#897

In the Matter of Arbitration	
Between	Before: Harry Graham
OCSEA/AFSCME Local 11	Case Number:
and	27-34-03-10-053-01-03
The State of Ohio, Department of Rehabilitation and Correction	

APPEARANCES: For OCSEA/AFSCME Local 11:

James McElvain
OCSEA/AFSCME Local 11
390 Worthington Rd.
Westerville, OH 43082

For Department of Rehabilitation and Correction:

David Burrus
Labor Relations Officer
Department of Rehabilitation and Correction
1050 Freeway Dr. North
Columbus, OH. 43229

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter at the Richland Correctional Institution. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record was closed at the conclusion of oral argument on May 13, 2005.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was Article 11.11 violated when the Employer did not

accommodate the Grievant? If so, what shall the remedy be?

BACKGROUND: The Grievant, Danielle Moore, has been employed as a Correction Officer at the Richland Correctional Institution since November 27, 2000. In 2002 Ms. Moore became pregnant. She sought accommodation and continued work at Richland during the course of her pregnancy. In support of her petition for accommodation Ms. Moore submitted a physician's statement dated June 14, 2002. That statement indicated she was "restricted to a position not requiring her to run or lift 20 lbs." Another physician statement, dated June 24, 2002 indicated Ms. Moore was experiencing "pregnancy complications." A third statement from Ms. Moore's physician was provided. Dated August 27, 2002 it indicated she was able to work "as long as she is given light duty. Due to the pregnancy Danielle is not able to lift over 20#s, is unable to run 3/4 miles (walk is OK) and cannot break up fights." Ms. Moore's application for accommodation at Richland was denied. She applied for, and was granted, disability income benefits. In order to protest the denial of accommodation a grievance was filed on Ms. Moore's behalf. Dated March 10, 2003 it sought payment to her of any benefits she would have received had she been accommodated. That grievance was denied. As set forth below, the parties do not agree it is

properly before the Arbitrator for determination on its merits.

POSITION OF THE UNION: The Union contends the grievance was filed in timely fashion. Ms. Moore returned to work in February, 2003. On February 28, 2003 she learned for the first time pregnant employees at Richland had been accommodated. On that date she spoke with her Union steward about the situation. The grievance was filed on March 10, 2003. At Section 25.02 the Agreement sets forth a detailed procedure for the manner in which grievances shall be processed. At Step 1 of the grievance procedure the Agreement provides that grievances are to be filed "not later than ten (10) working days from the date the grievant became aware, or reasonably should have become aware, of the occurrence giving rise to the grievance not to exceed thirty (30) days after the event." In this situation Ms. Moore and the Union Steward, Larry Diller, acted with dispatch. As seen by the filing date, March 10, 2003, the written grievance is well within the ten day filing period. As this is the case, it must be considered on its merits contends the Union.

The initial notice to the Employer concerning Ms. Moore's status was dated June 14, 2002. Upon presenting it, Ms. Moore was assigned to the entryway of the Richland facility. Subsequent to Ms. Moore's placement on disability, similarly

situated employees at Richland were accommodated. On February 6, 2003 Officer Angela Sparacio was assigned to duty at Control, Entry and Perimeter. She was considered to be a "ghost" employee. Ms. Sparacio was restricted to not lifting more than 20 pounds nor was she able to break-up fights. These are similar to the restrictions placed upon Ms. Moore. On August 19, 2004 Ms. Sparacio's assignment was reiterated. The same accommodation was made for Officer Jill Phinnessee on January 29, 2003. She was assigned to Control, Entry and Perimeter and considered to be a "ghost" employee. As was the case with Ms. Moore, Ms. Phinnessee was not to lift anything over "20-25 lbs." Nor was she to break-up fights. (Jt. Ex. 2, p. 13). In 2000 Officer Gwen Collins (now Albright) was restricted by her physician to tasks that were "primarily sitting down and no lifting >10#." She was accommodated. She was assigned to the Package Room, spent most of her day sitting, and did not exceed her lifting restrictions. The Employer has accommodated pregnant employees at Richland and under Article 11.11. It should have done so for Officer Moore the Union contends.

It was the Employer that advised Officer Moore to apply for disability benefits. No indication was provided either to her or local Union officials that any sort of accommodation had been made for similarly situated individuals at Richland.

Under these circumstances the Agreement has been violated in the opinion of the Union. As there was a substantial difference in the wages and other benefits due the Grievant had she been accommodated, eg. shift differential and overtime pay, the Union urges a finding on her behalf and award of the wages and benefits denied to her.

POSITION OF THE EMPLOYER: According to the State this dispute cannot be reached on its merits. In its opinion it was filed belatedly and is untimely. As noted above, the Agreement specifies that grievances must be filed not later than ten work days from the date the Grievant became aware, or reasonably should have become aware, of the event prompting the grievance. Those conditions were not met in this instance. Ms. Moore was provided an application for disability benefits. It was completed by her physician on July 1, 2002. (Jt. Ex. 2, p.8). The grievance was filed on March 10, 2003. Under the plain terms of the Agreement at Section 25.02, Step 1, the grievance was late and cannot be reached on its merits the State contends.

Should it be determined that the grievance is reachable, the Employer asserts it should be denied. At Section 11.11 the State is not required to provide any sort of accommodation for a pregnant employee. All that is required is that a good faith effort to provide alternative work and

equal pay upon the recommendation of a physician. That was done in this instance. The initial medical information provided by the Grievant indicated she should not run. Nor was she to lift more than 20 pounds. (Jt. Ex. 2, p.2). On August 27, 2002 those restrictions were restated along with the notation that she was not to break-up fights. Her physician indicated Ms. Moore was able to work "as long as she is given light duty." (Jt. Ex 2, p.4). Light duty is not available at the Richland facility. Under the restrictions placed on Ms. Moore, accommodation is not required.

