CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration Between:	*	
THE STATE OF OHIO Department of Public Safety State Highway Patrol	*	Grievance Number 87-1744
-and-	*	Virginia Fogt
THE FRATERNAL ORDER OF POLICE Ohio Labor Council, Inc. State Unit I	*	Decision Issued November 14, 1989

APPEARANCES

FOR THE STATE

Captain John M. Demaree	Patrol Advocate
Lieutenant D. L. Anderson	Personnel Officer
Samuel J. Goode	Benefits Administrator

FOR THE FOP

Paul Cox	Attorney for the FOP
Cathy Perry	Paralegal

ISSUE: Article 55: Claim that State was obligated to provide double family health coverage (two individual certificates) to both spousal employees.

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

SUMMARY OF GRIEVANCE;
THE ISSUE

The 1986-1988 Agreement between the State of Ohio and the Fraternal Order of Police (Ohio Labor Council, Inc.) required the Employer to provide employee health insurance and pay specified amounts of premium costs. Article 55 stated:

> The Employer shall provide health insurance to the employees of the bargaining unit in accordance with the procedures specified in 124.82 of the Ohio Revised Code. The Employer's contribution for all health plans offered by this section is set at the following rates: For single coverage under age seventy (70), eighty dollars and seventy cents ($80.70) for fiscal year 1988, eighty five dollars and fifty eight cents ($85.58) for fiscal year 1989. For family coverage under age seventy (70), one hundred ninety three dollars and fifty two cents ($193.52) for fiscal year 1988, two hundred and five dollars and twenty two cents ($205.22) for fiscal year 1989.

Grievant, an Ohio State Trooper and a member of the Bargaining Unit, applied for HMO family coverage under Article 55. Her application was turned down because her husband, a Highway Patrol Sergeant, already had family coverage under the State's Blue Cross/Blue Shield Plan. The rejection of Grievant's application was consistent with

regulations of the Ohio Department of Administrative Services. A Benefits Handbook, published by the Department and distributed to all State employees, set forth the following limitation in at least three separate sections:

> When husband and wife are both employed by the state, either may carry family coverage or both may carry single coverage, but both cannot carry family coverage either under Blue Cross/Blue Shield or an HMO/PPO.
>
> You may enroll for Individual or Family coverage. An Individual contract covers only you. A Family contract covers you and your dependents. [Benefits Handbook, 10.]

By declaring Grievant ineligible for independent family coverage, the Employer deprived her of a significant advantage. If each spouse had a family contract, one would have served as coinsurance for the other, absorbing the out-of-pocket expenses customarily incurred by beneficiaries of the Blue Cross/Blue Shield Plan.

The grievance, as modified in the Step Three review, was referred to arbitration as a "class action." It demanded that Grievant and all similarly situated members of the Bargaining Unit be granted the right to obtain their own family insurance plans regardof the fact that their spouses may also have family coverages.

The issue is whether or not Article 55 requires that the remedy be granted. Stated another way: Does Article 55 of the Agreement

confer special spousal rights to health-care coverages which supercede the rules of the Ohio Department of Administrative Services? In examining the issue, it is important to note that the contractual provision incorporates Ohio Revised Code §124.82. Presumably, the Department rules reflect legislative intent. However, the statute does not prohibit a bargaining unit of State employees from negotiating for broader benefits than granted non-unit and exempt employees.

BACKGROUND AND CONTENTIONS

On May 23, 1985, the Court of Appeals for Franklin County Ohio issued a decision in a case almost identical to this one. Capitol City Lodge No. 9 of the Fraternal Order of Police and nine female police officers whom it represented filed an action against the City of Columbus, Ohio on the issue of spousal insurance coverage. The City had refused to enroll the plaintiff officers in its Blue Cross/Blue Shield Plan because they were married and covered under their husbands' policies. They and their bargaining unit sought injunctive and monetary relief.

