#1805

In the Matter of the Arbitration

- between -

The State of Ohio,
Ohio Veterans Home

- and -

Ohio Civil Service Employees
Association, AFSCME, Local 11

Arbitrator: John J. Murphy
Cincinnati, Ohio

For the Union: Herman S. Whitter
OCSEA, AFSCME Local 11
390 Worthington Road, Suite A
Westerville, Ohio 43082-8331

Robert Robinson, 2nd Chair
Staff Representative

Also Present: Vanessa Brown
Chapter President

Robert Boger
Member, Union State Board of Directors

Kathy Boger
Connie Logan
Bill Kessler
Betty Haney
Employees

For the State: Andrew Shuman
Office of Collective Bargaining
100 East Broad Street
Columbus, Ohio 43215

Michelle Ward, 2nd Chair
Office of Collective Bargaining

Also Present: Craig Selka
Food Services Manager

Marsha Van Barg
Scheduler, Nursing

FACTUAL BACKGROUND:

The Ohio Veterans Home (Employer) is a state agency that has certain continual operations called "Seven (7) day operations." Examples would be the Nursing Department, whose employees provide nursing care to the resident veterans; the Dietary Department, preparing and presenting meals to the residents and stocking the two kitchens to accomplish this goal. The last example set forth in the facts of this case was the Housekeeping Department. There are other departments that do not operate continually, generally called non-seven day operations.

This case concerns a class grievance[1/]. The central complaint in the grievance is that the Employer is failing to comply with its contractual obligations in responding to requests for vacations. In addition to the alleged contract violations, the grievance complains that the Employer has also breached prior grievance settlements. The grievance states:

[1/] The employees comprising this class are defined later in this Opinion.

> Once again Management's refusal to follow the simple and clear contract language (and) 2 prior grievance settlements on the same issue makes the filing of this grievance necessary. OVH is in continuous violation of the contract and the grievance settlements (case numbers are omitted) by not responding promptly to vacation and other requests for leave.

Among other matters, the remedy requested proposed a specific rule by which the Employer could meet its contractual obligation in respect to responses to vacation leaves.

> All requests for leave to be responded to within 72 hours . . .

ISSUE:

The parties stipulated the following statement of the issue:

> Is the Ohio Veterans Home in violation of Section 28.03 of the Collective Bargaining Agreement as it relates to promptness?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 13 - WORK WEEK, SCHEDULES AND OVERTIME

13.01 - Standard Work Week

The standard work week for full-time employees covered by this Agreement shall be forty (40) hours, exclusive of the time allotted for meal periods, consisting of five (5) consecutive work days followed by two (2) consecutive days off.

. . . In addition, the Employer agrees to schedule each full-time employee with at least seventeen (17) weekends off per year in the . . . Ohio Veterans Home.

13.02 - Work Schedules

It is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time, including persons on leave (excluding disability leave).

. . .

Work schedules for employees who work in seven (7) day operations shall be posted at least fourteen (14) calendar days in advance of the effective date. The work schedule shall be for a period of at least twenty-eight (28) days and shall not be changed without a fourteen (14) day notice, except in accordance with reassignment as provided for in Section 13.05.

ARTICLE 28 - VACATIONS

. . .

28.03 - Procedure

Vacation leave shall be taken only at times mutually agreed to by the Agency and the employee and shall be used and charged in units of one-tenth (1/10) hour. The Agency may establish minimum staffing levels for a facility which could restrict the number of concurrent vacation leave requests which may be granted.

Employees who work in seven (7) day operations shall be given the opportunity to request vacations by a specified date each year. Employees shall be notified of this opportunity one (1) month in advance of the date. If more employees request vacation at a particular time than can be released, requests will be granted in seniority order.

Employees in seven (7) day operations can also request vacations at other times of the year. If more employees request vacation than can be released, requests will be granted on a first come/first serve basis with seniority governing if requests are made simultaneously.

Emergency vacation requests for periods of three (3) days or less may be made by employees in seven (7) day operations as soon as they are aware of the emergency. An employee shall provide the Employer with verification of the emergency upon return to work.

