

Arbitration Between:

Megan E. Ferguson, Grievant,)	
The Ohio State Troopers Ass'n,)	
Employee Organization)	
)	
And)	No. 11-0042
)	
Ohio Department of Public Safety,)	
Division of Ohio State Highway Patrol,)	
Employer)	

APPEARANCES:

For the Union:

Herschel Sigall, Esq.
Elaine N. Silveira, Esq.
Paul David Riley, Union Representative
Larry K. Phillips, Union Representative, President, OSTA

For Ohio Department of Public Safety, Division of the Ohio State Highway Patrol:

Sgt. Corey Pennington, Employer Representative
Charles Cassie

Before Sarah Rudolph Cole, Arbitrator

The Ohio State University, Moritz College of Law
55 West 12th Avenue
Columbus, OH 43221
Tele: (614) 688-4918
Fax: (614) 292-2035
E-mail: cole.228@osu.edu

Facts

This grievance arises out of an injury that the Grievant, Ohio State Patrol Trooper Megan Ferguson, suffered while attempting to initiate a traffic stop on May 9, 2010. A vehicle that failed to respond to her lights and siren struck her patrol car. Grievant suffered a concussion as well as injuries to her neck, shoulder and back. Grievant filed for occupational injury leave (OIL), which pays an employee's full salary when the employee is injured on the job and cannot perform her regular job duties. In order to be eligible for OIL, an employee must also file a claim with the Bureau of Workers' Compensation. (Collective Bargaining Agreement 46.02) Grievant filed with BWC as required. She was granted OIL following the accident, and drew that leave until July 23, 2010, when the Employer terminated her OIL because BWC denied Grievant's application for "trigger point" treatment. As of July 23, 2010, then, Grievant began drawing payments from her own leave balances rather than OIL leave. Grievant appealed the BWC's denial of her claim and filed for temporary total disability from BWC. Although BWC initially denied her claim for temporary total disability, her appeal of that denial was successful and she was granted temporary total disability on October 7, 2010. The Employer appealed that decision, but ultimately lost that appeal. During this same time frame, on October 19, 2010, BWC approved the trigger point treatment plan. On December 6, 2010, the Employer granted OIL to Grievant from November 12, 2010 through December 31, 2010. The Employer does not automatically grant OIL retroactively, so the parties began discussions based on the Grievant's claim that OIL had been improperly denied from July 23, 2010 until November 11, 2010.

The parties eventually reached a settlement agreement. The agreement, contained in Joint Exhibit Five, reads, in pertinent part:

The Employer agrees to approve the Grievant's Occupational Injury Leave for the time period beginning 7/22/2010 through 11/11/2010.

The Grievant will be paid 616 hours of Occupational Injury Leave and 16 hours holiday pay (Labor Day and Columbus Day).

The Grievant's leave banks will be reimbursed 113 hours vacation, 67 hours 36 minutes sick leave, 3 hours 54 minutes personal leave and 33 hours 36 minutes compensatory time.

The Grievant will re-pay the Bureau of Workers Compensation for temporary total compensation that she has received covering the time period beginning July 23, 2010 through November 11, 2010 in the amount of \$12,396.32.

Following this agreement, the Employer approved Grievant's OIL claim and paid her OIL for 616 hours at her regular hourly rate for the time period from July 23 to November 11, 2010. The agreement required Grievant to repay BWC because employees are not entitled to receive both OIL and workers' compensation for the same time period. The Employer also automatically restored Grievant's vacation, sick and personal leave balances as well as her compensatory time balance. The Employer deducted OIL hours to account for the vacation, sick and personal leave she had previously used to supplement her BWC claim (leave that was now restored in the system). On February 11, 2011, the Employer issued a paycheck to Grievant in the amount of \$13,495.83, deducting from that gross amount \$4,201.46 for taxes and \$1,754.18 in other deductions. The final amount of the paycheck was \$7,540.19.

Grievant did not cash the check, believing that the Employer was to have issued her a separate check for the repayment of the BWC. Grievant also believed that the Employer would restore her leave balances but would not deduct that restoration amount from her OIL. Based on her understanding, she filed this grievance and requests that her leave balances be restored without an offsetting deduction of OIL hours.

Union Position

The Union believes that the Employer did not handle Grievant's OIL or workers' compensation claim in a reasonable manner. The Union also believes that the Employer misunderstood the terms of the settlement agreement. The Union contends that the settlement agreement required the Employer both to pay Grievant for OIL leave for the period between July 23, 2010 and November 11, 2010 and to restore her leave balances without deducting any amount from the payment to Grievant. The Union contends that, in negotiations leading up to the agreement, it took this position. The Union also contends that the Employer promised to issue a check for \$12,396.32 to Grievant that Grievant would then endorse and turn over to BWC. To support its position, the Union emphasizes that the Employer's use of passive voice in the settlement agreement, "[t]he Grievant's leave banks will be reimbursed . . ." means that the Employer, not the Grievant, was to reimburse the leave banks. As a result, according to the Union, Grievant would be entitled to both OIL leave for the time period and a restoration of the leave balances to her account for the leave that she took during that period without any consequence to her. In other words, Grievant would have the leave restored without her having to reimburse the Employer for the leave actually taken and then also receive a check for the previously denied OIL leave.

