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VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 27-03-020807-1108-01-03
and	*	
	*	Kathryn George, Grievant
OHIO DEPARTMENT OF	*	Discrimination
REHABILITATION AND	*	Health and Saftey
CORRECTION	*	

APPEARANCES

For the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO:

David Justice, Staff Representative
Mark E. Linder, Assistant General Counsel
Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO

For the Ohio Department of Rehabilitation and Correction:

David J. Burrus, Labor Relations Officer
Ohio Department of Rehabilitation and Correction

Krista Weida, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:00 a.m. on March 9, 2004, at the Chillicothe Correctional Institution in Chillicothe, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and authorized her to frame the issue on the merits. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Civil Service Employees Association/AFSCME Local 11/AFL-CIO (the "Union") were Chapter President Cheryl Rhoads, Chief Steward Rick McElwee and the Grievant, Kathryn L. George. Testifying for the Ohio Department of Rehabilitation and Correction (the "Employer") were Personnel Officer Lachona McKee and Warden James Erwin. Also in attendance was Labor Relations Officer Chris Lambert. Joint Exhibits 1-9 were entered into evidence. The oral hearing was concluded at 1:40 p.m. Written closing statements were timely filed and exchanged by the Arbitrator on April 22, 2004, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. BACKGROUND

The Grievant has been a correction officer at Chillicothe Correctional Institution since November 18, 1996. Job duties of correction officer include "prevents escapes or incidents which threaten the security or safety of the facility/inmates, staff or general public which includes, when necessary using physical force, unarmed self-defense, firearms or other force to detain or secure inmates." (Joint Ex. 8 & 9)

In the summer of 2002 the Grievant bid on and was awarded a Pick-A-Post position as visiting/utility officer on the second shift. She began working in this position on or about July 2. There are three visiting/utility posts at the institution, one of which is male-only because its duties include inmate shakedowns. Another works the visiting stand, monitoring visits, dispensing medications and performing other duties. The third is assigned to the A-building, processing visitors and making reservations. A supervisor decides which officer works the

visiting stand, which one works visiting registration, and where the stand officer works after the visiting hall is closed.

On July 26 the Grievant's obstetrician-gynecologist supplied her with a statement stating she was pregnant with an expected due date of March 22, 2003, and advising her not to lift more than ten to fifteen pounds for the duration of her pregnancy. The Grievant reported this to her employer the following week and worked her usual position Tuesday and Wednesday. While she was off on personal leave on Thursday, she received a message from the personnel office asking her to telephone the institution. When she called the next day she was told she would not be allowed to work because of lifting restrictions.

A meeting was held the following week with Warden James Erwin during which other posts for the Grievant were discussed. The Union could not agree to her displacing other officers in violation of the Pick-A-Post Agreement and the warden could not agree to splittimg her job between the visiting hall and entrance building because if she had to use force against an inmate or visitor she would be in violation of her weight-lifting advisory. The Grievant was told to apply for disability benefits.

On August 7, Chapter President Cheryl Rhoades filed a grievance on behalf of Officer George (who was on vacation that week) claiming violation of Article 11.11 (later amended to include Articles 2.01 and 2.02). While this grievance was being processed, the Grievant applied for disability and dually filed a charge with the Ohio Civil Rights Commission ("OCRC") and the U.S. EEOC. The disability application was initially denied, but after a third-party physician determined she was physically incapable of performing the job duties of a correction officer, she was granted disability benefits for the period August 15, 2002 through March 25, 2003. The

documentation the Grievant submitted to substantiate her disability claim included a statement from her doctor's partner which states in part,

> The patient's pregnancy is complicated with chronic hypertension and she is currently on Labetalol to control her blood pressures. It is the policy of our practice that patients that are pregnant are put on limited restrictions to prevent possible complications with the pregnancy. Our policy is that patients do no heavy lifting with a 20 lb. weight limit on lifting and pushing. We have also recommended to patients that they work no more than 40 hours per week and no more than eight hours a day. We find that patients that do exceed these restrictions have increased risk of preterm labor and potential preterm delivery. (Joint Ex. 3B)

The OCRC determined there was no probable cause and dismissed the charge on October 30, 2003. There is no evidence in the record of an appeal or request for review by the EEOC.