Other employees shall request vacation according to agency policy (work rules) unless the Employer and the Union mutually agree otherwise. The Employer shall not deny a vacation request unless the vacation would work a hardship on other employees or the Agency. The Employer shall promptly notify employees of the disposition of their vacation requests. Unless the Employer agrees otherwise, an employee's vacation will not exceed one (1) year's accrual.

APPENDIX Q - AGENCY SPECIFIC AGREEMENTS

The following supplemental agreements apply to OCSEA/AFSCME bargaining unit employees within the specified agencies only:

. . .

OHIO VETERANS HOME
Scheduling

. . .

Current scheduling practices (i.e., every other weekend off, restricted use of vacation on weekends, and scheduling of intermittent employees) will remain in effect unless operational needs prohibit their continuation.

POSITIONS OF THE PARTIES:

A.) The Union Position

The Union first noted the admonition on the Employer to "promptly notify employees of the disposition of their vacation requests" is contained in the fifth paragraph of Article 28.03. This paragraph is introduced by referring to "Other employees" and does not mention employees in seven (7) day operations. This raises an apparent question of whether the admonition of promptness in response contained in the fifth paragraph is applicable to employees in seven-day operations.

However, the Union argued that the fifth paragraph of Article 28.03--together with this introductory phrase "other employees" was given meaning by a binding arbitration award issued by Arbitrator R. Brookins on June 14, 2004. The Union quoted the following statement in the Brookins' award as binding in this case:

> Consequently, the arbitrator holds that the "promptness requirement" under Article 28.03 applies equally to seven-day employees and to non-seven-day employees. (p. 10 Ohio River Valley Juvenile

Corrections Facility and OCSEA,Case No. 35-2012-04-00-053-01-03).

At issue in the Brookins' award was an Agency's rule of responding to vacation requests within forty-eight hours prior to the date at which the vacation leave would commence. As the Union noted, Arbitrator Brookins found this forty-eight rule a reasonable implementation of the promptness requirement imposed on the Employer. The Union argued that this finding about the propriety of the forty-eight hour rule should not be applied in this case. Therefore, the Union requested that the admonition on the Employer to promptly notify "means up to seventy-two hours from the submission of the request for leave." (Emphasis in text; Union post-hearing brief at 5).

B.) Employer Position

The Employer argued that "Arbitrator Brookins misapplied the promptness language (in Section 28.03)" (Employer post-hearing brief at 1). Arbitrator Brookins was in error in interpreting the fifth paragraph of Article 28.03. Therefore, Article 28.03, as it relates to promptness of the Employer to respond to a request for a vacation leave applies only to "other employees," not employees from seven-day operations.

While the Union offers no evidence concerning non-seven-day employees, the record shows that the Employer does in fact provide prompt response to the request by seven-day employees

for vacation. The seven-day employees are canvassed twice a year for vacation requests, and receive their responses immediately or thirty days prior to the period of year for which the requests are solicited. Outside of the canvass procedure, ad hoc requests for leaves are responded to immediately or on the next day when the request is submitted and the leave is requested during the four-six week posted work schedule. If not within the work schedule, they receive a prompt response within the context of the operational needs of the agency.

The Employer observed that Arbitrator Brookins considered a choice between the Employer's rule in responding to vacation requests and a different rule proposed by the Union. However, the Employer in this case argued that the Employer is limited to deciding whether the Employer's practice on the facts of this case meet the contractual admonition of a prompt response to vacation requests. "However, you (the arbitrator) do not have the authority to grant the specific seventy-two (72) hour time restriction requested by the Union. That authority is properly left to the parties at the bargaining table." (Employer post-hearing brief at 4).

OPINION:

There are three preliminary matters that must be addressed that will help to define the question about which the arbitrator has the authority to decide under the terms of the contract and under the specific submission by the parties in this case. First, there is the question of whether this arbitrator has the authority to address the Union's request that the arbitrator rule that prompt notification means notification within 72 hours from the submission of a request for a leave. The second preliminary matter deals with the need to define the class of employees who are represented by this grievance. This is, of course, particularly important for the remedy in this case, whether the grievance is granted or denied. Lastly, the statement of the grievance quoted above, as well as the Union's evidence and opening statement noted that this grievance is in part an enforcement of settlements of prior grievances. This matter needs to be discussed and resolved prior to addressing the contractual question in this case.