Employer Position

The Employer claims that the settlement agreement requires the payment of OIL leave to Grievant for the time period between July 23 and November 11. The agreement also requires Grievant to pay back her own leave banks. The Employer explains that this is the normal course of business when OIL is retroactively granted. In order to receive the retroactive OIL leave, the

employee must reimburse her leave banks (if she wants her leave restored). Otherwise, the Employer explains, the employee would be paid twice for the same time. In addition, and largely for the same reason, an employee must reimburse BWC for workers' compensation paid during a time when leave was not granted but is now retroactively granted. Thus, the Employer argues that it agreed to retroactively pay OIL leave but only if the Grievant reimbursed her own leave banks (because she wanted her leave that she had taken restored) and if the Grievant reimbursed BWC for the workers' compensation payments she received when she was not on OIL. The Employer also states that it did not promise Grievant a lump sum check to pay BWC back.

Opinion

The sole issue in this arbitration is how to interpret the following language contained in the settlement agreement signed by the Grievant and the Employer to settle Grievant's claim for OIL. The pertinent language is: "The Grievant's leave banks will be reimbursed 113 hours vacation, 36 minutes sick leave, 3 hours 54 minutes personal leave and 33 hours 36 minutes compensatory time." The Grievant claims that this language requires the Employer to reimburse her leave bank for leave that she took when she was not granted OIL. The Grievant argues that the settlement required the Employer to both reimburse her leave bank for leave she took during the time she did not receive OIL (7/23 to 11/11) and pay her OIL for the same time period. The Employer argues that the settlement required the Employer to pay the OIL for the relevant time period but that the Grievant, not the Employer, was to reimburse her leave bank for leave she took during the time she did not receive OIL. While the Grievant provides considerable background leading up to the settlement agreement as well as discussion of whether Grievant was to be provided a lump sum check to reimburse BWC, the only disputed issue, according to

the Union's post-hearing brief, is whether the Employer or the Grievant is to restore the leave balances exhausted during the time period when Grievant did not receive OIL (7/23 -11/10) (See Union Brief at 16). Thus, this opinion focuses only on that issue.

I find that the settlement agreement required the Grievant, not the Employer, to reimburse the Grievant's leave balances. The Employer's obligation was to pay 616 hours of OIL leave for the time period from 7/23 to 11/11 (as well as pay holiday pay for the two holidays during that period). The agreement obligated the Grievant to repay the leave balance.

I believe that the settlement agreement's language, as well as the extrinsic evidence available, supports this conclusion. The language itself, written in passive voice, does not indicate whether the Employer or the Grievant is to pay the leave balances. As a result of this ambiguity, the arbitrator must consider extrinsic evidence of the negotiations leading to the signing of the settlement agreement to determine the meaning of the language. The e-mails exchanged prior to the settlement make it clear that both parties understood that the Grievant would have to "buy back" her leave if she was to receive OIL for the relevant time period. On December 2, 2010, Sergeant Anne Ralston e-mailed Dave Riley, the Union Representative, the following: "[s]he can't get both 100% of her leave returned without buying it back AND 72% TT payment because the leave she burned was paid to her at 100% If she wants her leave balances restored she will need to buy it back." (U-1) In an e-mail from Dave Riley to the Grievant the next day, he explained, "You apparently will have to buy back some of your leave as you were paid for it from the osp and then were paid the same time period from BWC." (U-1) The parties then signed the settlement agreement on December 16, 2010. This e-mail exchange makes clear that the parties understood that Grievant would have to buy back her leave if she wanted her leave restored and receive OIL for the relevant time period. In addition, this

interpretation makes sense based on testimony from Joseph Eckstein, who manages payroll for the Department of Public Safety. Eckstein testified that it is common for OIL to be retroactively granted in a settlement agreement. When this happens, payroll deletes the leave payments (for vacation etc.) out of the system, the employee gets her leave payments back and the system takes the money given the employee for her leave time, deducts it from the OIL payment and then pays out the remaining OIL to the employee (minus taxes and other benefit amounts). Then, according to Eckstein, the Department of Public Safety notifies BWC that it is now paying the employee OIL. Then the employee must repay BWC.

While the language of the settlement agreement is ambiguous, because it does not indicate whether the Employer or the Grievant must repay the leave balances, the extrinsic evidence available, including e-mails between the two parties' representatives prior to the signing of the settlement agreement, together with the testimony that this settlement agreement is routinely used and that the process the Department used in this case to reimburse leave balances when OIL is retroactively granted was the normal course of business, convinces this arbitrator that the Grievant, not the Employer was to repay her leave balances in order to receive the retroactive OIL leave. In addition, this reading makes sense, since it is highly unlikely that the Employer would have agreed to pay the Grievant twice for many of the hours between 7/23/10 and 11/11/10.

Conclusion

The grievance is denied.

June 13, 2013

____Sarah R. Cole_____

Sarah R. Cole, Arbitrator