#1965

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO

AND

SERVICE EMPLOYEES INTERNATIONAL UNION
DISTRICT 1199

Before: Robert G. Stein
CASE#
28-06-20051003-0188-02-12
28-06-20060328-0194-02-12

Grievant:
Joel Dwyer, Separation

Advocate for the EMPLOYER:

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Advocate for the UNION:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement") (Joint Exh. 1) between The State of Ohio and Service Employees International Union, District 1199 ("Union"). That Agreement is effective for calendar years 2006 through 2009 and includes the conduct which is the subject of this grievance.

Robert G. Stein was mutually selected by the parties to arbitrate this matter, pursuant to Article 7, Section 7.07(A) of the Agreement, as a member of a recognized permanent panel of arbitrators. A hearing was held on September 5 and September 25, 2007 in Columbus, Ohio. The parties mutually agreed to those hearing dates and location, and they were each provided with a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions.

The hearing was not recorded via a full-written transcript and was closed upon the parties' submissions of post-hearing closing statements. The parties have stipulated to a set of facts related to the matter and also to the submission of nineteen (19) joint exhibits. No issues have been

raised regarding procedural or jurisdictional arbitrability, so the matter is deemed to be properly before the arbitrator for a determination on the merits.

ISSUE

Did the Employer separate Joel Dwyer from his employment with the Division of Parole and Community Services in violation of the Agreement? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 5—Management Rights
Article 6—Non-Discrimination
Article 7—Grievance Procedure

BACKGROUND

Joel Dwyer ("Dwyer" or "Grievant") began his employment as a parole officer with the Ohio Department of Rehabilitation and Corrections, Division of Parole and Community Services ("DPCS") on June 19, 1997 in Defiance, Ohio. Subsequent to an annual medical evaluation on September 21, 1998, neurologist Dr. Marinos Dalakas from the National Institute of Neurological Disorders and Stroke authored a letter to Dwyer's immediate supervisor, John McIntyre ("McIntyre"), indicating that Dwyer was affected by a rare hereditary neuromuscular disease called familial inclusion body myopathy. (Joint Exh. 6, p. 5) Dr. Dalakas' diagnosis and

prognosis indicated that the disease had "significantly progressed with easily detectable weakness in the muscles of his arms and legs" and would likely result in it being "difficult for [Dwyer] to effectively complete various tasks related to his profession including: lifting, running, handling firearms, or engaging in unarmed self-defense." (Joint Exh. 6, p. 5) Based on Dwyer's concerns regarding how his current and potential future limitations or disability would impact his job, a meeting was held on October 25, 1998 with Dwyer, McIntyre, and DPCS Regional Administrator for the Lima area, James Robinchek ("Robinchek"), in attendance. According to the arbitration hearing testimony of both Dwyer and McIntyre, discussions at that specific meeting included the personal pledge of both Robinchek and McIntyre that both of them would "work with" Dwyer to promote Dwyer's continued employment with the DPCS. Dwyer voluntarily relinquished his issued firearm and also forfeited the traditional stipend for carrying a gun. (Employer's opening statement, p. 1)

From late in 1998, Dwyer was gradually "transitioned" from performing as a supervising parole officer to assuming a position as a primary PSI writer in Williams County by 2002, subsequent to his successful bidding into a PSI or writing unit position. (Union's closing statement, p. 1) On October 5, 2005, Dwyer was observed by McIntyre using a type of cane or walking stick to ambulate around the DPCS office in Bryan, Ohio.

McIntyre was concerned about Dwyer's well-being and ability to fulfill the requirements of his position and subsequently contacted his supervisor, Regional Director Casey Moore, who referred the matter to the DPCS Director of Human Resources. A decision was made by the Employer to place Dwyer on administrative leave effective October 21, 2005 pursuant to Ohio Admin. Code § 124.388 (Joint Exh. 11, p. 4), pending the completion of two independently-conducted medical evaluations of Dwyer. The Union subsequently filed the initial grievance number 28-06-20051003-0188-02-12.

Both examining physicians were provided with a copy of the position description for Supervising Parole Officer (Joint Exh. 5, pp. 13-14) and were asked to make independent determinations regarding Dwyer's ability to perform the essential functions of that specific position. A subsequent letter from Dr. William Smith (Joint Exh. 6, p. 9) indicated the following:

> The claimant can certainly not carry out the physical requirements, such as pursuing violators, walking, running, climbing, bending, stooping, lifting, or applying unarmed self-defense techniques.
>
> He has been able to serve as a productive employee for the past seven years, he is extremely motivated, and at the present time is able to carry out the work he has been doing for the past seven years without difficulty.