After these preliminary matters are addressed, the merits must first consider the decision of Arbitrator Brookins and the extent of the applicability, if any, of the Brookins' decision to this arbitration. Then, after defining the Employer's action

challenged by this grievance, we consider whether this action was consistent with the contract.

A.) Preliminary Matters

1.) The Union's Proposed Seventy-Two Hour Rule

The face of the grievance in this case requested that "all requests for leave be responded to within 72 hours (after submission)." The Union requested that the arbitrator adopt this rule as the award in this case. (Union post-hearing brief at 5). Indeed, the Union and the Grievant may have been encouraged by the path that had been set forth in the analogous case before Arbitrator Brookins. In that case, the Grievant claimed that the contract required the agency to respond to requests no later than 24 hours after submission. (Brookins' Opinion at 5). The Union also requested an award from Arbitrator Brookins adopting the 24-hour rule. (Brookins' Opinion at 7). Therefore, in a similar fashion, both the Grievant and the Union in this case request that the arbitrator adopt their proposed rule that vacation leaves must be addressed by the Employer within 72 hours of submission.

There is serious doubt as to whether this arbitrator has the authority to analyze and decide to adopt the proposed 72 hour rule. The arbitrator's authority is determined by the terms of the contract and the terms of the submission of the

question to the arbitrator by the parties. The parties in this contract did not specify a particular time or formula in the contract for the response by the Employer to a request for a leave. Article 28.03 states that the "Employer shall promptly notify employees of the disposition of their vacation request." There is nothing further in the contract other than this general standard to govern the response time by the Employer.

The contract enjoins the arbitrator from adding to or subtracting from or modifying any of the terms of the contract. (Article 25.03, paragraph 7). This language creates doubt in this arbitrator that this arbitrator can approach the question in this case as a choice between the Union's proposed 72 hour rule and the Employer's practice challenged by the filing of the grievance. Such an approach would convert this case into a form of "interest arbitration" under which the arbitrator determines what the terms of a contract will be.

This contract also encourages the parties "to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator." (Article 25.03). The parties did so in this case by submitting to the arbitrator the following issue: "Is the Ohio Veterans Home in violation of Section 28.03 of the Collective Bargaining Agreement as it relates to promptness?" The parties submitted to this arbitrator the

question of contractual propriety of the Employer's action in responding to requests for vacation leaves. The submission does not direct the arbitrator's attention to a consideration of the Union's proposal; nor does the submission in any way suggest that the arbitrator choose between the Union's proposal and the Employer's challenged action.

While there is serious doubt of the authority of this arbitrator to consider the Union's proposed 72 hour rule, there is no need to definitively answer that question until the question submitted by the parties to the arbitrator is determined. If the Employer's action challenged by the Union through this grievance is inconsistent with the contract, then, the question becomes does the case stop there, or is the arbitrator authorized to consider and decide the Union's proposal.[2/]

[2/] It is fair to note that Arbitrator Brookins to some extent accepted the invitation of the Union to address its proposed 24-hour rule by stating: "The Arbitrator is unpersuaded that the twenty-four-hour rule is the most practical or desirable means of implementing the 'promptness requirements'." (Brookins Opinion at 11). On the other hand, the issue presented by the parties to Arbitrator Brookins asked: Did the Employer violate the contract, and if so, what shall the remedy be? (Brookins Opinion at 6-7). Furthermore, the text of the Brookins Award makes no mention of the Union's proposed 24-hour rule. Rather, the Award evaluates the Employer's action in adopting a rule of response within forty-eight hours of the commencement of the leave as consistent with the contract.

2.) Enforcement of Prior Grievance Settlements

The face of the grievance claimed that management was failing to follow "2 prior grievance settlements on this same issue. . . ." None of the documents submitted in evidence concerning the settlement agreements had any specification as to when the leave request was submitted, when the leave dates were to occur, or when the Employer responded to the leaves. This absence of any specificity continues in the settlement language. One settlement stated: "The Employer shall promptly notify employees of the disposition of their vacation requests"; the other, "management shall adhere to the contract regarding . . . 28.03."

