TEXT OF THE OPINION:

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Mental Retardation
and Development Disabilities
Gallipolis Developmental Center

-and-

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION OCSEA/AFSCME, AFL-CIO
Local 11

Case No.:
G87-1687

Decision Issued:
February 9, 1990

APPEARANCES

FOR THE AGENCY

David S. Norris, OCB Contract Compliance
Tim Wagner, Chief, Arbitration Services
Donald L. Walker, Labor Relations Designee
Mike Fuscardo, Labor Relations Designee
Pamela K. Matura, Former Gallipolis Superintendent
Ronald Slone, Observer

FOR THE UNION

Dan Smith, General Counsel
Yvonne Powers, Associate General Counsel
Russell Murray, Executive Director, OCSEA
Bruce Wyngaard, OCSEA Arbitration Director
A. M. Hamilton, Local President

Monty Blanton, Steward
Sharon L. Brown, Steward

ISSUE:

Article 27 -- Protest of policy assuming supervisory authority to deny personal leave when Life/Safety staffing minimums would be jeopardized.

Jonathan Dworkin, Arbitrator
P. O. Box 236
9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE;

THE ISSUE

Each member of the OCSEA State Bargaining Unit is entitled to an annual allowance of three days' personal leave. Article 27 of the Agreement provides in pertinent part:

ARTICLE 27 - PERSONAL LEAVE

Employees shall be entitled to three (3) personal leave days per year which are credited to the employee in the pay period which includes December 1. Full-time employees who are hired after the December 1 pay period shall be credited with personal leave on a prorated basis. Part-time employees shall accrue personal leave on a prorated basis.

Personal leave shall be granted if an employee makes the request with one (1) day 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. [Emphasis added.]

The grievance protests a personal leave policy of the Gallipolis Developmental Center, a branch of the Ohio Department of Mental Retardation and Development Disabilities (MRDD). The policy outlines circumstances under which Supervision will grant or deny leave applications. The underlying assumption is that Management has authority to deny timely personal leave requests. The Union challenges the assumption, contending that personal leave is a contractually vested privilege of employment and that the Employer lacks discretion to deny applications submitted twenty-four hours or more before the projected leave day.

The Gallipolis Center is a residential treatment facility. Its primary mission is educating retarded and disabled adults with the objective of returning them to the

general community as functional members. The Center also houses and cares for people with severe behavioral problems, individuals suffering multi-handicaps, and aged, long-term residents. A large portion of the Center's programs are carried out by employees who administer direct care. Their work is crucial for several reasons. First and foremost, they provide protection for clients and patients -- individuals who one witness aptly characterized as the most vulnerable people in our society. Second, the employees provide protection for each other. Those who work closely with behavioral abnormalities need to be vigilant for their own safety as well as that of co-workers and residents. Third, minimal staffing levels (Life/Safety staffing minimums) are requisites for federal funding. Fifty-eight percent of the Center's operating funds come from Medicaid. Therefore, the facility must meet the standards Medicaid exacts from contract providers. There are many standards, touching upon almost every conceivable life activity; and a Medicaid requirement is that Life/ Safety staffing minimums be continually in place.

The Center is staffed by approximately three hundred employees in direct-care jobs. Some are part-time, most are full-time. It is obviously important that these employees be scheduled in a way that will provide the Life/Safety minimums at all times and, in order to assure that the minimums will be met, the Center adopted the policy at issue. The policy was created in 1982. It was revised and redistributed in 1987, approximately one year into the term of the first Collective Bargaining Agreement between the parties. It is quite long, consisting of five, single-space typed pages; only part of it is in contention. The grievance focuses on those portions which speak to supervisory authority to deny personal leave. They state:

I. POLICY

It shall be the policy of the Gallipolis Developmental Center to approve requests for personal leave by all employees with consistency and equality and without undue restriction, except when the use of such time results in below Life/Safety staffing levels.

. . .

IV. PROCEDURE

. . .

F. Pursuant to AFSCME/OCSEA, Article 27, personal leave shall be granted if an employee makes the request with one (1) day 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.

. . .

2. Should an employee or several employees request personal leave for the same time period and the facility would be placed in a position of falling below Life/Safety staffing minimums, a reasonable judgment must be made by the facility as to which requests can be denied.

3. In determining which request will be denied, the following criteria should be used:

a. Life/Safety minimums.
b. Number of employees on approved leave (i.e., personal, vacation, compensatory, etc.).
c. Number of employees on sick leave.
d. Number of employees on leave of absence, military leave, jury leave, etc.
e. Leave approval would place the affected unit . . . below Life/Safety staffing minimum levels.

