

ARBITRATION DECISION NO.:

177

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Administrative Services

DATE OF ARBITRATION:

March 9, 1989

DATE OF DECISION:

April 18, 1989

GRIEVANT:

Constance Leedy

OCB GRIEVANCE NO.:

02-04-(88-07-21)-0037-01-14

ARBITRATOR:

John E. Drotning

FOR THE UNION:

Daniel S. Smith, Esq.

FOR THE EMPLOYER:

Tim D. Wagner

KEY WORDS:

Arbitrability

Disability Separation

Extended Absence

Use Of Disability Separation

To Avoid Just Cause

For Removal

ARTICLES:

Article 24 - Discipline

§24.04-Pre-Discipline

Article 25 - Grievance

Procedure

§25.01-Process

§25.03-Arbitration

Procedures

Article 43 - Duration
 §43.01-First Agreement
 §43.02-Preservation
of Benefits
 §43.03-Work Rules
 §43.05-Duration
of Agreement

FACTS:

The Grievant was employed as a Systems Analyst 2 at the Department of Administrative Services. She was absent for a large portion of time over a four-year period because of health problems. During this time she received medical treatment. When the Grievant returned to work, the Employer initiated an involuntary disability separation. The Employer testified that there was no attempt to discipline the Grievant for her absences. However, the Grievant testified that after she returned, her Supervisor told her that she needed someone on the job full-time and that she could not hire someone else until the Grievant was off the job. The Grievant said that prior to this, no one told her that her absences were a problem. Accordingly, this Grievance was filed.

EMPLOYER'S POSITION:

The Employer argued that because the Agreement says nothing about disability separation, such separation is not arbitrable, and the Grievant is subject to any applicable state laws or rules on this issue. The Ohio Administrative Code provides that a disability separation is appropriate when an Employee is unable to perform the substantial and material duties of her position, which the Grievant was unable to do. Moreover, there was no effort by the Union or evidence at the hearing to indicate that the parties to the Agreement intended to include disability separation as an arbitrable right. Besides, the Union's reference to a just cause requirement makes no sense, because it would require notice, warnings and progressive discipline, which would be inapplicable to illness or incapacity to perform on the job. The Union's claim that the Grievant was given a disability separation as a pretext for discipline is totally baseless. If the Employer had wanted to terminate the Grievant, that would have been done in a different way and long before the disability separation was initiated.

UNION'S POSITION:

The Union argued that disability separation is an arbitrable right. In this case, the disability separation was a pretext due to the Employer's unsuccessful effort to discipline the Grievant. The Grievant provided medical statements supporting her ability to perform the substantial and material duties of her job. Thus, the Employer should have reinstated her when she returned to work, instead of initiating a disability separation. Moreover, in this Arbitrator's recent Lois Brown arbitration decision, in which the issue was civil service testing, the Employee had a right to grieve. As a matter of principle, there is no difference between testing and a disability suspension. Therefore, disability separation is an arbitrable right and, as in the Brown case, the Employer must justify its action by the just cause standard. If the Grievant was unable to work, as alleged by the Employer, she would have been eligible for disability benefits. Furthermore, Arbitrator Sharpe's ruling that a disability separation for disciplinary reasons is arbitrable, but one for health-related reasons is not, is flawed. This decision would require the Grievant to determine the Employer's motivation, which is an impossible burden of proof. Moreover, all the Grievant's leave time was approved by the Employer, and the Grievant was never told that her approved absences would result in the Employer's taking action against her.

ARBITRATOR'S OPINION:

The Arbitrator ruled that the Grievance is not arbitrable. The Union argued that, pursuant to Arbitrator Sharpe's decision, the Grievance should be considered a disciplinary action, to avoid imposing an impossible burden of proof on the Grievant. However, the hearing testimony does not support the conclusion that the Grievant was disciplined. Moreover, because the Agreement says nothing about disability separations, the Grievant is subject to any applicable state laws or rules. The Ohio Administrative Code specifies that a disability separation is appropriate when an Employee becomes unable to perform the substantial and material duties of her position. The hearing testimony indicates that the Grievant was unable to perform her job duties while she was receiving medical treatment. Furthermore, there is a clear distinction between this case and the Brown case. In the Brown case, the Agreement did specify the matter at issue. Thus, the Employer in that case did violate the Agreement, whereas here the Employer did not, since disability separations are not discussed in the Agreement. Accordingly, this Grievance is not arbitrable.

