IN THE MATTER OF ARBITRATION BETWEEN

STATE OF FLORIDA

and **CASE NO. 00-03840**

AFSCME COUNCIL 79 on behalf of James Taylor

Greivant.

Before: Leslie W. Langbein, Arbitrator

Appearances:

Stephen S. Godwin, Esq. Asst Gen. Counsel, Dept. of Management Services
On behalf of the Department of Juvenile Justice
Linda Barge-Miles, Esq., General Counsel, AFSCME Florida Council 79
on behalf of the Grievant

OPINION AND DECISION OF ARBITRATOR

Preface

Pursuant to Article 6, Section 5 of its collective bargaining agreement with the State of Florida, AFSCME timely requested the appointment of an arbitrator to review a decision by the Department of Juvenile Justice ("DJJ") denying Grievant, James Taylor, the use of disability leave. The Arbitrator was notified of her selection by the State of Florida August 1, 2001 and accepted her appointment. No hearing was scheduled based on the parties' mutual agreement to submit this dispute on the relevant documents and briefs. Those documents and briefs were received and reviewed. The Arbitrator has duly considered all evidence presented and has made reasonable inferences therefrom in rendering this decision.

Background

The Grievant is employed as a house parent on the first shift at the Jackson Juvenile Offender Correction Center. He suffered an on-the-job injury on January 7, 2000. Three days after the accident he was re-assigned to an alternative duty in a control room to accommodate his doctor's orders not to use his right arm. Between January 14, 2000 and March 10, 2000, Grievant used 30.75 hours of disability leave for medical appointments. On March 8, 2000, before a scheduled surgery, Grievant was informed that he would be transferred to the third shift effective two weeks hence (presumably because the third shift is the quietest as inmates are sleeping). Grievant did not contest the schedule change. Between March 13 and May 29, 2000, Grievant underwent surgery and remained home convalescing.

Grievant returned to work on May 30th, 2000 with a doctor's note releasing him to light duty. DJJ accommodated the request by continuing Grievant's assignment to the control room (on the third shift). However three days later Grievant re-injured his arm and requested additional disability leave for medical appointments. He then went out again on worker's compensation leave from June 7th through June 12, 2000.

Grievant attended physical therapy in Tallahassee which is ninety (90) miles away from his work site. Each trip to obtain therapy, including driving time, took between 5 to 6 hours. Grievant wished to use additional disability leave on the days when he had to drive to Tallahassee for therapy. The request was denied since Grievant had neither used the first full forty (40) hours of disability leave nor did he require time off from work to obtain therapy or treatment. (Grievant's transfer to the third shift left him capable of

scheduling doctor appointments during the normal business day.)

The grievance proceeded through Article 6's step process and resulted in the Union's demand for arbitration on September 8th, 2000.

Pertinent Provisions

The resolution of this dispute depends on the interpretation and application of the following CBA provision and career service rules:

> **Article 18, Section 1 - Leaves**
>
> Employees shall be granted leaves of absence as provided in Chapter 60K-5 of the Personnel Rules of the Career Service System.

Rule 60K-5.031(1)(a), F.A.C., provides in pertinent part:

> (a) An employee who sustains a job-connected disability that is compensable under Chapter 440, F.S., shall be carried in full pay status for up to 40 work hours without being required to use accrued leave beginning immediately following the onset of the injury. Such leave shall be used intermittently to cover appointments to health care providers, physical therapy and similar activities provided such activities are directly related to the employee's workers' compensation injury....An employee who returns to work and has exhausted the 40 hours of disability leave will, upon presentation of written confirmation from the authorized physician, be granted additional disability leave not to exceed six workdays for follow-up examinations or treatment required by the authorizing treating physician for a particular injury.

Also pertinent but not cited by the parties is Article 22 of the CBA entitled "Disability Leave". A portion of that article when read in pari materia with Article 18 requires an agency to utilize a reasonableness standard when exercising discretion under Chapter 60K-5.

Parties' Positions

The Union takes the position that it is the Department's responsibility to insure that

Article 18 disability leave is available to all unit employees regardless of shift. Unit employees who are injured while on duty but who work third shift are denied the opportunity to avail themselves of the benefits provided by Article 18 and Chapter 60K-5. To ensure even application of the Article and rule, employees like Grievant should be either be transferred to a day-shift or credited with an equal amount of time off their night shifts as day-shift employees who attend medical appointments during work hours. Alternatively, the Union argues that since obtaining treatment is a condition of worker's compensation benefits, time spent traveling to and from treatment and the time in treatment should be considered compensable. It also argues that Grievant's transfer to the third shift and refusal to grant him disability leave is reprisal for union activity.

