

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 591

OCB GRIEVANCE NUMBER: 35-03-900103-0002-06-10

GRIEVANT NAME: NAGY, MARGARET ET AL

UNION: SCOPE/OEA

DEPARTMENT: YOUTH SERVICES

ARBITRATOR: DROTNING, JOHN

MANAGEMENT ADVOCATE: KITCHEN, LOUIS

2ND CHAIR: COE, ROGER

UNION ADVOCATE: STEVENS, HENRY L.

ARBITRATION DATE: APRIL 8, 1991

DECISION DATE: MAY 7, 1991

DECISION: DENIED

CONTRACT SECTIONS
AND/OR ISSUES:

DOES ART. 27, SECTION 27.07 A, REQUIRE THAT
THE AMOUNT OF ACCRUED, BUT UNUSED, PERSONAL
LEAVE AVAILALBE FOR USE EXCEED 40 HOURS AT ANY
ONE TIME?

HOLDING: EMPLOYER'S POSITION IS SUPPORTED BY 1) CONSISTENT
PAST PRACTICE AND 2) LACK OF EVIDENCE FROM THE
UNION SHOWING THAT NEGOTIATIONS OF THE CHANGES
RESULTED IN BEING ABLE TO CARRY FORWARD 40 HOURS &
STILL ACCRUE 32 MORE. IMPOSSIBLE TO CONCLUDE THAT
AN EMPLOYEE CAN MAINTAIN A BALANCE IN EXCESS OF 40
HOURS P/L.

ARB COST: \$987.14

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591

IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING
STATE OF OHIO

AND

STATE COUNCIL OF PROFESSIONAL EDUCATORS
OEA/NEA

ARBITRATION AWARD

Grievance: 35-03-900103-002-06-10
Arbitrator: John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on April 8, 1991 in the Office of Collective Bargaining, 65 E. State St., Columbus, Ohio. Appearing for the Union were: Mr. Henry L. Stevens (Labor Relations Consultant) and Ms. Carrie Smolik. Appearing for the Employer were: Mr. Louis Kitchen, Deneen Donough, Esq., Mr. Gene Brundige, Mr. Jerry Miller, and Mr. Roger A. Coe.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 4/8/91. The discussion and Award are based solely on the record described above.

II. ISSUE

Management put the issue as follows:

Does Article 27, Section 27.07 A, require that the amount of accrued, but unused personal leave, available for use, exceed forty (40) hours at any one time?

The Union asked:

Does the Employer violate the 1989-92 Agreement between the State Council of Professional Educators and the State of Ohio when they denied bargaining unit 10 members the opportunity to carry forward a maximum of forty (40) personal leave hours plus 32 accrual hours in the following year (1). If so, what shall be the appropriate remedy?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1 - #5.

The parties also submitted a series of stipulated facts as follows:

1. Grievant Margaret Nagy had 15.3 hours of personal leave to her credit on November 18, 1989.
2. Grievant Margaret Nagy received a block of personal leave in the amount of thirty-two (32) hours on December 2, 1989.
3. Grievant Margaret Nagy was credited with carrying forward eight (8) hours of personal leave and credited with a total of forty (40) hours on December 2, 1989.
4. Grievant Margaret Nagy was paid for 7.3 hours of personal leave at \$14.77 per hour for a total of \$107.82 on December 2, 1989.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. ARBITRABILITY

1. MANAGEMENT

Mr. Lou Kitchen testified that Article 27.07(A) states that an employee can:

...carry forward the balance of personal leave up to a maximum of forty (40) hours.

Kitchen went on to say that Employer Exhibit #1 which is the DAS document identified as Section 124.386 states in part that employees can:

Carry forward the balance. The maximum credit that shall be available to an employee at any one time is forty hours.

Kitchen also testified about Articles 1.04 which talks about legal references, 5.02(A) which defines a grievance as well as 6.04 which limits the Arbitrator in that he shall not add to, subtract from, or modify the Contract.

Mr. Kitchen went on to say that what is carried forward is that the maximum amount of hours available are regulated by the Contract.

Kitchen also testified that Joint Exhibit #4 identifies the grievance trail.

2. UNION

Mr. Henry Stevens, in responding to Mr. Kitchen's issue on arbitrability, argued that the issue was raised too late in the game. Stevens argued that the case is clear and he identified Section 27.07(A) and 27.02(3).

Stevens raised the question as to whether a person can carry forward forty hours and he went on to say that Article 27.02(3) states that an individual can continue to increase the hours carried forward. Stevens argues that one has to be able to accrue hours.

Stevens also argued that Section 124.386 of the Department of Administrative Services is superseded by the Collective Bargaining Agreement.