AWARD:

Grievance is denied.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

**OHIO DEPARTMENT OF
ADMINISTRATIVE SERVICES**

AND

**OHIO CIVIL SERVICE
EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME, AFL-CIO**

ARBITRATION AWARD

OCB Grievance No.:

02-04-880721-0037-01-14

HEARING DATE:

March 9, 1989

ARBITRATOR:

John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on March 9, 1989 at 65 State Street, Columbus, Ohio. Appearing for the Union were: Daniel S. Smith, Esq., Linda Feely, Esq., Allyne Beach, Constance Leedy, and John Fisher. Appearing for the Employer were: Tim D. Wagner, Dan Wilson, Shirley Turrell, Joan Rourke, and Peggy Walter.

The parties were given full opportunity to examine and cross examine witnesses and to submit written evidence and documents supporting their respective positions. Post hearing briefs were filed on or about 3/27/89 and the case was closed. The discussion and award are based solely on the record described above.

II. ISSUES

The parties did not agree on a mutual submission. The State asked:

Is the disability separation arbitrable under the Agreement between OCSEA/AFSCME Local 11 and the State of Ohio?

If so, was the disability separation taken in this case done for the purpose of side-stepping discipline in Article 24 of the Contract?

The Union put the issues as:

- 1) Does the Agreement permit the Employer to impose on employees an involuntary disability separation?
- 2) If so, is an involuntary disability separation reviewable on the merits by an arbitrator?
- 3) If so, what is the standard of review which should be used?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1 through #10.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. STATE

1. TESTIMONY AND EVIDENCE

Ms. Peggy Walter, a Systems Analyst 2 in the Division of Compensation Services, testified with respect to data processing and education which involved training and seminars in how to use the hardware and the software systems. Walter also commented on the product support area and the Wang Honeywell Group which is where the mainframe and system word processing is located and there is access by desk computers and 150 people are involved in that group. Walter went on to say that the Wang Honeywell group is used by the Ohio Board of Regents as well as the Department of Administrative Services.

Walter testified that she supervised Constance Leedy since February of 1985. Leedy, said Walter, was a Communication Technician 2 and she did some trouble shooting for desk computers, printers, and screens. Leedy also tested and explained new software systems and interacted with other agencies. Walter said that the Division of Computer Services must supervise and test all technology.

Walter went on to say that there are two full-time people in her section and two people on a cooperative plan.

Constance Leedy's role was to respond to users and vendors' problems and perform back-up on systems, move disc packs, and connect equipment and insert boards into the PC's.

Walter stated that Leedy was absent a large proportion of time because of health problems; specifically a hiatus hernia, back problems, and arthritis (see State Exhibit #1). Walter went on to say that the normal work year constitutes 2080 hours and Leedy was off on sick leave for health related reasons 47% of the time in 1985, 58% of the time in 1986, 28% of the time in 1987, and 51% of the time in 1988.

As a consequence of Leedy's time off, others had to take on her tasks. Upon Leedy's return, there were start up problems because Leedy had to re-familiarize herself with what had occurred during her absence. There might have been new software on the hardware and she could not hire replacements for Leedy.

Walter said that Leedy's absences were not predictable and she went on to say that she told Leedy that her absences caused problems in the operation of the systems. Walter said she specifically gave this statement to Leedy when the latter applied for promotion. Walter testified that it is difficult to write up a promotion, given Leedy's absence. She went on to say that she evaluated Leedy and told her that it was hard to justify her performance because of the absence. Walter also indicated that Leedy was a good record, had never received discipline for either non-health or health related reasons.

Walter testified that she had not and did not try to fire Leedy and, in fact, wanted her to return to work.

Walter testified that a disability separation is a way to give the employee a chance to resolve health problems and she initiated that separation. Leedy, continued Walter, had serious health problems and she thought time off would help her sort out these problems and be able to return to work.