In a second letter dated January 26, 2006 (Joint Exh. 6, pp. 13-14), after noting that Dwyer "utilizes a walking stick to help with balance and

wears full leg braces on each leg to assist with ambulation," Dr. Raymond K. Meyer made the following conclusions following his examination of Dwyer and review of the position description:

> According to the [position description] form, 10% of his duties may involve work such as running, climbing, crawling, bending, stooping, etc. Mr. Dwyer cannot be expected to complete these activities without difficulty or assistance and, to my knowledge, has not been required to do these types of activities for the past seven years. It is my opinion that the patient can do all his remaining duties in his job description with no difficulty or need for accommodation.

Based on the results of the two medical examinations, the originally-scheduled involuntary disability separation hearing was postponed to permit the Grievant to formally make an accommodation request pursuant to the Americans with Disabilities Act of 1990 ("ADA"). Dwyer's accommodation request (Joint Exh. 6, pp. 10-11) was considered by DRPC's ADA oversight committee and was ultimately denied based on a DPCS determination that the Grievant "had requested an **exemption** from performing the physical requirements of his position, not an **accommodation**." (Employer opening statement, p. 2) The re-scheduled pre-separation disability hearing occurred on March 13, 2006, and Dwyer was involuntarily separated from his employment on March 14, 2006.

Dwyer unsuccessfully appealed his involuntary disability separation with the State Personnel Board of Review on March 22, 2006. On March 28, 2006 the Union filed a second grievance (Joint Exh. 2a, p. 1) on behalf of the Grievant, alleging that Dwyer had been "unjustly terminated."

Because the matter remained unresolved after passing through the preliminary stages of the Agreement's grievance procedure, it has been submitted to the arbitrator for final and binding resolution.

SUMMARY OF THE UNION'S POSITION

The Union's basic contention is that the DPCS violated Articles 1, 5, and 6 of the Agreement due too its purported discrimination and disparate treatment of Dwyer and by effecting his involuntary disability separation. The Union claims that the evidence clearly reflects the attitudes and intentions of Dwyer's supervisors, Robinchek and McIntyre, to facilitate Dwyer's continued employment with the DPCS in the Defiance office. He moved from a full-time supervising parole officer to a position of primary PSI writer sometime in 2002. The Union alludes to the hearing testimony of Parole Officer Clayton Foor, who testified regarding the general knowledge of DPCS employees of the Grievant's disease and his eventual use of full leg braces. His testimony included his specific memories of a staff meeting in which "Dwyer was told that he would be a full-time PSI writer in Williams County and that his co-workers, Parole Officers Watson and Alexander, would handle the supervision field work." (Union's closing statement, p. 2) The Union avers that that type of conduct constituted an intentional granting of an accommodation to Dwyer by the Employer by assigning him a position either principally or

exclusively dedicated to writing. (Union's closing statement, pp. 2-3) The Union also claims that the recognition of an intentional modification of Dwyer's duties was verified in the October 27, 2007 pre-disciplinary hearing report for supervisor McIntyre, which noted that McIntyre "did assign PO Dwyer light duty to help PO Dwyer compensate for his physical limitations." (Union closing statement, p. 3; Joint Exh. 19, pp. 1, 5, 13, 16) The Union claims that Dwyer had been placed and was permitted to continue to work in a position not requiring him to run, crawl, or pursue offenders. This placement was a result of Dwyer's successful bidding into a newly-created position (a product of the locally-recognized Back to Basics Plan), and was also a result of a plan, purportedly submitted to and approved by Robinchek, to make Dwyer a PSI writer and have him monitor low-risk supervision cases. (Union closing statement p. 3) The Union notes that both the Employer's Statement of Job Duties for Officer Joel Dwyer (Employer Exh. 1) and the hearing testimony of other DPCS PSI writers specifically excluded running, crawling, climbing, stooping, and lifting forty pounds as duties Dwyer had been required to perform as an "investigation officer." Dwyer himself testified that he performed many administrative duties or functions for the Williams County Court, including attending and testifying at court proceedings and hearings of various sorts and especially "maintaining a small caseload of offenders sentenced from court and transitioned out of Williams County for

supervision in another county [or] out of state . . ." or who were attending treatment facilities. (Employer Exh. 1)

