

#1985

In the matter of Arbitration between:

State of Ohio, Department of Public Safety, Unit 2

And

The Fraternal Order of Police, Ohio Labor Council, Inc.

Case #'s: 15-00-080114-0002-05-02 & 15-00-080204-0021-05-02

Grievant: Mr. Ronald Robinson

E. William Lewis
Arbitrator

Hearing date: June 4, 2008

Decision issued: July 11, 2008

Representing the Employer:

Ms. Marissa N. Hartley, OCB
Labor Counsel
Office of Collective Bargaining
100 East Broad Street, 14th floor
Columbus, Ohio 43215

Representing the Union:

Mr. Paul Cox, Chief Counsel
FOP/OLC, Inc.
222 East Town Street
Columbus, Ohio 43215

By mutual agreement, the Hearing was convened on June 4, 2008, at 10:00am, in the Office of Collective Bargaining, Columbus, Ohio.

In attendance for the Union:

Mr. Paul Cox	Chief Counsel
Mr. Joel Barden	Sr. Staff Rep.(witness)
Mr. Bret Benach	Labor Relations Administrator ODNR (witness)
Ms. Renee Engelbach	Paralegal
Mr. Ronald Robinson	Enforcement Agent Grievant (witness)

In attendance for the Employer:

Ms. Marissa N. Hartley	Labor Counsel, OCB
Lt. Charles J. Linek	Labor Relations Specialist ODPS
Mr. Joe Trejo	Asst. Manager-Labor Relation
Mr. Robert J. Young	HR Administrator, ODPS (witness)

The parties were asked to submit exhibits into the record. The following were stipulated to by the parties, and submitted as Joint Exhibits:

Joint Exhibit #1	CBA, State of Ohio & FOP/OLC Unit 2
Joint Exhibit #2	GRIEVANCE REPORT FORM Dated 1/11/08
Joint Exhibit #3	GRIEVANCE REPORT FORM Dated 1/29/08
Joint Exhibit #4	Grievance response, dated February 19, 2008
Joint Exhibit #5	FRANKLIN COUNTY MUNICIPAL COURT--Order of Protection Case # 07-32185

The following were submitted as Union Exhibits:

Union Exhibit #1	ODNR/FOP-OLC Arbitration Case # 25-17-042898-01-05-02
Union Exhibit #2	E-mail, regarding availability of work for Robinson, dated January 31, 2008
Union Exhibit #3	E-mail, from Associate Mullet-indicating Robinson's availability for duty Dated: December 27, 2008

BACKGROUND:

The State of Ohio, Department of Public Safety, Ohio Investigative Unit, (OIU), hereinafter known as the Employer/State, is an investigative unit focusing on the illegal use and distribution of drugs and alcohol. The Fraternal Order of Police, Ohio Labor Council, hereinafter known as the Union/FOP, represents Enforcement Agents assigned to the OIU.

The grievant, Mr. Ronald Robinson, is an Enforcement Agent assigned to the Columbus District. Mr. Robinson has been an Enforcement Agent for approximately ten years. On December 26, 2007, Agent Robinson was placed under the jurisdiction of a Temporary Criminal Order of Protection(TCOP). The Order was issued by the Franklin County Municipal Court (Jt. 5). The Order arose from a domestic dispute with his wife, and restricted Agent Robinson from carrying a firearm. The Order was in effect from 12/26/07 through 2/5/08.

Enforcement Agents, per joint testimony, carry firearms for safety and enforcement purposes. On December 27, 2007, the Union, through Agent Mullet, notified the Employer (AIC Segraves) that Agent Robinson was available to work any duties prescribed by the Department, until the matter was resolved(Un-3). According to testimony and evidence Agent Robinson was not returned to work(Jt. 2,3). He was instructed to use available leaves, including sick leave, While under the Protection Order, for the off-duty incident.

Two grievances were filed by Agent Robinson, dated 1/11/08 and 1/29/08. The January 11 grievance charged the State with violating Article 18-Administrative Investigation, and Article 19.01-Standard Disciplinary Procedures (Jt. 2). A request for a refund of leave taken and to be placed on administrative duties or administrative leave, was the proposed remedy. Grievance #2, dated 1/29/08, Charged the Employer with violating Article 19-Disciplinary Procedures, and Article 45.01-Leave Without Pay. The grievance claimed that Agent Robinson was willing to continue working, to include administrative office duties, as in the past. The grievance also claimed that by placing the grievant on unpaid leave was a form of discipline, without just cause, and no AI was conducted.

A request was made for all lost wages and to be placed in paid status immediately.

The grievances were combined by the parties and a meeting was held on February 1, 2008. Management, by letter, denied the grievances on February 19, 2008, and the parties selected June 4, 2008 as the arbitration date.