The Franklin County Court of Common Pleas ruled in favor of plaintiffs, and the City appealed. Its basic position, like the Employer's position in this case, was that the collective bargaining agreement and the City ordinances required only that employees be given coverage; there was no mandate that each be granted an indi-

vidual family certificate. Since plaintiffs were covered under their husbands' insurance, the City argued that its obligations had been fulfilled. The Appellate Court disagreed. Basing its decision on the City's wage-benefits ordinance, the collective bargaining agreement, State law, and the City's Blue Cross/Blue Shield policy, it determined that the City was required to grant every employee a family health-insurance certificate regardless of whether or not they were beneficiaries under their spouses' certificates.

The decision was premised mainly on Section A of the group contract which stated that every employee who was a sworn officer of the Division of Police was eligible for enrollment of himself and eligible members of his family. From this, the Court concluded:

> . . . in light of the specific language of the contract as set forth above, it appears that the only reasonable interpretation of the contract is that individual coverage is required for each eligible employee who requests it regardless of his or her marital status and the eligibility of his or her spouse. So long as the individual requesting enrollment fulfills the requirements of eligibility, as set forth in Schedule A, defendant is required to submit an application for that individual's enrollment under the contract in the desired form of coverage, either family or individual. Under the original group contract entered into in February 1979, Blue Cross and Blue Shield agreed to provide, or cause to be provided, to all enrolled eligible employees of the employer and their enrolled eligible family members, the health care benefits described in the attached certificates. As admitted in the pleadings by both parties, plaintiffs are sworn uniformed personnel of the Division of Police for the city of Columbus. Therefore, plaintiffs are eligible to enroll for benefits under the group

> contract including family coverage for each spouse in a married police couple, and defendant was under a duty to notify each eligible employee of his rights and submit an application on his behalf. Fraternal Order of Police vs Columbus, 24 Ohio App. 3d 157, 160 (1985). [Emphasis added.]

This appellate decision triggered this grievance. In fact, the decision was attached to the grievance as supporting rationale, and the Union contends that there is no justification for the award to be inconsistent with the judgment. Both cases rely on statute. Although the source of the Arbitrator's authority is defined by contract rather than law, the Union points out that the governing contractual provision incorporates the law by reference and makes it part of the Agreement. Article 55 states that insurance shall be provided in accordance with Ohio Revised Code §124.82. While that statute neither sanctions nor prohibits the remedy demanded by the Union, a connected legislative pronouncement is directly in point. Revised Code §3923.12(C)(2) speaks to the scope of health coverage in the public sector:

> A provision that the insurer will furnish to the policyholder, for delivery to each employee or member of the insured group, an individual certificate setting forth in summary form a statement of the essential features of the insurance coverage of such employee or member and to whom benefits thereunder are payable; if dependents or members of the immediate family of such employee or member are included in the family coverage, only one certificate need be issued for each family unit. [Emphasis added.]

On its face, the concluding language of §3923.12(C)(2) seems in conflict with the Union's position. It states that only one certificate need be issued when an employee is included in family coverage. However, the provision also states that each member of the insured group is entitled to a certificate of insurance. The question raised under §3923.12(C)(2) is whether Grievant became a "spouse" rather than an employee for the purposes of health coverage when she married an insured employee. The Union argues that she remained an employee regardless of her marital status and was lawfully entitled to her own family certificate. The argument echoes the analysis by the Court of Appeals:

> R.C. 3923.12 refers to the duty of the employer to deliver to <u>each</u> <u>employee</u> an individual certificate supplied by the insurer explaining the essential features of his insurance coverage. Duplication of the certificate and delivery to dependents or members of the employee's family are not required where they are included in the same coverage. However, R.C. 3923.12(C)(2) does not determine eligibility within the family unit, and each member of the family is not excluded from receiving his own certificate if he or she is also an employee of the policyholder and is entitled to separate coverage. Therefore, R.C. 3923.12(C)(2) does not preclude defendant from delivering certificates individually to plaintiffs and their spouses under the group contract. 24 Ohio App. 3d 160-161. [Emphasis by the Court.]