The circumstances of Ms. Phinnessee and Ms. Sparacio differ from those confronting the Grievant. They were made ghost employees after the events under review in this proceeding. Their treatment is irrelevant to that afforded the Grievant in the State's opinion. Further, headquarters of the Department was unaware of the arrangements being made at Richland to provide work for Officers Phinnessee and Sparacio. Had the proper authorities known such was occurring, it would have been prohibited.

Additional support for its position is furnished by the opinion of Arbitrator Anna Smith in Case No. 27-03-020807-1108-01-03 (2004). In that Case Arbitrator Smith was of the view that the Agreement requires a "good faith" effort be made at accommodating a pregnant employee. In the dispute

before her, Arbitrator Smith found that to have occurred and denied the grievance. The same result should occur in this situation according to the State.

DISCUSSION: To reiterate, Section 25.02 provides that a grievance must be filed not later than ten working days from the date the Grievant became aware of, or reasonably should have become aware of, the event giving rise to the grievance. At arbitration Officer Moore testified forthrightly and credibly that the Personnel office at Richland had told her no accommodation was available for her. In June, 2002 the Grievant was unaware that at least one other similarly situated officer, Ms. Collins, had been accommodated. That is understandable given the large size of the Richland facility and that it is a continuous shift operation. Nor was the President of the Local Union, Robert White, aware that people situated as was Officer Moore had been accommodated when he accompanied her to a meeting with Personnel staff in June, 2002. Neither was Larry Diller, the Steward who processed the grievance, aware others had been accommodated. Only upon her return to work and learning that others had been accommodated was Ms. Moore aware of the potential for a violation of the Agreement. She promptly contacted Mr. Diller who promptly filed the grievance. By her testimony, which is uncontradicted, Officer Moore learned that others had been

accommodated on February 28, 2003. The grievance is dated March 10, 2003. Bearing in mind that the Agreement provides for a period of ten "working days" to toll for the filing of a grievance and considering days off in that period the workings of arithmetic mandate the conclusion the grievance was filed in timely fashion. It is reachable on its merits.

Officer Moore initially submitted documentation concerning her medical restrictions dated June 14, 2002. It indicated she was restricted to not running or lifting more than 20 pounds. (Jt. Ex. 2, p.2). Those restrictions were amplified on August 27, 2002. She was not to lift over 20 pounds. Nor was she to run 3/4 of a mile. She was prohibited from breaking-up fights. Subsequent to Officer Moore's pregnancy, pregnant Officer Jill Phinnessee was prohibited from lifting over 20-25 pounds. She was not to break-up fights. Officer Phinnessee was accommodated. She became a "ghost" employee. Similarly, Officer Angela Sparacio was not to break-up fights nor lift over 20 pounds. (Jt. Ex. 2, p.15). Neither was she to run. (Jt. Ex. 2, p. 17). Like Officer Phinnessee, Officer Sparacio became a "ghost" employee. A third employee, Officer Gwen Albright (Collins) was restricted to "light work only." She was to perform tasks primarily sitting down. She was prohibited from lifting more than 10 pounds. Officer Moore's condition did not differ from

that of Officers Phinnesse, Sparacio and Albright. They were accommodated. Nothing is on the record to indicate that the Employer had any rationale whatsoever for treating Officer Moore differently than her colleagues. The test set forth in the Agreement at Section 11.11 is that the Employer is to make a "good faith effort" to provide alternative work to a pregnant employee upon a doctor's recommendation. There is absolutely no evidence the Employer made any effort, let alone the contractually mandated good faith effort, to find alternative work for Officer Moore.

In Case No. 27-03-020807-1108-01-03 Arbitrator Anna Smith was confronted with a dispute similar to this one. It came from the Chillicothe Correctional Institution. The dispute from Chillicothe is different from this in several respects. There is no record of pregnant Correction Officers at Chillicothe being accommodated as there is at Richland. Nor is there any record the Employer at Richland acted in the same manner as at Chillicothe. Arbitrator Smith found that "Here, the employer met, conferred, considered and ... ultimately rejected the Union's proposal for the valid reason that the position's requirements for physical force and self-defense hold even in the visitors hall and A-building." (Smith, p.11). In this situation, no such record of considering Officer Moore's situation is on the record.

Discussion was had with her about the Return to Work Partnership Program. Her potential eligibility for disability benefits was discussed with her. Conspicuously absent from the record is any discussion of the possibility of accommodation. Officer Moore's situation was the same as that of Officers Collins (Albright), Phinnesse, and Sparacio. They were accommodated. No reason whatsoever was advanced by the State as to why Officer Moore was not.

This holding is specific to the facts presented at Richland Correctional Institution. If the Employer can demonstrate it made the requisite "good faith effort to provide alternative, comparable work and equal pay to a pregnant employee upon a doctor's recommendation" (Sec. 11.11) it will have satisfied its obligation under the Agreement. As the record does not demonstrate that occurred in this instance the grievance must be sustained.

AWARD: The grievance is sustained. The Employer it to pay to the Grievant, Danielle Moore, the difference between what she received in disability income and what she would have received but for the violation of the Agreement found to have occurred. Jurisdiction is retained for 30 calendar days from the date of this award to resolve any issues concerning remedy.

Signed and dated this 31st day of May, 2005 at

Solon, OH.

Harry Graham

Harry Graham
Arbitrator