The Union stresses that the record reflects that Dwyer was "an above-average employee" and that his supervisors and co-workers described him as "a key contributor," "an excellent team player, . . . professional [in] completing his duties, and [one who] does a good job managing investigations ordered by a sometimes demanding Court." (Union closing statement, p. 5) The Union also stresses that Dwyer never missed a day of work due to his disease and ever received any employment discipline during his approximately eight and one-half years of service with the DPCS. The Union points out that Dwyer's specific use of a cane in October 2005 resulted from a then-current orthotics problem which caused balance problems on uneven surfaces. Hearing testimony by Dwyer indicated that the orthotics problems was subsequently resolved and that he is able to walk better, does not actually need to use a cane or walking stick, and purportedly could perform all of the duties listed in Employer Exh. 1. The Union also points out that Dwyer has maintained his Unarmed Self-Defense certification, thereby promoting his return to his former position.

The Union maintains that its disparate treatment claim is supported by the evidence dealing with another now-retired parole officer, Roland Vasconcelles, who was formerly employed at the same office as Dwyer.

The Union points out that, although Vasconcellos was afflicted In 1992 with a neurological disorder purportedly similar to that affecting Dwyer, the former "was allowed to continue to work, consisting mainly of office duties, until his retirement in 2001." (Union closing statement, p. 9) The Union argues that Vasconcelles' physical limitations or restrictions resulted in him being able to perform less physical work activity than Dwyer and exempted Vasconcelles from performing some of the essential job duties. (Union closing statement, p. 9-10) The Union specifically stresses that, despite the fact that the two DPCS employees had similar physical limitations due to neuromuscular disorders "Vasconcellos was accommodated and exempted from essential duties until his retirement, while Dwyer was accommodated by exemption from essential duties for seven years and then separated." (Union closing statement, p. 10)

Based on these claims, the Union specifically requests that Dwyer "be reinstated to his position as a PSI writer for Williams County working out of the Bryan office with, but not limited to, full back pay and benefits from date of separation, no break in seniority, and all other benefits afforded by the collective bargaining agreement."

SUMMARY OF THE EMPLOYER'S POSITION

The Employer basically refutes the Union's contentions and insists that Dwyer's disability separation was warranted "[w]hen it was

determined that the Grievant could no longer carry out the physical requirements of the parole officer position, [and] he could no longer perform the essential functions of his job." (Employer opening statement, p. 2) The Employer readily acknowledges that the Grievant was an asset to the agency but was not discriminated against due to his disabling condition. The Employer stresses that the Grievant's involuntary disability separation was based upon medical evidence that he could not perform the essential functions of the parole officer position and that, before taking any employment actions impacting the Grievant, DPCS explored accommodating him under the ADA. The Employer further avers that, because the Grievant requested "exemptions" from performing the essential functions of the parole officer position, rather than reasonable accommodations, no accommodations could be made.

The DPCS insists that "[t]he essential functions of all parole officers are based upon the parole officer position description" (Joint Exh. 5, pp. 13-15), that the Employer has the right to determine the duties to be included in the position description, and that all parole officers "must be able to perform them all even if they no not perform all of the duties all of the time." (Employer closing statement, p. 4) The Employer insists that the only applicable position description in this matter is that pertaining to the classification of parole officer and that no separate position description has been recognized for a PSI position or writing unit. The Employer

stresses that the essential functions relevant to carrying out certain physical demands are critical to the parole officer position because "being able to perform the essential functions of physically responding to protect themselves and others and pursue and arrest dangerous offenders is a real probability." (Employer closing statement, p. 5) The Employer specifically claims that "officers assigned to writing units must be able to perform the same essential functions as any other parole officer, . . . and "the essential functions are the same for all parole officers" including "being able to respond to hostile offenders, make arrests, and transport offenders." (Employer closing statement, pp. 5-6) The DPCS notes that Employer Exhibit 1 specifically includes duties such as meeting with and escorting offenders and transporting and arresting offenders. These are among the duties the Grievant was expected to perform while he had been assigned to work primarily as a writer. Based upon the physicians' determination that the Grievant was unable to perform the requisite physically-related essential functions, the Employer insists that its decision to separate the Grievant from his position based upon his disability was appropriate and reasonable.