There is no standard set forth in the documents containing either of these settlements upon which to evaluate the Employer's action in this case. Therefore, the question in this case must be confined to whether the Employer's action in response to the leave request is consistent with the contract. There is no basis to evaluate the Employer's action under the evidence submitted as prior settlement agreements.

3.) The Class of Employees Involved in This Grievance

The third preliminary matter necessary to define the question in this arbitration concerns the definition of the class of employees represented by the grievance. On its face,

the grievance includes the statement that it is a "class action." There is a need to define the class particularly in terms of the reach of the award issued in this case.

Several of the paragraphs in Article 28.03 refer to two different groups of employees--"employees in seven (7) day operations" (paragraphs 2, 3, and 4). Paragraph four, on the other hand, refers to a different group of employees: "Other employees."

The evidence submitted in arbitration, the joint documents presented by the parties, and the facts stipulated by the parties all concern employees who work in seven-day operations. The evidence, facts, and documents deal with employees in the dietary, nursing, and housekeeping departments--operations that are continual, seven days a week. The named class representative in the grievance is an employee in Housekeeping. No evidence, joint documents, or stipulated facts dealt with "other employees."

Consequently, this grievance is a class grievance, and the class is defined as employees working in seven-day operations.

B.) The Merits

1.) The Brookins' Award

The duty to respond to vacation requests promptly is found in the fifth paragraph of Article 28.03. This fifth paragraph

begins in the first sentence by naming "other employees." By contrast, the preceding paragraphs--2, 3, and 4--referred in the text of each of these three paragraphs to "Employees in seven (7) day operations." Since the class of employees involved in this grievance are employees in continual, seven-day operations of the Employer, the question becomes whether the duty to respond promptly as stated in the fifth paragraph is intended by the contracting parties to benefit the members of the class in this grievance.

This precise question was presented to Arbitrator Brookins concerning a seven-day employee in a different state agency. Arbitrator Brookins held "consequently, the Arbitrator holds that the 'promptness requirement' under Article 28.03 applied equally to seven-day employees and to non-seven-day employees. (Brookins Award at p. 11).

Arbitrator Brookins' holding is binding on the parties and must be applied by the Arbitrator in this case. It is a decision by an arbitrator with authority to consider the question of contract interpretation; it is a decision on the precise contractual language involved in this case; it is a decision involving the same parties and the same contract involved in this arbitration.

The Employer argued that this holding was an error in interpretation of the contract. "The Employer previously argued (in the Brookins' arbitration) and continues to argue (in this arbitration) basic grammar and construction of the language." (Employer post-hearing brief at 1).

The test on the applicability of the Brookins' decision to this case is not whether this arbitrator agrees with the analysis in the Brookins' Opinion. Also, it is not whether this arbitrator would have rendered a similar decision had the issue in this case been presented as an original question to this arbitrator.

It could not be said that the Brookins' analysis was egregiously erroneous and substantively without merit. The Brookins' analysis was based upon construction of the language in the fifth paragraph of Article 28.03 in the context of preceding paragraphs. It was based upon traditional rules of construction of contracts. The Brookins' Award should stand until the parties choose to change it in bargaining a future contract.

2.) The Employer Action Challenged in This Case

This case centers on the Employer's response to requests for vacation leaves. To understand the particular challenge by the Union, it is important to note the scope of the Employer's

action under all of the provisions in Article 28.03 that deal with vacation leaves. Under the contract in the second paragraph of Article 28.03, employees who work in seven-day operations are given one opportunity per year to request vacations by a specified date. The evidence showed that all employees in nursing, dietary, and housekeeping were given this opportunity and more. For example, the record and stipulated facts show that the Employer offers vacation canvassing twice a year in the nursing and dietary sections. For example, by notice on July 6, 2004, the employees in nursing could pick vacations from the period of September 1, 2004 to February 28, 2005. They would make their choices known to the Employer on August 3 and 4, 2004, and the Employer would respond immediately to the request. In similar fashion, employees in dietary were given such an opportunity and the Employer response occurred no less than thirty days prior to the date of the vacation leave period. Not only does this canvassing occur for vacation requests with these responses by the Employer on one occasion as required by the second paragraph of Article 28.03, a second opportunity for a second canvassing for another six month period of the year is provided to employees in nursing and dietary.