4. If the reason for the personal leave is, in the judgment of the Superintendent, of such nature that denial would represent a significant hardship to the employee, or a greater hardship to that employee as compared to another employee, the most compelling case may be approved and the less compelling case may be denied.

The policy is reasonable on its face. Its apparent purpose is to balance employee rights and direct-care requirements. It is as unobtrusive as imaginable in light of its objective and the pressing need to assure adequate staffing to meet the responsibilities of the Center. Although a Union witness testified that the policy was abused from time to time -- that personal leave requests were turned down without regard for minimum staffing -- her testimony tended more to obscure the issue than clarify it. This is a policy (or "class") grievance, not an individual complaint. It challenges the policy itself, and would be just as viable if the Employer's claim of right had never resulted in a denial of personal leave. The Union's thrust is that Management lacks authority to disallow a timely request for personal leave no matter how compelling the reason for disallowance may be.

The Employer's response is that the negotiators clearly did not intend to prioritize personal leave to the extent that it could cripple the Agency. According to MRDD, Article 27 was meant to embody an implied understanding that the Agency's public mission and responsibilities came first and that personal leave would not impair Management's fundamental rights. Those rights, as set forth in Article 5 of the Agreement, incorporate the following items from Ohio Revised Code §4117.08(C):

(C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

. . .

(4) Determine the overall methods, process, means, or personnel by which government operations are to be conducted;

(5) Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;

(6) Determine the adequacy of the work force;

(7) Determine the overall mission of the employer as·a unit of government;
(8) Effectively manage the work force;
(9) Take actions to carry out the mission of the public employer as a governmental unit.

* * *

Article 27 defines the issue. The question to be answered is how much authority did the Employer relinquish when it agreed to the personal leave provision, and how much did it retain. Did the State bind itself to granting all timely personal leave requests even if to do so meant sacrificing its governmental obligations?

PRELIMINARY ARBITRAL FINDING

A seeming ambiguity in Article 27, one which could support the Employer's position, is the sentence in the second paragraph, "The leave shall not be unreasonably denied." Conceivably, this language could be interpreted as an acknowledgment that Management reserved authority to deny personal leave applications; otherwise the express limitation on that authority would be meaningless.

Union witnesses who negotiated Article 27 maintained that the sentence is irrelevant to this controversy. They pointed out that the second paragraph of the provision is in three parts. The first states that personal leave "shall be granted" to an employee who provides one day's notice. That language, according to the Union, is unqualified. The second portion allows employees to request personal leave with less than a day's notice and requires a timely supervisory response. The witnesses explained that the third portion, stating that leave shall not be unreasonably denied, was understood by both bargaining teams to relate only to untimely requests -- those submitted less than twenty-four hours in advance. It was agreed that Supervision could disallow untimely personal leave applications, but not unreasonably. None of the negotiators understood that the qualified right to deny untimely requests applied also to timely requests.

The testimony on this aspect of bargaining intent was assertive and factual. It was not simply an expression of opinion. No refuting evidence was submitted by the Employer. Accordingly, the Arbitrator finds that the Union's testimony was accurate. Since this dispute is limited to whether or not the policy was permissible with regard to timely requests for personal leave, it follows that the contractual sentence, "The leave shall not be unreasonably denied," is immaterial. It will not be considered in the examination of the grievance.

* * *

As has been noted, Section 4, Subsection F4 of the Gallipolis policy allows Supervision to compare the reasons for competing personal leave requests, approving the one which is "the most compelling" and denying the one which is "the less compelling." As it stood, Subsection F4 presented a second issue for arbitral determination. Assuming that Supervision has implied authority to deny timely personal

leave requests in order to maintain Life/Safety minimums, does it also have authority to demand reasons for requests, compare and judge them?

In its presentation, the State simplified the case by candidly admitting that Subsection F4 overreaches Management's contractual rights. It consented to an award expunging the provision from the personal leave policy. The concession accomplished much to eliminate extraneous matters and pinpoint the question to be decided.

ADDITIONAL FACTS AND CONTENTIONS

The Union acceded to most of the Employer's arguments from the start. It admitted that maintaining Life/Safety minimums is a concomitant of Medicaid certification. Even without the Medicaid factor, the Union conceded that the Center should never be required to accept staffing levels so low as to jeopardize the safety of residents and employees. It made these concessions easily, because it does not view this dispute as one which requires balancing equities, needs, and rights. In its view, the case turns on the most uncomplicated contractual interpretation. The issue is not what the negotiators should or might have agreed to, it is what they actually agreed upon and what they adopted. Therefore, the focus of the Union's presentation was on bargaining history.