It was mutually agreed that the grievances were properly before the arbitrator. However, a procedural issue regarding witness notification, Article 20, Section 20.08(7) Discovery, was raised at the hearing. It was resolved for this hearing. The parties mutually agreed that questions regarding Section 20.08(7) Discovery, for future application, will be left to arbitration or negotiations.

ISSUE:

The issue was stipulated to by the parties as follows:

“Did the Employer violate the Agreement, when dealing with the employee’s leave balances, and leave between 12/27/07 and 2/5/08?”

UNION POSITION:

The Union states that this is not a discipline case. The employee was under a court issued Protection Order. It was unrelated to the job, and restricted him from carrying his service revolver. The Employer forced the employee off work, without pay, without engaging the disciplinary process in the contract, a violation, claims the FOP.

Arbitrator Graham, in his 1999 decision, with the same question as here, says no to the Employer, points out the Union(UE-1). The contract language is not new. Unpaid leave has never been used in twenty-six years, in this contract. This is not the OSTA contract, and the State is trying to get something it couldn’t get in collective bargaining, declares the Union.

Section 19.01, prohibits a reduction in pay without just cause. The Employer cannot deny pay without going through Articles 18 & 19-- ADMINISTRATIVE INVESTIGATION and DISCIPLINARY PROCEDURE. The FOP, argues that Agent Robinson could have been put on Administrative Leave, with pay (19.02), or light duty or administrative work. Without implementing discipline, the State is required to pay or continue to work Agent Robinson.

The Union doesn't deny the Protection Order, but the Employer is using it as a smoke-screen", because they didn't want to workout the issue with the FOP, they claim. They request the arbitrator to make the grievant whole, regarding wages and benefits.

EMPLOYER POSITION:

The Employer also agrees that this is an issue case, and therefore, the burden of proof is the Union's. The grievant was arrested for assault and domestic violence. He was placed under a Criminal Protection Order, which prohibited him from carrying a firearm. Enforcement Agents are required to carry firearms while on duty. Although the grievant was willing to work, he could not, without a firearm, fulfill his job duties, argues the State.

The Employer could have terminated Agent Robinson, under Article 19, for losing firearm privileges. However, the Employer generously waited out the Court Order, they claim. According to the State, they allowed Agent Robinson to use his permissive leave. No administrative or clerical duties were available to perform, and it was not the State's doing that the grievant was in the situation, they note.

He wants paid for one month of no work at the taxpayer's expense, caused by his behavior. Furthermore, Agent Robinson, made no attempt to contact the Court for work relief regarding his firearm issue. It seems that no good deed goes unpunished, exclaims the Employer.

There was no disparate treatment as the FOP alleges. The Department of Public Safety and the Department of Natural Resources are separate appointing authorities. The employees in the two Departments are not similarly situated.

Although the Union alleges that the State violated the Administrative Leave provision (19.02), the Employer points out that implementation of Administrative Leave is at their discretion. Administrative Leave is for the purpose of investigation, which was not necessary. The TCPO prevented Agent Robinson from carrying a firearm, and that was the event triggering fact.

The grievant's off-duty conduct resulted in the firearm restriction, rendering him unable carryout his job duties. The State was generous in its actions, and was within the bounds of the Agreement, they argue. Therefore, the arbitrator is requested to deny the grievance.

RELEVANT CONTRACT PROVISIONS:

18.06 Notification of Disciplinary Action

When an administrative investigation leads to disciplinary action, the procedures for notification to the employee contained in Article 19 shall be followed.

18.09 Off-Duty Status

Disciplinary action will not be taken against any employee for acts committed while off duty except for just cause.

19.01 Standard

No bargaining unit member shall be reduced in pay or position, suspended or removed except for just cause.

Any employee who, as a result of the action of any court, loses his/her certification and/or ability to carry a firearm, may be charged with serious conduct and terminated without progressive discipline.

19.02 Administrative Leave

Upon verbal notification followed within seventy-two (72) hours by written delineation of the reasons, an employee may be placed upon administrative leave with pay at regular rate. The employee will not lose

any pay, fringe benefits or seniority as a result of administrative leave. Administrative leave may be instituted as the result of the Employer's 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. Such administrative leave with pay shall be for the purpose of investigating the event or the condition.

19.04 Pre-suspension or Pre-termination Meeting

2nd Paragraph: The employee may waive this meeting. The meeting shall be scheduled no earlier than three (3) working days following the notice to the employee.

45.02 Length of Leave

Upon written request, leave may be granted for any personal reason for a maximum duration of six (6) months. Leave of absence without pay may be granted for a maximum period of two (2) for purposes of education or training which would be of benefit to the Agency.