The Union's summation is uncomplicated and direct. Article 55 of the Agreement required the Employer to offer health insurance to each member of the Bargaining Unit. If there is any ambiguity in the contractual provision concerning the scope of the requirement, it is resolved by Ohio law. The law, as interpreted by the Court is clear; each employee is entitled to be a primary insured whether or not s/he happens to be married to another employee who is a primary insured. In the Union's view, the Arbitrator should not look beyond the stipulation that Grievant was an employee and a member of the Bargaining Unit. Those were the qualifications which caused her right to individual family coverage to vest, and her marital status was irrelevant to that right.

* * *

The Employer's position relies strongly on past practice and the mutual understandings which existed among the negotiators when they approved Article 55. The State had guaranteed health coverage to employees -- but not individual contracts -- for a substantial number of years before the Collective Bargaining Agreement was adopted. The regulations denying two family certificates for employees married to one another were in effect when the Agreement was being negotiated; everyone on the Union's bargaining team was aware of them.

The Employer concedes that neither Article 55 nor its statutory reference, Revised Code §124.82, expressly prohibits what the grievance seeks. By the same token, neither provision expressly requires the State to grant special privileges to employees married to employees. Therefore, according to the Employer, there is no defensible basis for an arbitrator to change the status quo. But there is a basis for preserving the past custom and practice -- Article 2 of the Agreement. Article 2 is a clear expression of mutual intent to import certain kinds of past practice into the Agreement. It states in pertinent part:

> ARTICLE 2 - EFFECT OF AGREEMENT - PAST PRACTICE
>
> . . .
>
> Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement and which are not specifically provided for or abridged by this Agreement will continue in effect under conditions upon which they had previously been granted throughout the life of this Agreement unless altered by mutual consent of the Employer and the Labor Council. [Emphasis added.]

The Employer maintains that this provision was not meant to be one-sided. It was designed to make both the State and the Bargaining Unit secure in the knowledge that previously established benefits would continue as before, without extra-contractual diminishment or accretion.

The Employer charges that the Union is now trying to improve a benefit through arbitration. The Agreement is not the source of the Union's claim -- a Court of Appeals decision is its basis. But the Court did not interpret the Agreement between the State and the FOP/OLC. It ruled on an altogether different contract between the City of Columbus and its bargaining unit. It did not have before it and did not consider the prohibition against "coordination of benefits" which formed the negotiations backdrop for Article 55. It did not interpret the bargaining intent which led to the Agreement governing this dispute.

The Employer's conclusions are summarized in its brief:

> The rules prohibiting both husband and wife from carrying family health coverage, as promulgated by the Department of Administrative Services, are long standing rules that were not abridged by the contract.
>
> Obviously there was no mutual agreement to alter these established rules and there is no contractual language that would negate this well established "past practice". For the Union to prevail in this case would place obligations upon the Employer not specifically required by the collective bargaining agreement, which would in itself be violative of the agreement.
>
> This is not a case where the grievant was denied health insurance coverage, nor is it a case where the Employer acted in an arbitrary, capricious or discriminatory manner. It is a case whereby the Union is attempting to gain through arbitration what they failed to gain during negotiations.
>
> The grievance must be denied. [Brief, 14.]

OPINION

The underlying issue concerns the derivation and extent of arbitral authority. As stated, the grievance grew out of a decision of the Court of Appeals for Franklin County. Arguably, the decision interpretted and crystallized the law of Ohio (or at least the law of Franklin County) relative to rights of employees to duplicate family health-insurance certificates. Frankly, the Arbitrator is unimpressed with both the decision and its supporting rationale. He would have to follow them if he were a common pleas judge in the county, but he is not a judge, and he lacks authority to apply the court ruling to this controversy. His jurisdiction stems solely from the Collective Bargaining Agreement and is restricted to interpreting the language in that Agreement. This definition of arbitral powers is most clearly set forth in Article 27, §27.07, Subsection 6, which states: "Only disputes involving the interpretation, application, or alleged violation of a provision of this Agreement shall be subject to arbitration."