Joan Rourke, Human Resource Administrator for the Department of Administrative Services, testified that she works with disability separations and they are designed to separate an employee for physical or mental conditions which make it impossible for that employee to carry out their duties (see Chapter 123:1-33-02 entitled "Disability Separation" of Joint Exhibit #8).

Rourke said that disabilities separations have been carried out since 1982 and in the five years she has been on the job, she has implemented 20 to 25 disability separations.

Rourke testified that the request for the disability separation came from Walter and it requires approval of the Deputy Director and then she would review the employee's history to see if there is evidence that there was, in fact, a disability. Following this, said Rourke, it goes to the appointing authority, the director of the department, and then to the division of state personnel.

Rourke testified that she advised that a disability separation for Leedy was the only sensible alternative and that there was absolutely no reason to discipline Leedy. Leedy, said Rourke, has reinstatement rights and, in fact, asked to return on 1/7/89 and was separated on 7/10/88 (see Joint Exhibit #10).

The July 21, 1988 letter from Dr. Sadar to whom it may concern, said Rourke, was not satisfactory given that it is only a two sentence letter. Rourke testified that she received that letter written in July of 1988 sometime after January 7, 1989.

Rourke testified that Leedy was told of her rights under separation as noted on Joint Exhibit #3. Rourke asserted that Management did not attempt to discharge Constance Leedy. Moreover, said Rourke, Leedy had no discipline in her record.

On redirect, Rourke said that she sent the position description to Dr. Dolor for him to evaluate the grievant. She went on to say that she held no hearing because there is no provision in the

disability leave situation for a hearing. Leedy, said Rourke, had reinstatement rights.

Ms. Shirley Turrell testified that a step 3 meeting was set for August and Leedy wanted to submit two documents and Beach said the documents were inadequate and the parties talked about arbitrability.

The State cross examined Union witnesses but Constance Leedy was not cross examined.

Ms. Allyne Beach testified on cross that she did not know when the examination took place. She said that she and Turrell discussed whether Union Exhibit #1 was sufficient for reinstatement and she said that both Union Exhibit #1 and the Sadar letter were insufficient. Beach said that she did not recall whether she said that both Union Exhibit #1 and the Sadar letter were sufficient.

2. ARGUMENT

The Employer claims that the parties agreed that the only question was whether disability separation is arbitrable?

Management asserts that disability separation actions are not arbitrable because it is a deeply rooted past practice, no Contract language supports arbitrability, the intention of the parties in bargaining the Contract, Union inactivity in the disability separation area, the clear intent of relevant language in both the Ohio Administrative Code and the Ohio Revised Code, and their relationships to the Contract, credible Management witnesses, and a flawed and tortuous Union argument.

Management claims that past practice justifies its action unless it conflicts with the Contract. The State has used the Ohio Administrative Code to initiate disability separations in the past. That procedure was used in this case and has been previously utilized by DAS and other State agencies.

The Employer asserts that the Union had not grieved disability separations in the past, yet it now contends that under the Contract, the Employer cannot impose a disability separation on a bargaining unit employee.

The Union cites section 43.05 as partial justification for its position but the Contract talks about the entire Agreement between the parties, claims the Employer. Management argues that it can take all actions except those restricted by the Contract and it cites 4117.08(C).

Management goes on to say that the Union in its opening statement stated that employees can be removed only through layoff or disciplinary action and disability separation was not included. Moreover, the Management points out that Section 43.02 of the Contract states that if the Agreement is silent, benefits shall continue and determined by statutes, regulations rules or directives. The Union, asserts the Management, cannot have it both ways. Moreover, it goes on to argue that 4117.10(A) refers to the lack of specification about a matter and there is nothing in this Contract that addresses disability separation.

Management also argues that disability separation does not fit the language of Article 25.01 or 25.03 of the Collective Bargaining Agreement. Management claims that it does not rely solely on the Sharpe arbitration and it does not concur with the Union that Sharpe's decision was illogical, unfair, and one which would lead to absurd and nonsensical results. Management goes on to say that Arbitrator Sharpe stated that if the Commission's action in his case was a disability rather than a disciplinary separation, it would not be covered by the Contract. Therefore, the grievance would not be arbitrable under ORC 4117.10(A). Management asserts that in the Leedy case, the DAS action was a disability separation and, therefore, a matter not addressed under the OCSEA Agreement.