DISCUSSION AND OPINION:

The facts in this case are not in dispute. Enforcement Agent Robinson was placed under a Temporary Criminal Protection Order, issued by the Franklin County Municipal Court, on 12/26/07(Jt.-5) The protected person was his wife Juanita. Part and parcel to the order was a restriction on Agent Robinson from carrying any deadly weapon. Evidence and testimony established that DPS, Investigative Unit Enforcement Agents, are required to carry firearms while on duty.

Joint Exhibit 2, Grievance dated 1/11/08, claims that the grievant was instructed to use sick leave for lost time. Joint Exhibit 3, Grievance dated 1/29/08, shows the grievant being placed on unpaid leave for the time lost. On both Exhibits, the grievant is requesting to be placed on administrative duties or Administrative Leave during the period covered by the TCPO. The CPO expired on February 5, 2008, and the grievant was returned to work the next day.

The Union argues that never has this Employer placed an employee in these circumstances, on personal leave, without pay. To do so, resulted in the employee being reduced in pay, thus circumventing the just cause requirements in Articles 18 and 19. Furthermore, the FOP alleged that in prior incidents of a similar nature, the employees were permitted to work on administrative assignments(Jt-2,3 & UE-1).

A leave without pay was not requested by the employee, therefore, a violation of Section 45.02 was also committed by the State.

The Employer argues that it was not their doing, that the employee was in a firearms restriction status. With no administrative assignments available, they generously allowed Agent Robinson to use his permissive leave. Agent Robinson is asking for one month's pay for his misbehavior.

It was determined through testimony that the grievant only had ten hours of permissive leave. The balance of time after leave use was considered leave without pay.

The FOP argues that arbitrator Graham's 1999 discision is evidence as to how the Employer should have treated this grievant(UE-1). Both grievances claim that, in the past, Agents under criminal charges were placed on administrative duties or Administrative Leave. However, there was no FOP evidence or specifice testimony introduced regarding their claim of "admin" duty or leave, as in this case. Although arbitrator Graham's award makes the grievant whole through restoration of leave and wages, in this arbitrator's opinion, the incident event was not similar. Graham's incident event occurred on duty, and this incident event occurred off duty. Furthermore, the appointing authorities were different, Graham's grievant was employed by the Department of Natural Resources, and not the Department of Public Safety. The arbitrator finds nothing in the Agreement directing the Employer to provide alternative work.

If no "admin" duty work, then Administrative Leave(19.02), argues the Union. This is an Employer discretionary provision and may be implemented, according to the State. Furthermore, the State pointed out that

Administrative Leave with pay, is for the purpose of investigating the event or condition. Nothing to investigate, per the Employer, the CPO was issued and in front of them.

The Employer, was in the arbitrator's opinion, acting in a generous manner by allowing the Agent to use permissive leave and approving a leave without pay. However, when Agent Robinson declined the State proffered solution(Jt-2,3), the Employer should have complied with Article 19.

Even though both parties stated that this was not a discipline case, the Union argued successfully, that the "forced" leave without pay was a form of discipline. Thus, requiring the Employer to comply with the just cause contract requirement.

It is unfortunate that off duty misbehavior occurs, however, in the arbitrator's opinion, the specific circumstances are addressed in Section 19.01. There was a court issued Temporary Criminal Protection Order, restricting the carrying of a firearm. It is also noted, that the grievant, with alleged attorney advise, did not petition the court for a work release exemption. When the Employer, at its option, did not offer alternative work, and the grievant chose not to accept their proffered offer, Agent Robinson should have been charged with serious misconduct subjecting him to discipline.

There certainly was just cause for disciplining Agent Robinson for his off duty conduct, which rendered him unable to fulfill his job duties(18.09). Agent Robinson is an agent of law enforcement, and was charged with a criminal act. Since the grievant declined the permissive leave and leave without pay option, and there is a clear nexus between his off duty conduct and the job in question the Award is as follows¹:

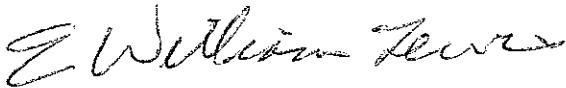
¹ Elkouri & Elkouri, 6th ed. Pgs. 938-41, & 1312

AWARD:

Any permissive leave deducted during the lost time period of 12/27/07 through 2/5/08 is to be credited to the grievant's record. The grievant is to be paid three (3) days lost wages (19.04), and the balance of the time until he returned to work is to be converted to a suspension without pay.

This concludes the Arbitration decision.

Respectfully submitted this 11th day of July, 2008.

A handwritten signature in cursive script, reading "E. William Lewis".

E. William Lewis, Arbitrator