Thus, the Arbitrator is not authorized to convert court decisions into contractual provisions. He is not authorized to amend, alter, or improve the Agreement. His sole function in this dispute

is to determine what the parties meant by the language of Article 55.

The Arbitrator agrees with the Employer's arguments and has little to add. When the Agreement was being negotiated, it is improbable that either party envisioned augmented health insurance for employees married to one another. Their mutual expectations were that no employee would be deprived of insurance coverage and that the State would treat Bargaining Unit members the same as all its other employees. The only possible difference and, according to the evidence, the only item placed on the bargaining table, was how much of the premium the State would pay. Nothing else was discussed. The Court of Appeals decision posed a new possibility, but it was not one that the parties anticipated or negotiated for. The Agreement was unchanged by the decision and the scope of the benefit in Article 55 was solidified by Article 2.

There is another reason why this grievance should be denied. In many cases, especially those involving discipline, the question of disparate treatment arises. The Union characteristically argues that the very existence of the Collective Bargaining Agreement and the Employer's recognition of its employees as a collective unit requires fairly equal treatment of all. This dispute demonstrates that the principle of equality cuts both ways. What the Union seeks in this grievance is disparate treatment -- a special advantage

based upon marital status (one hundred percent coverage while other employees would be subject to deductibles and co-pay obligations). The Agreement sanctions distinctions between employees based upon seniority and possibly other factors; but it makes no mention of marriage as a source of contractual privilege. It is the Arbitrator's belief that sustaining the grievance would create an illegitimate class of privileged employees and violate a fundamental precept of the contractual relationship.

The grievance will be denied. It is important however for the parties to understand that the Award which follows might not speak to every circumstance. The Union raised a hypothetical which could become a source of controversy. Grievant's husband was previously divorced and was responsible for providing health insurance for children of his former marriage. Grievant did not have similar reponsibilities, but what if she did? What if she too were required to insure her children of a former marriage. Her husband's family policy would not reach her children and she would be denied the right to coverage encompassing her health-care obligations. In such circumstance, would the State not have an obligation to provide two family coverages? Possibly it would. The Benefits Handbook defines "eligible dependents" as including unmarried children (with certain limitations). It also defines "children" as follows:

> The term "children" includes the employee's own or legally adopted children, any stepchild or foster

> child who depends upon the employee for support and who normally resides in the employee's household, children of divorced or separated parents when the children are not residing with the employee but required by law to be supported by the employee, children for whom the employee has been appointed legal guardian, or children attending an accredited school even though not residing at home as long as he or she meets the other dependency requirements. No person will be considered a dependent while in the armed forces. [Benefits Handbook, 197. Emphasis added.]

The Union's hypothetical is provocative, but it is not relevant in this dispute. Therefore, it will not be decided. The Award is intended to address only the grievance presented and its facts. Should the hypothetical mature into a real dispute between the parties, it will have to be resolved either in the grievance steps or in different arbitration proceedings.

AWARD

The grievance is denied. The Employer is required to provide health insurance to each member of the Bargaining Unit, but is not necessarily required to grant duplicate family certificates to spousal employees. This decision is intended to apply to Grievant and similarly situated members of the Bargaining Unit. It is not meant to resolve hypothetical fact situations which were not pertinent to the grievance.

Decision Issued:
November 14, 1989

Jonathan Dworkin, Arbitrator

ARBITRATION AWARD SUMMARY

OCB Award Number: 340

OCB Grievance Number: 87-1744 Virginia Fogt

Union: FOP

Department: OSHP

Arbitrator: Jonathan Dworkin

Management Advocate: Capt. John Demaree

Union Advocate: Paul Cox

Arbitration Date: 12-22-87

Decision Date: 11-14-89

Decision: Denied