VOLUNTARY RIGHTS ARBITRATION

#941

IN THE MATTER OF THE ARBITRATION BETWEEN:

State of Ohio, Department of Rehabilitation and Correction, Richland Correctional Institution

- AND -

Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO

Grievant: Class Action (Section 11.11)
Grievance No: 27-34-20041026-1721-01-03

ARBITRATOR'S OPINION AND AWARD
Arbitrator: Dr. David M. Pincus
October 2, 2006

Appearances

For the Employer

Teri Decker	Chief, Bureau of Labor Relations
John Kinkela	Labor Counsel, OCB
Charles Scruggs, Jr.	Labor Relations Officer
Beth A. Lewis	Advocate and Assistant Chief, Bureau of Labor Relations

For the Union

Jessica Wolff	Grievant
Angela Sparacio	Grievant
Jill Phinnessee	Correction Officer
Robert White	Chapter Representative
Roy Steward	Chief Steward
James McElvain	Advocate

INTRODUCTION

This is a proceeding pursuant to a grievance procedure in the negotiated Agreement (Joint Exhibit 1) between the State of Ohio, Ohio Department of Rehabilitation and Correction, Richland Correctional Institution (hereinafter referred to as the Employer) and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO (hereinafter referred to as the Union). The Arbitration hearing was held on May 31, 2006. The parties agreed to submit post-hearing briefs in accordance with guidelines established at the Arbitration hearing.

STIPULATED ISSUE

Did the Employer violate Section 11.11 of the parties' Collective Bargaining Agreement? If so, what shall the remedy be?

JOINT STIPULATIONS

1. The grievance is properly before the arbitrator.
2. On July 17, 2003, the Department of Rehabilitation and Correction notified OCSEA/AFSCME Local 11 that it would modify local Pick-A-Post Agreements and close posts in order to reduce overtime.
3. Richland Correctional Institution initially had fourteen (14) posts that were closed due to Terry Collins' post closure memo.
4. On July 28, 2003, OCSEA/AFSCME Local 11 filed grievance 27-01-20030728-0248-01-06 protesting the post closures in the northern institutions.
5. On December 4, 2003, Terry Collins reduced Richland Correctional Institution's closed posts from fourteen (14) to ten (10).
6. The parties arbitrated the post closure issue on December 10, 2003 . The Arbitrator's decision was issued on June 14, 2004.

7. On July 1, 2004, DRC closed the Lima Correctional Institution.

8. On July 15, 2004, OCSEA/AFSCME Local 11 filed grievance 27-30-20040715-2253-01-03 to protest the fact that DRC continued to close posts in the northern institutions. The parties settled this grievance on August 27, 2004.

9. On July 29, 2004, Terry Collins further reduced Richland Correctional Institution's closed posts from ten (10) to eight (8).

10. Correction Officers Angela Sparacio and Jessica Wolff worked until October 26, 2004.

PERTINENT CONTRACT PROVISIONS

ARTICLE 11 - HEALTH AND SAFETY

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Section 11.11 - Concern for Pregnancy Hazards

The Employer will make a good faith effort to provide alternative, comparable work and equal pay to a pregnant employee upon a doctor's recommendation.

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(Joint Exhibit 1, Pg. 18)

ARTICLE 27 - PERSONAL LEAVE

27.01 - Eligibility for Personal Leave

Each employee shall be eligible for personal leave at his/her base rate of pay.

27.02 - Personal Leave Accrual

Employees shall be entitled to four (4) personal leave days each year. Eight hours of personal leave shall be credited to each employee at the end of the pay period which includes the first day of January, April, July and October of each year. Full-time employees who are hired after the start of a calendar quarter shall be credited with personal leave on a prorated basis. Part-time employees shall accrue personal leave on a prorated basis. Proration shall be based upon a formula of .015 hours per hour of non-overtime work

This method of accrual shall take effect April 1, 1992. Prior to that time, employees will continue to accrue personal leave pursuant to the provisions of the 1989 Agreement. Employees that are on approved paid leave of absence,

union leave or receiving Worker's Compensation benefits shall be credited with those personal leave hours which they normally would have accrued upon their approved return to work.

27.03 - Charge of Personal Leave

Personal leave which is used by an employee shall be charged in minimum units of one-tenth (1/10) hour.