In response to the Union's claims of discrimination and the Employer's alleged non-compliance with the ADA, the Employer emphasizes that the questions of whether the Employer violated the ADA and, if so, the appropriate remedy, are issues for the federal court to

determine in response to a complaint previously filed by Dwyer. (Joint Exh. 9, pp. 5-9) DPCS insists that it has fully complied with ADA requirements by (A) providing the Grievant with an opportunity to make an ADA accommodation request prior to DPCS taking any action resulting in any change to his employment status through disability separation; (2) utilizing its internal agency ADA accommodations policy (Joint Exh. 5, pp. 15-17) and internal review process in considering the Grievant's accommodation request to determine if the employee could perform the essential functions of his job and, if not, whether a reasonable accommodation be made; and (C) finding that the ADA did not require exemptions to the Grievant's performance requirements based on his inability to execute some of the essential functions of his position due to his disability. (Employer closing statement pp. 8-9) The Employer argues that, because "the physical requirements of a parole officer were essential functions that applied to all parole officers," Dwyer's request for accommodation could not be granted because "the ADA does not allow exemptions from essential functions of the job." Instead, "it provides for accommodations that allow the disabled employee to perform the essential functions of his/her job." (Employer closing statement p. 10) The Employer contends that the DPCS's ADA accommodation committee properly denied the Grievant's accommodation request. The DPCS also denies that Dwyer's assignment to a "desk job" on a transitional basis

allegedly beginning in 1998 and then on a full-time basis since 2002 did constitute the Employer's *de facto* efforts to accommodate Dwyer's progressive medical condition.

In response to the Union's disparate treatment claims, DPCS avers that the Union has failed to establish that other parole officers who were similarly-situated to the Grievant were not subject to disability separation. The Employer insists there was a recognizable absence of evidence that any physicians had ever determined that any other parole officers were unable to perform the essential functions of the position, as was demonstrated in the Grievant's situation. In response to the Union's claims regarding the retention of his job by former parole officer Vasconcellos, the Employer asserts that the latter employee was never found to be unable to perform any essential job functions by independent physicians, as was the Grievant, nor was there ever any incident or conduct which would have triggered a DPCS supervisor to question Vasconcellos' ability to perform the essential functions of his job because Vasconcellos' physical limitations were not apparent prior to his retirement.

The Employer further argues that the Grievant's permanently disabled status was independently confirmed based on the approval of Dwyer's application for disability retirement income effective on August 1, 2006 (Joint Exh. 7, p. 7) The Employer insists that, if the Grievant's ability to ambulate has, in fact, improved through the use of new braces and

wedges for his shoes, as Dwyer contends, then the appropriate avenue for him to pursue would be his reinstatement via either the statutory appellate provisions of Ohio Admin. Code § 123:1-33-04 (Joint Exh. 6, p. 4), used for challenging involuntary disability separations, or the DRC's own reinstatement process subsequent to disability retirement. (Joints Exh. 12, pp. 5-6) Because the Grievant was **separated** from employment, rather than **terminated**, DPCS admits that "if his medical condition changes and allows him to perform the essential functions of his job, he has a right to return to his job" under both or either of those two venues, and that, therefore, the grievance process should not be utilized to circumvent the established procedures of exhausting the Grievant's rights to appeal his separation and/or seeking reinstatement. (Employer closing statement, pp. 15, 19)

Based upon the above arguments, the Employer requests that the Union's grievances be denied in their entirety.

DISCUSSION

Prior to actually focusing on the merits of this specific controversy, the arbitrator intends to clearly acknowledge the limits of his jurisdiction in this matter, as well as the application of findings herein. As widely recognized, the authority and jurisdiction of the arbitrator are derived from the mutually-recognized powers granted to him by the parties to a

collective bargaining agreement. Section 7.07(D) of the Agreement includes the following language establishing the parameters of the authority of arbitrators selected to issue decisions in response to internally unresolved grievances:

> Only disputes involving the interpretation, application or alleged violation of a provision of this 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 express language of this Agreement . . .

The arbitrator is a creature of the contract from which he derives his authority. Although he may use his expertise in interpreting and applying the contractual provisions, the arbitrator cannot substitute his own sense of equity and justice because his award must be grounded in the Agreement's terms. He is limited thereby and must, therefore, confine his decisions as directed or prescribed.

In this particular matter, the parties have mutually elected to include the following language in Section 6.01 Article 6—"NON-DISCRIMINATION:"

> Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining units on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, union affiliation and activity, **handicap** or sexual orientation, or discriminate in the application or interpretation of the provisions of this Agree, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States or the State of Ohio. In addition, the Employer shall comply with all the requirements of the federal **Americans with Disabilities Act** and the regulations promulgated under that Act.