Management asserts that there was no effort by the Union or no evidence at the Hearing to indicate that the parties intended to include disability separation as a grievable right and benefit

under the Contract. Moreover, the Union's reference to a just cause requirement makes no sense, asserts Management, because it would require notice, warnings, and progressive discipline which would be totally inapplicable to illness or incapacity to carry out the job. Management goes on to say that the Union's claim that 43.05 supports its position is incorrect because the Union cannot use that language to arbitrate disability separations when such a situation is not set forth in the Contract.

Management goes on to assert that Section 43.01 means that matters addressed by the Agreement take precedence over conflicting State laws and rules, but disability separation is not addressed by the Agreement. Therefore, the Ohio Administrative Code is not in conflict with the Agreement nor superseded by it.

Management goes on to point out that testimony by Management witnesses indicated that the disability separation was designed to allow the Division of Computer Services within DAS to carry out its mission. Moreover, there was a long period of time and much patience by Management before it initiated the disability separation for Connie Leedy. The testimony of Walter was that she did not want to terminate Leedy; if she had wanted to discharge Leedy, she could have done it in a different way.

The Union's contention, asserts Management, that Leedy was given a disability separation as a pretext for discipline is simply not supported by the testimony of the parties at the Hearing.

Under the Ohio Administrative Code, continues Management, Leedy has the right to assert her rights to her job and she failed to do this properly in January of 1989. However, that right still remains, notes Management, and it is up to the grievant or the Union as a representative to file proper documentation in her request for reinstatement.

The Employer cites a prior award by this Arbitrator and points out that in this case, there is no conflict between the Ohio Administrative Code governing disability separation as applied to Leedy and the Contract. Therefore, the State asserts that the Arbitrator cannot properly apply procedural requirements from another jurisdiction since the Contract limits arbitral jurisdiction to the four corners of the Collective Bargaining Agreement.

For these reasons, Management asks that the grievance be dismissed as not arbitrable.

B. UNION

1. TESTIMONY AND EVIDENCE

Ms. Constance Leedy testified that on 3/16/88, she returned to work. At that time, Leedy said she had to learn a new software package and incorporate it into a user guide. Leedy then testified about her normal day's activity and she went on to say that upon her return, she realized the medication she had been taking was not working and she had continued headaches. She said she took physical therapy which really helped.

Leedy testified that she had been misdiagnosed by medical personnel three times and she identified the beginning misdiagnosis was in 1985. Leedy testified that eventually she learned that she had degenerative discs in her neck which caused most of the problems.

Leedy testified that she returned to work on 3/8/88 and was being treated with medication and physical therapy. That latter process, said Leedy, ended in May of 1987. Leedy then testified about the medication she took and the fact that she began using Midrin in April or May of 1988.

Leedy testified that prior to May of 1988, all her absenteeism was because of her medical illnesses, vacations, and/or her grandmother's death.

While at work, said Leedy, she was 100% efficient and no supervisors told her that her absences were a problem.

Leedy testified that she had a conference with Walter in May of 1988 and Walter told her that

she needed someone on the job full-time and that she could not hire another person until Leedy was off the job. Leedy said that she went to talk to the Union about that situation.

Leedy went on to say that in July of 1988, Walter got medical results and Leedy said she was told that she would get a disability separation. Leedy said she was better, but Walter told her it was too bad, that it was too late.

Leedy testified about the letter from William J. Flaherty to her dated July 6, 1988 (see Joint Exhibit #3) and she went on to say that no one asked her about her side of the story. She indicated she told Walter that she did not have arthritis but rather a degenerative disc and that she was okay.

Leedy testified that she gave the letter from Edward S. Sadar to Management at a step 3 meeting and they indicated that it was insufficient. Following that decision, Leedy said she worked for the State Library 8:00 to 5:00 for 260 segments. Leedy went on to say that she carried out exactly the same duties at the State Library that she has with DAS, that is, installing software and training personnel.