27.04 - Notification and Approval of Use of Personal Leave

Personal leave shall be granted if an employee makes the request with a forty-eight (48) hour notice. In an emergency the request shall be made as soon as possible and the supervisor will respond promptly. The leave shall not be unreasonably denied.

When any bargaining unit, not covered by this Agreement, has filed a Notice of intent to strike or engages in a wildcat strike, the Employer reserves the right to cancel or deny all personal leave requests.

Personal leave shall not be taken on a holiday.

27.05 - Prohibitions

Personal leave may not be used to extend an employee's date of resignation or date of retirement.

(Joint Exhibit 1, Pgs. 83-84)

ARTICLE 29 - SICK LEAVE

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Section 29.02 - Sick Leave Accrual

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Sick leave shall be granted to employees who are unable to work because of illness or injury of the employee or a member of his/her immediate family living ion the employees household or because of medical appointment or other ongoing treatment...

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(Joint Exhibit 1, Pg. 87)

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B. Pick-a-Post

The Union and the DR&C shall continue Pick-A-Post for Correction Officers and Correction Counselors during the term of this Agreement.

1. Effective with the ratification of the 2003 - 2006 collective bargaining agreement, all Pick-A-Post agreements will be reviewed to (a) insure that the agreements are within their funded post allocations, (b) that the pull and move posts are removed, and (c) they are within their relief ratio.
2. The relief ratios will be determined by the Regional Director, after discussion with the Union. If needed this will be reviewed annually.
3. Each local chapter will determine whether a re-canvass is necessary.
4. No agreements shall be considered approved until approved by the Statewide Pick-A-Post Committee.
5. The Pick-A-Post Oversight Committee shall be required to meet monthly during the term of this agreement unless mutually agreed otherwise.
6. The Pick-A-Post Oversight Committee shall continue to be responsible for assuring the efficacy of the Pick-A-Post agreements through an assessment of both positive and negative impacts upon the operation of the institutions.

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Correction Officer Pick-A-Post

1. The respective Regional Director shall at least annually supply each warden with a funding letter for each institution indicating the following: a) the number of authorized correction officer positions, b) total weekly posts, and c) a relief factor designated for that prison's staff.
2. All Pick-A-Post agreements negotiated at the local level shall comply with the limits imposed by the funding letter of the Regional Director.

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(Joint Exhibit 1, Pg. 251)

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F. Vacation Allotments

The Union and DR&C agree that all institutions will update their vacation allotments at least on a yearly basis. Each November the institution personnel office shall calculate the total number of vacation days that the existing correction officer workforce will accrue in the coming year. The total number of vacation days to be accrued shall then be made available for bid by the correction officers at the annual canvass. The total number of days made available for the annual canvass shall be evenly distributed throughout the calendar year, and made available for bid to the correction officers on the various shifts in proportion to their numbers. If in calculating the number of vacation days available there is a remainder, then the remainder will be multiplied by 365. The resulting number of additional days will be added to the vacation slots available, and distributed as determined by the local labor-management committee. Each officer may bid on any number of vacation days up to the total number or days he/she will accrue during the coming calendar year. Officer bids may be for individual days and/or for grouping of days. Any available vacation days not bid upon by the correction officers shall remain available on the respective shifts for bid at a later time per Article 28.

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(Joint Exhibit 1, Pg. 253)

CASE HISTORY

On October 21, 2004, the Employer's Central Office Bureau of Labor Relations was informed that the Richland Correctional Institution had filled two "ghost" or unfunded posts in an attempt to accommodate two pregnant correction officers. Teri Decker, Chief of the Bureau of Labor Relations, testified she advised Charles Scruggs, the Labor Relations Officer at the facility, to cease filling these unfunded posts. She, moreover, directed Scruggs to meet with union representatives and attempt to structure accommodations which did not breach the parties' collective bargaining agreement.

Scruggs testified that two meetings were held to discuss the disputed

matter. It was determined that an accommodation was possible on four of their five scheduled work days. On these agreed-to days, the employees would work "relief" in "non-contact" posts. The Union's requested accommodation for the fifth scheduled work day, however, imploded the accommodation process. The Union asked for the two employees to be an "extra" or "ghost" on a post or be permitted to take the day off and use accrued leave for coverage purposes. The Employer refused to accept this accommodation alternative.