The problem in this case centers on requests for leaves that occur outside of these canvassing systems. These are called "ad-hoc requests for vacation leave." These requests can take place anytime during the year, but, again, outside of the canvassing periods for which employees in nursing and dietary have two opportunities.

The response by the Employer is geared directly to the fact that both dietary and nursing have four-week work schedules. When the ad-hoc vacation request is submitted during the four-week work schedule, and requests a leave during the four-week work schedule, the Employer responds either on the day of the request or the next day. This factual scenario is also not the problem in this case.

The problem in this case centers upon ad-hoc requests for vacation leave that seek the leave on dates for which the Employer has not, as yet, developed the four-week work schedule. For example, one such leave was described in a joint exhibit that set forth an array of forty-eight varying leave requests by an employee in the nursing department. This employee submitted a request for a vacation on April 17, 2004. The request sought leave for one day of vacation on November 26, 2004--eight months later. It was held by the Employer until the Employer had established the work schedule for the four-week period covered

by the leave request. When the schedule was established, the Employer approved the leave request on October 21, 2004.

3.) The Employer's Action in Responding to Vacation Leave Requests and the Contract

We have narrowed the Employer's action challenged in this case. It is to the Employer's response to vacation leave requests made outside the canvassing opportunities. The other important characteristic of the matter in this case is that the leave request seeks a leave for a day or days within a period of four weeks for which the Employer has not, as yet, developed a work schedule.

While the challenged action of the Employer has been particularized in this way, this challenged action cannot be evaluated under only the fifth paragraph of Article 28.03. Arbitrator Brookins has determined that this fifth paragraph does apply to employees in seven-day operations. However, the response duty by the Employer to vacation leave requests cannot be evaluated in isolation of other associated provisions in Article 28.03. It is important to note that all seven-day employees have at least one opportunity--and in the case of nursing and dietary operations--two opportunities to select vacations with immediate or at least one month response by the Employer.

We cannot use an unadorned dictionary definition of the adverb "promptly" to evaluate the Employer's response to the challenged action in this case. That adverb is in the fifth paragraph of Article 28.03 but that fifth paragraph must be construed in light of the other paragraphs within the same section that bear on vacation leave requests. As Arbitrator Brookins pointed out, "one must balance employee's contractual right to take and enjoy leaves against Management's right to realize the Agency's mission. These two interests must be reasonably balanced if they are to coexist without either undue erosion or mutual destruction." (Brookins' Opinion at 11).

There is a contractual basis for the necessity of balancing the Employer's interests in limiting the number of persons to be scheduled off work at any one time and in maintaining minimum staffing. The contract states in Article 13.02:

> It is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time, including persons on leave . . .

Moreover, both parties agreed that this Employer was subject to State minimum staffing schedules at least with respect to the nursing department, and both parties agreed that the Employer could adopt and has adopted staffing schedules higher than that required by the State.

The Employer presented undisputed evidence of the difficulties of predicting operation and staffing needs. Personal leave can be taken with as little as 48 hours notice. Injuries and sick call offs are impossible to predict. While Article 13.01 mandates only seventeen weekends off per year, this Employer has agreed to schedule every other weekend off. Even assuming a particular slot may appear open on a shift months in the future, operational needs and staffing problems may not be known until the four-week schedule is established.

The particular action challenged by the Employer in this case is the Employer's holding requests for vacation leaves until the schedule for the four-week period covered by the leave is established. This is consistent with the contractual obligation of the Employer under the fifth paragraph in Article 28.03. This conclusion is based upon the construction of the paragraph in Article 28.03 that applies to requests for vacation leave by employees in seven-day operations. It is also based upon the view that the contract does require a balancing of both the contractual right of employees for a prompt notice of their ad-hoc vacation leave request with the Employer's contractual right to limit the number of persons to be scheduled off work at any one time, including persons on leave. Since the Employer's action challenged by this grievance is consistent with the

contract, it is unnecessary to determine whether the arbitrator has the authority under the contract or the issue-submission in this case to evaluate the Union's proposed rule of response.

AWARD:

The grievance is denied.

Date: February 14, 2005

John J. Murphy
Arbitrator