Leedy testified that Walter knew that she was employed by the State Library system.

Ms. Allyne Beach testified that she was a State rep for OCSEA and that Union Exhibit #1 is attached to the two-line Sadar statement.

On redirect, Beach said there was some discussion at the step 3 meeting that the two documents introduced by the grievant were insufficient. She went on to say that DAS said the documents were insufficient for reinstatement.

The Union also cross examined Management witnesses. Peggy Walter, on cross, testified that time sheets were used to compile State Exhibit #1 and most of the time off was approved.

Walter said that in March of 1988, she talked to Leedy about her medical condition and the fact that Leedy's absences were making problems for her. Walter indicated that she asked Leedy when she would be able to return to work and Leedy said, "I don't know". Walter went on to say on cross that she explained the problems confronting her as a result of Leedy's absences. That conversation, said Walter, occurred before Leedy was put on disability separation.

Walter said that she did not recall saying to Leedy, "Too bad; It's too late".

Upon returning to work in May of 1988, Walter said that Leedy needed information about changes in the software and that could take up to eight hours. She also said they had a new Honeywell machine and all of the personnel needed some training on the hardware as well as the software.

Walter, on cross, said that she went to Management to figure out what options she had with respect to Leedy's absences and was referred to Joan Rourke who said that a disability separation would allow her to staff.

Leedy, said Walter, filed a job audit in 1987 and was upgraded to Technician 2.

Joan Rourke, on cross, testified that she supervised Shirley Turrell. She went on to say that she did not take any steps to see if Leedy was eligible for disability benefits. Moreover, Rourke said she did not instruct Leedy to undergo a medical exam after she applied for reinstatement.

Rourke testified that Sadar's medical statement had no substance and it was her understanding that an employee could present substantive information from a physician.

Rourke said on cross that Dr. Dolor had no standards from her in order to make a decision as to how well Leedy could carry out her job. She went on to say that an employee has to be 100% capable of doing the job.

Rourke said that there is no disability leave benefits available for one who was on worker's compensation.

Rourke said she did not provide a hearing prior to the disability separation. She went on to say that employees can supplement disability leave with accumulated sick leave.

Rourke said there was no attempt to discipline Constance Leedy.

On recross, Rourke said that if Leedy supplied adequate documentation for reinstatement, it does not necessarily mean back pay.

2. ARGUMENT

In the Union's opening statement, it asserted that Article 43.01 of the Collective Bargaining Agreement indicates that the Contract takes precedence over conflicting State laws, statutes, and administrative rules. Moreover, it goes on to say that Article 43.03 of the Contract indicates that past practices are not binding. The Union points out that a disability separation is not a right contained in the Collective Bargaining Agreement.

Moreover, the Union asserts that even if the Employer could separate the grievant, it is equivalent to discipline because in this case, the Employer was not satisfied with the grievant's performance. The Employer, continues the Union, in carrying out the involuntary disability separation, alleged that the employee's work was unsatisfactory and it asserts that a suspension could have corrected the problem as opposed to a disability separation. In addition, the Union argued that a removal without reinstatement rights is not justified because the grievant's alleged unsatisfactory was health related.

The Union also asserted that 124-7-04 of the Ohio Administrative Code requires the Employer to follow an order under 124.34 of the Ohio Revised Code with the State Personnel Board of Review and that, it asserts, did not occur. Moreover, the Union goes on to say that there should have been a pre-disciplinary meeting before the disability separation and it cites the Loudermill Case in support of its claim.

The Union argues that Article 24 of the Collective Bargaining Agreement supersedes 124.34 of the O.R.C. and, therefore, the Contract sets a just cause standard which must be applied in this case.