> The Employer and the Union hereby state a mutual commitment to equal employment opportunity, in regards to job opportunities with the agencies covered by this Agreement. (Emphasis added)

Although those provisions clearly reflect an intention to assure compliance with the ADA and other civil rights legislation, the Grievant previously filed a federal court complaint (Joint Exh. 9, pp. 5-9) on December 21, 2006 alleging the Employer's violation thereof. This arbitrator agrees with the Employer's assertion that a determination of whether or not there has been a violation of the ADA lies within the jurisdiction of the court, rather then within the scope of the arbitrator's review here. Therefore, this decision is not intended to be viewed as a determination of the merits of the Grievant's claim that there has been a statutory violation which needs to be remedied. The arbitrator's review here is limited to a determination regarding the Employer's alleged violation(s) of the Agreement. In addition, the arbitrator also wishes to clearly assert that the findings herein are limited in scope and applicability strictly to the facts and circumstances peculiar to this Grievant's situation and are in no manner intended to be applicable or enforceable in regard to the Employer or any other employee under circumstances which are not identical to those surrounding Dwyer.

Basically, the parties' dispute involves a conflict regarding the Employer's exercise of its recognized rights and responsibilities regarding its direction and control of the members of its workforce. The second

paragraph of Article 5, entitled "Management Rights," specifically includes the following among its provisions:

> [T]he Employer retains the right to: . . . 3) determine the qualifications of employees covered by this Agreement; . . . 6) determine the work assignments of its employees; . . . 10) determine work standards and the quality and quantity of work to be produced; . . .

Arbitrators generally have recognized that management has broad authority and discretion to control its operations and personnel, provided that, in exercising that authority, it does not abuse its discretion or violate any of the individual or collective rights of the employees under a collective bargaining agreement. *PACE Locals 7-0087/96 and Kimberly Clark Corp.*, 01-1 Lab. Arb. Awards (CCH) P 3725 (Knott 2001).

> In reviewing an employer's exercise of discretion, it is not an arbitrator's function to substitute his independent judgment for that of the employer. Rather, an arbitrator is limited to determining whether an employer's decision is within the reasonable range of discretion, is not arbitrary or capricious, and was not motivated by anti-union animus or another improper reason.

Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264, 115 LA

190 (Landau 2001).

> Arbitrary conduct is not rooted in reason or in judgment but is irrational under the circumstances. It is whimsical in character and not governed by any objective standard or rule. An action is described as arbitrary when it is without consideration, in disregard of facts and circumstances of a case, and without a rational basis, justification, or excuse. The term "capricious" also defines a course of action that is whimsical, changeable, or inconstant.

City of Solon and Ohio Patrolman's Benevolent Ass'n, 114 LA 221 (Oberdank 2000).

While one of the most firmly-established principles in labor relations is that management has a right to direct its workforce, the Union and Grievant have a reciprocal right or duty to challenge managerial action perceived by them to have been ill-founded, arbitrary, or capricious. *Minn. Mining and Mfg. Co. and Local 5-517, Oil, Chem. and Atomic Workers Int'l Union*, 112 LA 1044 (1999). A thorough review of all of the facts, exhibits, and arguments submitted for review in this matter leads this arbitrator to a determination that the Employer has violated both the terms and the spirit of the Agreement as a result of its decision to effect Dwyer's involuntary disability separation in view of the specific circumstances and Employer decisions preceding his separation.

> [A]n arbitrator looks to the specific [collective bargaining] agreement to see if the employer has been prohibited from performing in a certain way or is required to perform in a certain way or if the employer's actions are unreasonable in that they interfere with employee rights protected by the agreement.

Hall China Co. and Glass, Molders, Plasterers and Allied Workers Int'l Union, 05-1 Lab. Arb. Awards (CCH) P 3390 (Allen 2004).

The arbitrator finds that the evidence submitted into the record indicates that the Employer acted arbitrarily, capriciously, and in the absence of good faith in effecting the Grievant's termination in the absence of substantial probative evidence that Dwyer was not able to