The grievance thereafter came to arbitration as aforesaid, free of procedural defect, for final and binding decision on the Arbitrator-framed issue of: *Did the Employer violate the Collective Bargaining Agreement in refusing to provide work for the Grievant while she was pregnant? If so, what is the remedy?*

In arbitration the Grievant testified she has seen approximately six other pregnant officers working. Two of these, she said, were on work restrictions, a fact she was aware of from seeing their files when working temporarily as a supervisor. Chief Steward Rick McElwee testified he, too, has seen obviously pregnant officers working, but he was unable to find anything about work restrictions in the files of the officers named by the Grievant. Training Officer and Chapter President Cheryl Rhoades, too, testified that in her many years with the department she has seen quite a few pregnant officers working. Never before now has she had to represent an employee for lack of accommodation. She named two officers with firearms restrictions placed on them by their doctors. Other nonpregnant officers have been accommodated where they have been

prohibited by domestic violence convictions from carrying firearms or because of medical restrictions. Warden Erwin testified that sometimes an accommodation is made for the sake of training, such as how a shotgun is held or by performing exercises at half speed. Not all positions require carrying a firearm, and employees can bid only on those for which they are qualified. The institution has made accommodation for some disabled employees under a transition–to–work program, but these are based on a doctor's assessment of the employee's ability to return to full duty within ninety days. He further testified that he can think of no position in the institution that does not require self-defense ability and that the issue with respect to the Grievant was not her pregnancy but the lifting restriction.

III. PERTINENT PROVISIONS OF THE CONTRACT

ARTICLE 2 - NON-DISCRIMINATION

2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status.

2.02 - Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

ARTICLE 11 - HEALTH AND SAFETY

11.11 - Concern for Pregnancy Hazards

The Employer will make a good faith effort to provide alternative, comparable work and equal pay to a pregnant employee upon a doctor's recommendation.

ARTICLE 25 - GRIEVANCE PROCEDURE

25.03 - Arbitration Procedure

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Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement. (Joint Ex. 1)

IV. ARGUMENTS OF THE PARTIES

Argument of the Union

The Union's position is that the Employer failed to rebut the Union's prima facie case that Chillicothe Correctional Institution impermissibly discriminated in excluding a pregnant woman with a weight advisory of 15 pounds from working inasmuch as the employer presented no evidence demonstrating the ability to lift more than 15 pounds is essential to good job performance. It did not establish which, if any, essential functions of the position she was unable to perform. Neither the correction officer classification nor its position description has a weight lifting qualification. Nor was there any evidence of what weight, if any, is required for unarmed self-defense, just the personal beliefs of the warden. In fact, Training Officer Rhoades testified that it is leverage, not weight, that is key to unarmed self-defense. Further, the Grievant's doctor issued only an "advisory." That is, the Grievant was offered an opinion, not given a command. She was thus not under a weight-lifting restriction, but had free will. Additionally, the warden is not an expert in obstetrics. He is therefore not qualified to rebut the Grievant's position that she was able to perform all her duties and responsibilities in emergency situations. He did not even get a medical opinion before prohibiting her from returning to work, as has been done in other disability cases. Dr. Copeland, on the other hand, opined that she could perform her job at least until December 25, 2002. Then, too, other officers have been able to requalify in unarmed self-defense and weapon training, and to perform their normal job duties during their pregnancies. The Employer thus had a past practice of accommodating pregnant correction officers until now.

The Union argues that Articles 2.01, 11.11 and 34.05 demonstrate that the Employer is required to make a good faith attempt to provide reasonable accommodation. The fact that there

is no light duty policy does not negate the requirement to accommodate where possible. The Employer never did try. It just rejected the Union's proposal and instead offered a proposition that would violate the contractual rights of another employee.

As to the Employer's claim that allowing the Grievant to work as a correction officer poses a direct threat to the health and safety of others, the Union submits that this is an overly protective condition that has a discriminating effect on the employment of women. It is not based on an individualized assessment and the most current medical knowledge and reasonable medical judgment as it should be. If safety is its claimed purpose, the policy must be shown to serve it. Merely raising the mantra of "safety" will not do. As supported by Dr. Copeland and unrebutted by the Employer, correction officers experiencing a typical pregnancy should have little difficulty performing their regular duties until girth becomes an issue, most often after the first trimester. The fact that the Grievant was awarded disability benefits retroactively does not negate the fact that the warden implemented a discriminatory policy.

Finally, the Union argues that the Pregnancy Discrimination Act of 1978, amending Title VII of the Civil Rights Act, makes it clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.

The Union concludes that the record establishes that the Employer discriminated against the Grievant, violating the Pregnancy Discrimination Act and Article 2.01 and 11.11 of the Collective Bargaining Agreement when it denied her work despite the fact that she could perform the essential functions of her position. It therefore requests that the grievance be sustained in its entirety.

Argument of the Employer

The Employer urges the Arbitrator not to entertain the Union's argument with respect to Title VII of the Civil Rights Act. Citing panel member Arbitrator Murphy in the Donald Miles case (Case No. 14-23-000828-0029-01-13), it says such claims are outside the four corners of the contract and therefore not within the Arbitrator's jurisdiction. Additionally, the Grievant filed her discrimination claim in the proper forum where it was dismissed.

Looking at the Union's argument that the Employer violated Article 2.02, the Employer asserts that no evidence supports this claim. The testimony that approximately six other pregnant correction officers, including two with restrictions, were allowed to work, was rebutted by Union Steward McElwee who found no documentation of work restrictions in those officers' files.