The first witness was the AFSCME/OCSEA Executive Director. He was the Union's chief negotiator in 1986. He pointed out that personal leave was not a "gift" from the State or a benefit for which the Bargaining Unit had to struggle. The allowance was already in place when negotiations started; and it had not been created as a special advantage. It had been carved out of sick leave. Previously, employees were entitled to fifteen days of sick leave annually. At some point prior to bargaining, the State unilaterally modified the sick-leave allowance to seven days, adding three days' personal leave and five days' disability leave. The change actually cut expenses. Although every employee would have three days' personal leave to take when and if s/he chose, it was highly unlikely that the State would have to fund disability leave to the extent that it previously paid for sick leave. In all probability, the move was designed to improve attendance and reduce costs.

Perceived abuses emerged shortly after the sick leave amendments took effect. Pre-authorized personal leave was a new concept, and some State agencies assumed that Supervision retained control of when and if it would be taken. The practice of denying personal leave applications became prevalent in many locations, although it was not indulged on a State-wide basis.

The new Public Employee Collective Bargaining Law brought the parties to the bargaining table in 1986 for their first Agreement. Each side had personal leave on its agenda; neither was entirely satisfied with the way the provision was working out. The issue was at impasse from the start and both bargaining teams struggled for a solution. The Employer's main concern was filling its staffing needs. It asked the Union for several clarifications, including a requirement for advance notice of at least forty-eight hours. Union negotiators were unmovable. They insisted that the leave-notice period should not be more than twenty-four hours and that granting timely application should never be discretionary.

As the parties reached closure, their disagreement was narrowed to the advance-notice issue. According to the Executive Director, Management had tacitly conceded that personal leave would be granted as a matter of right rather than discretion, and the only question remaining was how much lead time was necessary. At that juncture, the State's bargaining team caucused to review its staffing require-ments. Apparently, the State's negotiators conferred with agency heads and concluded that twenty-four hours would be sufficient to meet the staffing needs of most facilities. When they returned to the bargaining table, they granted everything the Union demanded -- non-discretionary personal leave for employees submitting applications a day or more ahead of time. The Union agreed that the State could reserve discretion to deny emergency personal leave requests submitted after the twenty-four-hour deadline.

The evidence on bargaining history, which was not refuted by the State, was the substance of the Union's case. The Union does not challenge Management's assertion that it needs guaranteed Life/ Safety minimums. It maintains, however, that the Arbitrator is not at liberty to supply the Center's needs by disregarding or implicitly amending Article 27. In the Union's judgment, the Article is too clear to be amenable to arbitral interpretation or manipulation. It says what it means, and its meaning must be applied. The Union concludes that the Arbitrator has no alternative but to sustain the grievance.

* * *

Although the Employer produced no evidence of bargaining intent, it does not admit that Article 27 is unambiguous. Instead, it relies upon a broadly accepted doctrine that arbitrators should avoid interpreting language in a manner which will lead to absurdly harsh results. This principle has been announced by scores of arbitrators in possibly hundreds of decisions. It was formulated by the pioneers of arbitration in some of the earliest published decisions, and continues to receive acknowledgment and approval today. Some of the best statements of the rule are as follows:

"Finally, it is the well settled rule that where one of two or more interpretations of an ambiguous contract will lead to harsh or unreasonable results, whereas an alternative interpretation is equally consistent and just as reasonable, the latter is entitled to preference. [M. Raphael, Yale & Towne, Mfg. Co., 5 LA 753, 757 (1946)].

* * *

And as in judicial interpretation, so is it a rule in arbitral construction that where the language of a contract is contradictory or ambiguous so that it is susceptible of two constructions, one of which would make it unreasonable and such as prudent labor negotiations would not be likely to enter into while another would do justice to both parties, the latter will be adopted. [H. Platt, Vickers, Inc., 15 LA 352, 355 (1950)].

* * *

A recognized rule of law frequently invoked by industrial arbitrators is that, when one interpretation of an ambiguous provision in a labor agreement would lead to inequitable or impractical results, while an alternative interpretation, equally consistent, would lead to reasonable results consonant with the realities and practicalities of the industrial relations world, the latter interpretation will generally be used. (C. Anrod, Marblehead Lime Co., 48 LA 310, 314 (1966)]."