continue to perform those duties he had been assigned for approximately seven (7) years in a quantitatively and qualitatively-acceptable fashion. Despite the apparent absence of any official ODPC agency records indicating that prior modifications had, in fact, been "officially approved" regarding Dwyer's duty assignments beginning as early as the October 1998 conversation involving Dwyer and his supervisors McIntyre and Robinchek, the evidence clearly demonstrates that the Grievant had been eventually transitioned into a recognized PSI/OBI writer position in Williams County. (Employer Exh. 1, paragraph 1) Although his duties and performance there have demonstrated his increased involvement in reporting to and making recommendations for the local court, Dwyer has continued to maintain some involvement with parolees or offenders, apparently most often by his presence during interviews with them, at court appearances, and during testings involving the individual offenders. The essential functions of a parole officer investigator are ultimately not relevant to a good-faith determination of Dwyer's continuing job performance in his specific position because the Employer had, for up to seven (7) years, not demanded or expected Dwyer to continue to carry out the traditional parole officer investigator's duties and functions, especially those involving potential danger to Dwyer based on his diminished ability to protect himself and to aid in the control of uncooperative offenders or parolees. Despite the fact that the Employer

denies the existence of any official position description applicable either to Dwyer or any other employee engaged in performing PSI/OBI employment, the record indicates that there are individuals performing full-time in such positions in other locations in Ohio. Any failure to have demanded a more accurate and applicable position description for Dwyer may have resulted from the Grievant's and Union's continued reliance on the modifications or "accommodations" already in place to promote Dwyer's continued employment as a perennially-rated above-average employee who effectively carried out those modified duties and responsibilities which had been assigned to him on a long-term basis. The Employer continued to make and maintain commitments to Dwyer based on the knowledge that Dwyer's neurological disorder is progressive and that he was a valuable employee. It was clearly reasonable for Dwyer and the Union to believe that the DPCS would continue to maintain the same commitments and "accommodations" so long as Dwyer continued to effectively perform his assigned duties.

As noted previously, in the exercise of its management rights, each employer is governed by the rule of reasonableness, and the exercise of management rights must be done in the absence of arbitrary, capricious, or unreasonable conduct. *California Edison and Int'l Bhd. of Elec. Workers, Local 47*, 84 LA 1066 (2002). "While it is not an arbitrator's intention to second-guess management's determination, he does have

an obligation to make certain that a management action or determination is reasonably fair." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 8, Local 1699*, 92 LA 1167 (1989). In the absence of contract language expressly prohibiting the exercise of such power, an arbitrator, by virtue of his authority and duty to fairly and finally settle disputes, has the inherent power to determine the sufficiency of a case and the reasonableness of an action taken which negatively impacts an employee. *CLEO, Inc., (Memphis, Tenn.) and Paper, Allied-Indus. Chem. and_Energy Workers Int'l Union, Local 5-1766*, 117 LA 1479 (Curry 2002).

AWARD

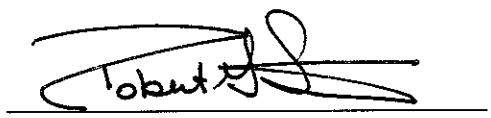
The grievance is granted with conditions. The DPCS is directed to reinstate Dwyer to his prior PSI position in Bryan with the same duties and responsibilities as identified in Employer Exhibit 1, which were carried out by the Grievant prior to October 2005 when he has placed on administrative leave. Along with being made whole for back benefits and seniority, Dwyer is entitled to receive the **difference** between the pay he would have received had he continued to work on a full-time basis from the date of his disability separation on March 14, 2006 and the total of the disability income benefits he has received until the date of his reinstatement, **unless he continues to pursue his federal lawsuit and a compensation award is ultimately given for those same funds**. The Grievant should not receive duplicate damages for the same conduct or events.

That reinstatement should occur within two pay period days after the date of this decision. Although the Union contends that the Grievant's physical limitations have been somewhat lessened through the use of new braces and shoe wedges, his ability to adequately perform will be determined through a performance evaluation conducted four (4) months after he has been returned to full-time employment. The Union must be fully apprised in advance regarding the method of evaluation and then should also be included in discussions regarding the actual performance evaluation results.

Because the remedy petitioned by the Union in its initial grievance, filed in response to the placement of the Grievant on administrative leave, as well as the Union's disparate treatment claims have actually been subsumed into the award identified above, no further discussion of those matters or issues is merited.

Based on the knowledge that Dwyer's neurological disorder is progressive and will have varying and potentially increased impact on his future job performance capabilities, the arbitrator recommends that, if and when the level of modifications currently in place (as of October of 2005) are no longer adequate to support his continued employment, then bilateral discussions need to occur between the Employer and the Union regarding the prospect of his continued employment with the possible use of alternative or additional modifications or "accommodations," which are not deemed to constitute undue hardship(s) imposed upon the Employer.

Respectfully submitted to the parties this 11th day of January 2008,



Robert G. Stein, Arbitrator