition from various practitioners who evaluated her. Those engaged by her, Jeff Thomas and

Jacqueline Lewis Lyons, found her capable of work. Confronted with that evidence the Employer sent her to Dr. Eddie Myers for another opinion. When Dr. Myers found her competent for duty she was immediately restored to work. There is no violation of the Agreement anywhere in this sequence of events according to the State. It urges that the grievance be denied in full.

DISCUSSION: The sequence of events under review in this proceeding arose as a consequence of complaints and concerns about Ms. Hustead's behavior raised by the public and co-workers. There was concern she was hostile towards co-workers and had harassed the public (Employer Ex. 2). As a consequence Ms. Hustead had been transferred out of the public eye, to review various reports. The record in this dispute indicates that the Employer had a bona-fide concern over her behavior. When it responded by sending Ms. Hustead for psychological examination it was "investigating the event or the condition" of the Grievant within the meaning of Section 19.02 of the Agreement. Additionally, the Employer had "a reasonable belief that the employee participated in an event or was in a condition of significant consequence to the Employer, the employee, or the public." (Section 19.02) In such circumstances administrative leave is appropriate. This is reflected in Employer Exhibit 5, the memo from Director

Buchholzer concerning use of administrative leave. In that memo Director Buchholzer indicated that only he was to authorize use of administrative leave. He continued "Administrative leave is only an alternative where the health or safety of employees or of any person or property entrusted to the employee could be adversely affected." This is precisely the case in this situation. The Employer was concerned over potential adverse consequences upon the public and employees of Ms. Hustead's behavior. It investigated the causes through the psychological exams it directed she take, those of Dr. Stratton and Dr. Myers. The events under review in this proceeding fall four-square within the situation for which administrative leave is to be used.

Section 19.01 sets forth the "Standard" of discipline. It is that "No bargaining unit member shall be reduced in pay or position, suspended or removed except for just cause."

(Emphasis supplied) Ms. Hustead lost pay by virtue of her use of sick leave. The Agreement at Section 40.02 provides for a reduced rate of pay when 40.1 or more hours of sick leave are used in the appropriate year. Similarly, by use of vacation time for a purpose other than vacation and at a time not planned for vacation Ms. Hustead was "reduced in pay" per Section 19.01. In his initial report Dr. Stratton did not recommend Ms. Hustead be relieved of duty. His report

(Appended to Jt. Ex. 2) is silent on that question. Employer Exhibit 4 is a follow-up report by Dr. Stratton. In it, he recommends that the Grievant be permitted to work in a non-law enforcement position "that does not involve interacting with the public." Testimony from Ms. Hustead at the hearing indicated that she was in such a position in April, 1998. She was reviewing various reports, a task she continued when she returned to duty. She was not dealing with the public when sent for her initial psychological exam. At the hearing the State acknowledged it was aware in April, 1998 that the Grievant was not in contact with the public.

Ms. Hustead was not disabled. Section 43.07,1 provides that an employee "may file an application for disability leave benefits." Ms. Hustead was not disabled by the terminology of Dr. Stratton's report and her own opinion. There was no basis for her to use disability leave in this instance. She could not properly do so. Application for and use of disability leave in these circumstances would have been a sham.

Section 40.02 provides that "Sick leave shall be granted to employees who are unable to work because of illness or injury of the employee...." As noted above, Ms. Hustead was able to work. She was at work prior to being sent home. Included in Joint Exhibit 5 are various requests for leave


filed by the Grievant. Among them are some for sick leave. On her application for sick leave for April 21 - 24, 1998 she justified her request for sick leave as "ordered to go home by Jeff Hoedt." That leave was approved, in spite of the fact Ms. Hustead was not sick. On May 20, 1998 she again applied for sick leave for the May 26-28 period. She was not prospectively sick. She was "ordered home." Again, the leave was approved as it was for the June 1-4, 1998 absence when Ms. Hustead was "ordered home." The same situation occurred for June 8-11, June 15-18, June 22-25 and July 1-3, 1998. In each instance the Grievant truthfully indicated she was using sick leave because she had been "ordered home." She was not sick. After 40 hours of sick leave are used in a year ending in November, the rate of pay is reduced to 70%. Ms. Hustead was "reduced in pay" within the meaning of Section 19.01 of the Agreement.

In this instance the Employer placed the Grievant in a situation where she used various leave accounts, sick and vacation, in order to maintain her income, albeit at a reduced level. Under the circumstances presented in this situation that represents a violation of the Agreement.

AWARD: The grievance is sustained. The sick leave and vacation hour accounts of the Grievant are to be restored to the level they would have been but for this incident. Any

straight time wages lost to the Grievant are to be paid to her.

Signed and dated this 16th day of March, 1999 at Solon, OH.



Harry Graham
Arbitrator