The Union in its opening also noted flaws in Arbitrator Sharpe's award in which he said that an involuntary disability separation, if for disciplinary reasons, was arbitrable but if it were for health related reasons, it was not arbitrable. In this case, the Union asserts that the Employer's action was disciplinary in nature and Sharpe's decision would require the employee to discover the Employer's motivation in order for the grievant to arbitrate the case. The Union asserts that the action is covered by Article 24 because the grievant was disciplined. The Union points out that the grievant's medical problems were totally exaggerated and it cites 123:1-33-02(A). The grievant, according to that statute, provided medical statements supporting her ability to "perform the substantial and material duties" of her job. Moreover, the grievant, notes the Union, can request reinstatement under 123:1-33-03(D) with a medical statement which indicates that she can carry out the substantial and material duties of her job.

For these reasons, the Union asserts in its opening that the involuntary disability separation was improper and, in fact, was a pretext for disciplining the employee.

The Union, in its post hearing brief, indicated that it would limit its closing statements to new arguments generated in the Hearing. In its brief, the Union cites this Arbitrator's recent decision in the Lois Brown case and points out the employee had a right to grieve termination and the termination was reviewable by the Arbitrator under the just cause standard. In the Lois Brown case, the Union notes that the issue concerned Civil Service testing, but as a matter of principle, there is no difference between testing and a disability separation. The Union asserts there is no distinction between an indefinite suspension and a termination and Management must justify both by the just cause standard.

The Union asserts that the Union did not have just cause to put the grievant on an involuntary disability separation.

The testimony indicated while there was a many-tiered administrative review, it was all a sham and the Director of Labor Relations, Joan Rourke, was the key player. The Union asserts that the Employer acted vindictively in its termination of the grievant. Rourke made it clear, asserts the Union, that she requested a disability separation because disciplinary action was unsuccessful.

Walker testified her primary frustration was that she could not get help from her supervisors. Leedy testified that she had two conversations with Walker and that in the first one, Walker talked about "getting rid" of her and in the second, Walker told Leedy that even though her health was better, Walker indicated that Leedy's situation was "too bad, too late". The Union asserts that even a disability separation for legitimate motives must be proven by the just cause standard if it is challenged.

The Union asserts that one doctor's evaluation cannot be given any weight because it conflicts with the employer's own stipulation. That doctor, notes the Union, said that he determined that the employee was not able to perform her usual daily job, but the Employer stipulated that the grievant is a good employee when she is at work. This, continues the Union, points up another glaring deficiency in the medical evaluation because the doctor, while describing her condition, did not provide any analysis as to how the grievant's medical condition prevented her from performing her daily job. The Employer must bear the risk on relying on the unsubstantiated conclusion of a medical professional over a matter which only indirectly related to his practice.

The Union asserts that the Employer did not have just cause to put the grievant on involuntary disability separation because the condition precedent to taking that action is that the employee must not be eligible to receive disability leave benefits. The Employer made no effort to determine whether the grievant was or was not eligible.

If the grievant was unable to work as alleged by the Employer, she would have been eligible for disability benefits, asserts the Union. Therefore, the Employer could not impose an involuntary disability separation. The physician, notes the Union, did not determine whether Leedy was able to perform the substantial and material duties of her position.

Rourke, continued the Union, testified that an individual must function at 100%, yet the Employer provided no description statement or position as to what 100% means. Does an overweight person function at a less than 100% because they can't walk as fast to the filing cabinet? Does a smoker function at less than 100% because he/she takes a smoking break? There was no standard utilized in this case.

The Union goes on to say that all the grievant's leave time was approved and even though Walker told Leedy that the absences were causing staffing problems, Walker never told the grievant that her approved absences would result in the Employer taking action against the grievant.

The Employer made no effort to get the grievant's side of the story, argues the Union, and as a result, there is a glaring violation of the grievant's constitutional rights and it cites *Loudermill* and the Contract, Section 24.04.

For all these reasons, the Union states that the grievance must be sustained.

V. DISCUSSION AND AWARD

The parties did not specifically agree on the issues. The Employer questions the arbitrability of the disability separation, but also asked - presumably assuming the Arbitrator found in favor of arbitrability - whether the disability separation was a way to sidestep discipline. The Union asked whether the Collective Bargaining Agreement allowed the Employer to impose an involuntary disability separation and whether such action is reviewable, meaning arbitrable and, if so, what review standard applies?

The sense of the above issues set forth by the parties is whether the grievance is arbitrable and

if it is, was the disability separation in lieu of discipline?