On October 25, 2004, the Union protested the Employer's accommodation decision. The Statement of Facts contained in the grievance stated in pertinent part:

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The union is aggrieved that on 25-Oct.-04, management has refused to abide by Article 11.11 of the contract to "In a good faith effort to accommodate pregnant employees" and has also refused to honor the bail agreement that has been in effect for 2-3 years at RiCI.

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(Joint Exhibit 2A)

The parties were unable to resolve the disputed matter during subsequent portions of the grievance procedure. Neither side raised procedural nor

substantive arbitrability issues. As such, the grievance is properly before the

Arbitrator.

The Merits of the Case

The parties respectfully urged the Arbitrator to limit his analysis to the stipulated issue dealing with Section 11.11 of the parties' contract. In accordance with the parties desires, wishes, and the record under review, no generalized discrimination claim nor any application of the Pregnancy Discrimination Act will be undertaken by the Arbitrator.

The Union's Position

The Union opines that the Employer violated Section 11.11 of the collective bargaining agreement. It does not deem this dispute as Pick-A-Post related, and relies on other similar situations resulting in dissimilar outcomes.

The Union maintained that certain matters referred to by the Employer never played a critical role in this particular facility. Neither changes in the Pick-A-Post agreement not post allocation took place at this particular location. Overtime problems were created by staffing shortages rather than the circumstances raised by the Employer. Also, the Grievants were relief officers who filled posts when other bargaining unit members had days off.

The matter in dispute should not be analyzed in terms of Pick-A-Post implications. The various exhibits introduced at the hearing dealt with pregnancy

hazards which are clearly safety and health issues and not subject to Pick-A-Post

applications.

The matter in dispute rests solely on the proper application of section 11.11. Local party officials were merely attempting to comply with section 11.11 requirements in a manner similar to other prior pregnancy hazard scenarios. On December 3, 2002, Eric G. Dahlberg, Deputy Director, issued a memoranda (Joint Exhibit 3) containing relevant guidelines for handling work requests from pregnant employees He ordered all wardens to work out mutual agreements with certain provisos. Dahlberg requirements were followed and resulted in several similar agreements (Joint Exhibits 4, 5, 6, and 7). Members of the class filing the present grievance (Joint Exhibit 2A) are merely attempting to realize similar outcomes.

The Employer's Position

The Employer did not violate section 11.11. In fact, it complied with the clear contractual particulars contained in this provision. A "good faith" effort to accommodate the pregnant employees was undertaken in accordance with the agreement (Joint Exhibit 1), while the Union's proffered accommodations could not be agreed to for they violated the parties' agreement (Joint Exhibit 1).

Allowing the employees to work as a "ghost" would violate Pick-A-Post language negotiated by the parties. The funding letter

designation refers to the number of authorized correction officer positions as well

as a relief factor with this information at the parties disposal. They negotiate the placement of posts within any given institution. Also, initially negotiated local Pick-A-Post agreements, and any subsequent modifications to the same agreement must be considered and approved by the Statewide Committee. As such, any change involving the accommodation of pregnant employees must also be approved by the Statewide Committee.

Clearly, the Union's proposed accommodation would have established "ghost posts." These posts arise when a post is unnecessarily double-filled, or more specifically, when more than the required number of officers work a single post while other established posts go unfilled or must be covered with overtime. As previously noted, all assignments within any institution are controlled by Pick-A-Post agreements. When an accommodation for a pregnant employee takes place outside the scope of a Pick-A-Post agreement, it becomes, by definition, a "ghost post." As such, "ghost posts" fail to comply with the funding letter requirement of the Regional Director, another mutually agreed to proviso negotiated by the parties.

The accommodation regarding the use of accrued leave balances is also flawed for a number of reasons. In 2004, the Union never proposed that the employees use leave balances to cover one day off per week. Also, at the arbitration hearing, the Union never produced information in support of sufficient leave balances at the time of the disputed incidents.

Even if the Grievants had sufficient leave balances available, the accommodation would have violated other provisions in the Agreement (Joint Exhibit 1). The parties have negotiated vacation allotment language. The accommodation would have resulted in granting vacation leave above the agreed-to allotment Preferential treatment would have resulted.