The Department argues that the purpose of Article 18 and Chapter 60K-5 is to make injured employees "whole", i.e., to make up for any work hours lost having to attend medical treatment for on-the-job injuries. Employees who do not actually miss work are not entitled to claim disability time simply because they were injured on the job and attended treatment. Since Grievant could obtain the treatment during non-work hours, he is not eligible for additional disability leave.

Discussion

The intent of Article 18 and Chapter 60K-5 is to make injured employees "whole" for work time (and thus pay) lost from on-the-job injuries. Under Chapter 440, an employee is not entitled to benefits (if at all) for the first week following an injury. Thus, if an employee is so seriously injured that he/she must remain out of work for a week, the State of Florida will grant disability leave so the the employee does not have to dip into

his/her banked vacation or sick leave.

However, these provisions are not intended to create an absolute 40 hour disability leave entitlement to employees or an obligation by the State to treat all injured employees alike–regardless of the severity of the injury. If a mild injury does not require an employee to be off more than the few work hours he/she requires treatment, the employee is not entitled to be credited with disability leave for hours that he/she actually worked. Article 18 also does not require a department to adjust the employee's schedule simply to allow an employee to use disability leave for treatments which can be obtained during non-work hours. In a manner of speaking, Article 18 is there to avoid the "unavoidable"–where there is no alternative but to obtain treatment during regularly scheduled hours.

Here, before his on-the-job injury, Grievant worked the first shift as a house parent. Presumably the first shift presents a greater physical challenge to a DJJ employee than the third shift when inmates sleep. Following the injury, Grievant presented a doctor's order that he be assigned to light duty. DJJ complied with the doctor's orders by assigning Grievant to a control room where the chance of aggravating the injury would be reduced.

Then Grievant apparently learned he would have to undergo surgery to repair the injury. Based on the documents tendered to the Arbitrator, the presumption is drawn that DJJ then re-assigned Grievant to the third shift to further reduce the chance of aggravation or re-injury of Grievant's arm. The record is clear that Grievant knew of the change in shift before he went out on worker's compensation leave on March 13, 2000. There is no indication in the exhibits tendered that he ever requested a transfer back to the first shift.

Even assuming Grievant had done so and was transferred back to the first shift, it does not follow that Grievant would have to be granted disability leave. The first shift ends at 1:30 p.m. Given an hour and a half drive from Marianna to Tallahassee, there would still be about 2-3 hours of business time available for medical appointments. (i.e., 3:00 p.m. to 5:00 or 6:00 p.m.). DJJ would not necessarily have to grant Grievant disability leave under these circumstances unless he was unable to obtain an appointment during these hours.

There is no indication in the record that DJJ intentionally transferred Grievant to the third shift solely to deny him the availability of disability leave. Rather, it appears that DJJ was fulfilling its obligations under Chapter 440 and possibly other laws to find a light duty position that would accommodate Grievant's physical condition. The Union would be hard-pressed to argue that DJJ's must ignore statutory obligations to comply with the collective bargaining agreement.

The Union's argument that Article 18 requires DJJ to consider time spent attending a medical appointment ninety miles away as a one-day assignment in another city. If this interpretation were applied, then Article 18 would result in further uneven treatment among bargaining unit members: individuals on later shifts would be given the opportunity to accrue overtime for driving time that would not be available to workers on the first shift. This hypothesis need not be tested however, since only individuals on worker's compensation can use disability leave to attend doctor's appointments and worker's compensation leave is basically the antithesis of work.

DJJ correctly notes that it is within the discretion of management to re-assign or

transfer workers. Article 9 does not allow bargaining unit members to grieve these changes (with few exceptions.) However, DJJ's discretion, must be exercised in good faith. If, for example, there was a showing that another injured employee on the third shift were allowed to credit time spent at a doctor's visit during off-hours towards duty time, then Grievant's challenge might be stronger.

As for the Union's argument that DJJ's failure to allow Grievant to take disability leave is retribution for union activity, the record os devoid of any evidence to support this inference. Further, Grievant did not grieve Article 5 and did not address this issue in the step process. Accordingly, even if there is evidence to support the claim, it has been waived. The issue of retaliation, if still viable, can only be addressed by PERC.

Award

The grievance is denied. Under Article 3(f), the Union is responsible for paying the fees and costs of the Arbitrator.

Dated:_____, 2002.

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Leslie W. Langbein
Arbitrator