The question of arbitrability is difficult to determine without considering the merits of the case, especially since the parties did not jointly identify a mutually agreed upon question in this case. Chapter 123:1-33-02(A)(1) states in part that:

If an employee becomes unable to perform the substantial and material duties of his position... he may be given a disability separation.

O.A.C. 123:1-33-03(D) notes that employees requesting reinstatement after a disability separation are eligible after a medical examination by a physician designated by the Director or by the submission of appropriate medical documentation which, in effect, indicates that the disability is nonexistent.

Constance Leedy, the grievant, testified about her health related problems. There is no question but that she was ill and as a result was unable to work full-time. Walter testified that Leedy was off 47% of the time in 1985, 58% of the time in 1986, 28% of the time in 1987, and 51% of the time in 1988 - although the Employer indicated that the 1988 data may be overstated. The testimony of Walter indicated that Leedy was unable to carry her functions while she was being treated for a degenerative disc problem. Moreover, that problem was not found until Leedy had seen at least three doctors. Having said all that, it is also clear that Constance Leedy was ill but that she is now recovered as noted by Leedy's testimony on direct and cross.

The Union cited in its opening statement and post hearing brief Arbitrator Sharpe's award which concluded that if a involuntary disability separation was a pretext for discipline, it would be arbitrable; but if it was for health related reasons, it was not arbitrable. Arbitrator Sharpe's decision is inappropriate and flawed, asserts the Union, because such a conclusion would require the grievant to discover the Employer's motivation for its actions. The grievant's burden would be impossible, argues the Union, and therefore, this action should be covered by Article 24 which deals with discipline. However, the testimony does not allow a conclusion that Grievant Leedy was disciplined; rather, her own testimony and that of Walter was the basis for the Employer's position that Leedy's medical problems justified an involuntary disability separation.

Moreover, Article 4117.10(A) states in part that:

Where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.

The Collective Bargaining Agreement says nothing about disability separations. Thus, there is no specification about that matter in the Collective Bargaining Agreement. Thus, in this case, the grievant is subject to Chapter 123:1-33-02(A)(1 and 2) and 03(D) as outlined in O.R.C. 4117.10(A).

There is a clear distinction between the Leedy case and the Lois Brown case where this Arbitrator held that the Contract did specify the matter with respect to Lois Brown. Therefore, in contrast to the Brown case, the Employer in the Leedy situation did not violate the Collective Bargaining Agreement in its disability separation of the grievant and, therefore, Article 24 of the Agreement is inappropriate. Moreover, Article 43.01 is not violated since in this case, the Contract did not address a matter covered by OAC 123:1-33. In addition, Section 43.05 of the Collective Bargaining Agreement was not violated because, again, disability leave was not one of the rights and duties specifically expressed in the Agreement.

Article 25 of the Contract defines a grievance as a "complaint or dispute which affects the

terms and/or conditions of employment regarding the application, meaning, or interpretation of the Collective Bargaining Agreement." As noted above on the merits, disability separation is not identified in the Collective Bargaining Agreement and therefore, Section 25.04 which calls for arbitration is not applicable in this case.

Obviously there are problems between existing or pre-existing State statutes and regulations in light of the recent collective bargaining law. If the statute, specifically 4117.10(A), had no language about specifications about a matter in the collective bargaining agreement, it is likely and reasonable for arbitrators to find in favor of arbitrability and deal with merits in order to resolve problems between the parties. In this case, if the parties had agreed to arbitrability, the grievance would have been decided on the basis of merits. At the same time, the absence of the language of 4117.10(A) might have allowed an arbitrator to consider 123:1-33, and specifically 03(D) and order a medical examination or the submission of appropriate medical documentation by the grievant in order for her to be reinstated to her former position. However, 4117.10(A) states that "if there is no specification, the parties are subject to applicable state laws" and those state laws are not part of this Collective Bargaining Agreement. Thus, the Employer's action on merits precludes arbitrability. Therefore, this grievance is not arbitrable.

John E. Drotning
Arbitrator

Cuyahoga County, Ohio
April 18, 1989