The State urges that adoption of the Union's interpretation of Article 27 will immediately lead to harsh, untenable results. It will require MRDD to prioritize casual personal leave applications over those direct-care services which are necessary to save lives, protect against injury, and preserve Medicaid funding. The State calls attention to the fact that in the long run, sustaining the grievance could license actions by the Union which are not only absurd, but illegal. For example, suppose every employee of a facility asked for personal leave at the same time and thereby caused a walkout. Would such action be consistent with the contractual relationship between the parties? The Employer contends that it would be if the Arbitrator were to sanction unrestricted personal leaves.

The Employer argues that Article 27 and every other provision of the Agreement was intended to create a meaningful balance between rights and obligations. It is inconceivable to the Agency that either State or Union negotiators meant to create a privilege of employment which could erode the very foundations of governmental services and threaten the institutions as well as the jobs they support.

The Employer pleads for a reasonable interpretation of intent rather than slavish adherence to the wording of Article 27. If the Arbitrator approaches this dispute with judiciousness and reason, it is argued, he will recognize that he has to deny the grievance. Otherwise, he will bind the Agency to an obligation which portends disaster.

OPINION

The rule disfavoring interpretations which lead to harsh, absurd, or otherwise indefensible results has been researched in depth by the Arbitrator. Without exception, every pronouncement of the principle carefully circumscribes it to ambiguous language. If the parties intentionally negotiated something which could bring about untoward consequences, an arbitrator has no authority but to apply the language as it was meant to be applied. S/he cannot rescue a party from a bad bargain, improve the governing Collective Bargaining Agreement, or disregard any of its written provisions. This precept has been repeated time and again in arbitral opinions and judicial rulings. More to the point, it stands out as a clear restriction on arbitral jurisdiction in the Agreement between these parties. Article 25, Section 25.03 states in part:

The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/ she impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

Section 25.03 provides an unambiguous road map for deciding this case. The Arbitrator cannot add something to Article 27 which does not exist. The unchallenged testimony and evidence on bargaining intent proves that Management agreed to the personal leave provision with its eyes open -- fully recognizing the potential consequences. The Life/Safety staffing requirements were not novel. They did not come into existence after the Agreement. They were established in 1977, nine years before bargaining commenced. The Agency administered them on a day-to-day basis. The minimum-staffing concept was not lost or ignored through misuse. It was a conscious concern of the Employer before, during, and after collective bargaining.

There is no doubt in the Arbitrator's mind that the needs of MRDD facilities were fully explored by Management before Article 27 was approved. If unrestricted personal leave was truly disastrous, the Employer would not have relied upon an unstated implication to win its point. The impasse would not have been resolved unless and until the State achieved the discretion it seeks in this dispute.

The Employer's position recalls the time honored maxim that a party will not be permitted to gain something in arbitration which it lost at the bargaining table. The Agreement provides no supervisory discretion to deny personal leave requests submitted a day in advance, and the Arbitrator cannot create an extra-contractual Management Right. Therefore, the grievance will be sustained.

The Award will be limited to the facts presented. It should not be interpreted as approving a wildcat strike through personal leave applications. Such strikes are illegal and contrary to the Agreement. It is apparent beyond debate that the Bargaining Unit cannot accomplish something by indirection that it is prohibited from doing directly. No illegal work stoppage has occurred, and none is before the Arbitrator in this controversy. When and if Article 27 is used to support such action, there is no doubt that the State and any member of its panels of arbitrators will deal with that problem appropriately.

AWARD

The grievance is sustained.

The Gallipolis Developmental Center is directed to amend its Personal Leave Policy by expunging or redrafting the first paragraph of Section I, and the protested sections of Section IV. Section IV, Subsection F4 shall be expunged in its entirety.

The policy, if rewritten, shall not imply that Supervision has discretion to deny timely personal leave applications whether or not granting them will jeopardize Life/Safety staffing requirements.

The Arbitrator reserves jurisdiction over whether or not a rewritten policy conforms to the requirements of this Award. In the event the Union believes that such policy is inconsistent with the Award, it may invoke the Arbitrator's reserve jurisdiction by serving the Employer and the Arbitrator appropriate notice of such intent. This retained jurisdiction shall expire sixty days after the Agency publishes and distributes a rewritten policy unless invoked within the sixty days, or an extension is mutually agreed upon, or the Union demonstrates good and sufficient cause for an extension.

Decision Issued:
February 9, 1990

Jonathan Dworkin, Arbitrator