The Employer submits that the only claim the Arbitrator should consider is whether the Employer made a good faith effort to find work for the Grievant under Article 11.11. This article clearly does not mandate an alternate assignment. The Employer contends it met the requirements of this provision when it met at least twice with the Union, considered the Union's proposal and made its own.

The Employer continues that there is no merit to the Union argument that other employees have been allowed to continue working when they could not participate in self-defense training or firearms certification. These employees were allowed to participate after clarification or consultation with their doctors. Moreover, there is a difference between training and being able to use the training, and there is no similarity between the Grievant's situation and that of those who are not permitted to carry firearms.

Finally, the Employer argues that its position in this matter is validated by the Department of Administrative Service's approval of the Grievant's disability claim. While the delay may have had a financial impact on the Grievant and her family, she received what she was due under the Collective Bargaining Agreement. Any other relief would add to the terms of the contract and is therefore outside the Arbitrator's authority to grant.

For all these reasons, the Employer requests that the grievance be denied in its entirety.

V. OPINION OF THE ARBITRATOR

The Arbitrator is persuaded that the Employer has not violated the Collective Bargaining Agreement in this case. To begin with, the Grievant's position requires the ability to use physical force and unarmed self-defense. The incidents requiring the exercise of this ability can and do occur wherever there are inmates or even members of the general public present including the A-building and visitors hall. Not withstanding the fact that unarmed self-defense depends in large measure on leverage, the Arbitrator has no reason to disbelieve the warden's testimony that exertion greater than the weight limits specified by the Grievant's doctor are required. His opinion, though not an expert one, is grounded in his years of experience in corrections and, significantly, it was corroborated by the independent third-party physician who determined on remand from the Department of Administration Service's hearing officer, that the Grievant was physically incapable of performing the job duties of a correction officer. The same physician's opinion also supports the Employer's claim that, despite the use of the term "advised" on the doctor's slip, this was a restriction in the sense that one acts against the advice at one's peril. While the Grievant does have free will and may choose to assume the risks, one cannot expect an employer to disregard competent medical opinion that the employee should not

be engaged in certain activities. It is true that the Employer here did not seek another opinion, but it had no reason to do so for it did not question the doctor's advice. Rather, it was the employee who disagreed with it (or at least the Employer's interpretation of it) and was willing to disregard it. Thus, the burden was on *her* to seek another opinion, not on the Employer. Finally, even the doctor's partner uses the term "limited restrictions" (Joint Ex. 3B, p.10) in his memorandum explaining their practice.

The fact that other women worked as correction officers while pregnant and other officers were able to requalify in unarmed self-defense does not prove that the Employer discriminated against the Grievant in refusing to accommodate her limitations. The Grievant was not simply pregnant. She was also restricted in her ability to perform her duties whereas there is no evidence these other officers were similarly restricted. She was thus differently situated than the others and so different treatment was warranted. The Employer's refusal to accommodate her did not impose an overly protective condition with a discriminatory effect on women. It was based not on her pregnancy, but on her weight restrictions, as demonstrated by the fact that other women without similar restrictions did work as correction officers during their pregnancies. Indeed, the Arbitrator finds no policy regarding pregnant correction officers in general. What she does see is an individual employee with weight limitations placed on her by her physician which the Employer is obliged to honor absent conflicting opinion of which none was presented. Dr. Copeland's opinion, which the Union urges the Arbitrator to follow, speaks to "traditional approach" and "standard pregnancy restriction," not whether the Grievant, herself, was capable of performing her duties, which is why the Department of Administrative Service's hearing officer remanded for an individualized assessment.

The question, then, is whether the Employer made a good faith effort to accommodate the Grievant's restrictions. As the employer points out, the Contract does not require accommodation, only a "good faith" effort. Here, the employer met, conferred, considered and and ultimately rejected the Union's proposal for the valid reason that the position's requirements for physical force and self-defense hold even in the visitors hall and A-building. It offered its own proposal, which the Union rejected for valid reasons of its own. There is nothing in the record that speaks of lack of good faith, so the Arbitrator finds no violation of Article 11.11.

Finally, there is the question of Title VII. Without addressing arbitral jurisdiction over Title VII issues, the Arbitrator finds that the Grievant dually submitted her charge to the Ohio Civil Rights Commission and the U.S. EEOC. The OCRC took jurisdiction and found, as does the Arbitrator, that the Employer's actions were not due to her pregnancy, but to her restrictions which were more limiting than those placed on others, including pregnant females, who were permitted to work. The Grievant thus has her answer to the Title VII issue from the OCRC.

VI. AWARD

The Employer did not violate the Collective Bargaining Agreement in refusing to provide work for the Grievant while she was pregnant. The grievance is denied in its entirety.

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
June 23, 2004

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