Seniority rights of other bargaining unit member would have been infringed by the suggested accommodation. Assuming some vacation spots were available, granting the two pregnant employees these slots would have prevented more senior employees from utilizing these potential vacation opportunities.

Use of personal leave and sick leave within this context also raise contractual problems. The employees had four days of personal leave available. Their pregnancies would have required higher balances for coverage. Section 29.02 grants sick leave to those "unable to work because of illness or injury." Pregnancy is not a sickness or injury eliminating the use of any potential sick leave balance as an accommodation proxy.

Section 11.11 was not violated by the Employer because it complied with the "good faith effort" requirement. The Employer had an honest and sincere intention to fulfill its obligations. Alternative were offered during two meeting held with Union officials. The Union rejected the proposal alternatives, while the Union's options would have resulted in contract violations.

The Employer, indeed, refused to consider some posts for the pregnant employees. These refusals, however, were based on the employees' doctors' recommendations. Perimeter, segregation control and visiting posts were rejected based on restrictions articulated by the employee's doctors, and certain potential liabilities attached to the Union's demands.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, neutral interpretation of the record including pertinent contract provisions and submitted closing statements, it is this Arbitrators opinion that the Employer did not violate Section 11.11 of the parties' collective bargaining agreement. The Employer engaged in a good faith effort to provide alternative comparable work and equal pay to the two pregnant grievants.

Activities engaged in by the Employer evidence a sincere good faith effort to accommodate these individuals. The record indicates that the Union attempted to structure accommodations similar to those agreed to in the past (Joint Exhibits 3, 4, and 5). Yet, Julius C. Wilson, the Warden, placed the Union on notice that the institution could no longer have pregnant employees assigned to posts as extras (Joint Exhibit 9).

Two meetings were held in an attempt to develop a mutually agreeable accommodation. Not only were the Employer's proposals reviewed, but options

tendered by the Union were considered. The Employer's proposals, moreover, were composed in light of contractual restrictions, but would have required review by the Pick-A-Post Oversight Committee.

The Employer did not exhibit bad faith just because it refused to consider certain posts for accommodation purposes. Certain posts were properly rejected based on the Grievants' doctor recommendations. Sparacio's doctor noted she was "not to run or break up fights." (Joint Exhibit 2), while Wolf's physician required her " not to lift more than 25 lbs., not to engage in extensive running and not to be exposed to possible acts of violence between inmates." (Joint Exhibit 7). The visiting room, perimeter and the segregation control center post options would have violated the doctors' restrictions. As such, the Employer justifiably rejected these proposed options.

The Union's options, moreover, were properly rejected because they violated the parties' contract for other pertinent reasons. The Union's proposals would have resulted in "ghost posts." The Grievants would have worked in positions at the expense of other established posts. Under these arrangements, the Employer would have been required to double-fill posts while other posts needed coverage.

The unauthorized previously described posts would also violate critical Pick-A-Post guidelines negotiated by the parties. The parties mutually agreed that the Regional Director's funding letter would authorize: (1) the number of

authorized correction officer positions, (2) total weekly posts, and (3) relief factor designated for the prison's staff. Clearly, the structure proposed by the Union would violate several aspects of the funding letter. Unapproved "ghost posts" would violate the spirit of the local Pick-A-Post agreement.

The Union's proposed use of accrued leave balances also failed for a number of reasons. First, nothing in the record indicated the Grievants had sufficient leave balances available to cover one day off per week at the time in dispute. Second, the vacation allotments section allows correction officers to bid for vacation days at the annual canvass. If the Grievants were allowed to take vacation time on dates previously selected, the Employer would be violating a mutually agreed to number of vacation days made available for bid. Also, other correction officer's seniority rights would be violated if vacations were preferentially granted to the pregnant employees.

Third, use of personal leave and sick leave within this accommodation context fail for similar reasons. Section 27.02 entitles an employee to four (4) personal leave days each year, while section 27.04 provides that requests be made forty-eight (48) hours in advance. Again, the four days in question could not possibly cover the entire pregnancy period. Last, section 29.02 grants sick

leave to employees "unable to work because of sickness or injury. A pregnancy condition cannot be viewed as an "illness or injury."

AWARD

For all the above stated reasons. The grievance is denied.

October 2, 2006
Beachwood, Ohio

Dr. David M. Pincus
Arbitrator