B. MERITS

1. UNION

a. TESTIMONY AND EVIDENCE

Ms. Carrie Smolik testified she worked for the Ohio School for the Deaf and had been Vice-President of SCOPE and is now President. She testified that she signed Joint Exhibit #1 and she knows the issue. Article 27, said Smolik, deals with personal leave.

Article 27.07(A) indicates that an individual has the option of carrying forward the balance of personal leave up to a maximum of forty hours. She went on to say that after the pay period on December 1st, the end of the year, one can carry forward the forty hours in the next year. She also talked about the ability to convert personal leave to sick leave and the cash benefits as noted in Sections 27.07(A)(B)and (C).

Smolik testified about Union Exhibit #1 which is a document showing that in Year 1, one might have forty hours and in Year 2, an additional thirty-two for a total of seventy-two hours and then in Year 3, one could have again, 40 hours of personal leave. She testified that nothing in the Contract prohibits the above.

The Union cross examined Management witnesses. Mr. Gene Brundige testified on cross that the Collective Bargaining Agreement talks about accruals.

Brundige testified that Employer Exhibit #1, the personal leave language from the DAS, states that one can have no more than 40 hours.

Brundige also testified that Joint Exhibit #5, the Contract between the State and 1199 indicates in section 12.06 that personal leave may accrue up to 48 hours. That limit, however, said Brundige, is not contained in the SCOPE Contract.

Mr. Jerry Miller on cross testified that item 5 in Employer Exhibit #9 does not address 40 hours. He went on to say that the SCOPE Agreement allows one to accrue 40 hours and the 1199 agreement says one can accrue up to 48 hours.

b. ARGUMENT

The Union asserts that the Collective Bargaining language is clear as a bell and the intent of the parties is also clear. The Union asserts that the testimony of the witnesses is not that divisive.

Personal leave in the Contract is a negotiated benefit and there is no maximum on accrual. The Union argues that it is not trying to get something that it did not have, because it already had it. The Union stated that it can carry forward forty hours at year's end and, in addition, also can continue to accrue 1.23 hours every two weeks. That is the Union's option. Article 27.07(A)(B) and (C) indicates that an individual can choose any one of those options. The Union asserts that if an individual accrues forty hours and then got an additional thirty-two, there would be a total of seventy-two. It is the Union's option to

choose either A, B, or C and, therefore, the Union argues that its position should be sustained.

2. EMPLOYER

a. TESTIMONY AND EVIDENCE

Mr. Gene Brundige testified that he was aware of the two contracts, Joint Exhibit #1, the 1989-92 Contract, and Joint Exhibit #3, the 1986-89 Contract. Brundige testified that he participated in the second agreement for the SCOPE Contract and he went on to say that the State viewed Article 27 as an economic item.

Brundige went on to say that under the old Contract, the 1986-89 Agreement, employees were credited with 24 hours of personal leave each year and in the new Contract for 1989-92, the number increased to 32 hours.

Article 27.07 of the prior agreement (Joint Exhibit #3) stated that one could carry forward unused personal leave to a maximum of 16 hours and under the same language in the 1989-92 Contract, one could carry forward the balance of personal leave up to a maximum of 40 hours.

Brundige testified that if one carried 40 hours, one could not add an additional 32 hours to that amount or one would lose the 40 hours. Brundige went on to say that, for example, if an employee used two hours of personal leave in the following year, one could get 1.23 hours.

Brundige testified that Article 4117.10 is part of the State Law.

On redirect, Brundige testified that 1199 specified a modified maximum at 48 hours and that conflicts with Employer Exhibit #1, but the Collective Bargaining Contract supersedes Employer Exhibit #1. However, the point, said Brundige, is that no such language exists in the SCOPE Agreement. He went on to say that an employee may carry over 40 or 48, but once they reach that, they cannot get more. He went on to say that if one goes over 40 hours, one does not lose personal leave but an individual would have to get a payout. Thus, if an employee had earned more than 40 hours, he would receive a payout, but he could not accrue personal leave over and above the 40 hours.

Mr. Jerry Miller testified that he worked with Management in contract negotiations and he said page 3 of Employer Exhibit #5 was to show changes in the payroll as a result of House Bill #694. He went on to say that page 2 of Employer Exhibit #6 shows personal leave credited with 24 hours. He pointed out that if one had 64 hours, 24 of those hours would have to be paid back in cash so that one gets back to 40 hours of personal leave. He went on to say that he has sent out letters each year restating the above.

Employer Exhibit #7 is the 1986 payroll letter and Employer Exhibit #8 also for 1986 shows no real changes, said Miller, and that was not altered by the first Collective Bargaining Agreement with OEA.

Employer Exhibit #9, item 5 on page 2 allowed employees to accrue personal leave each pay period up to 1.23 hours every two weeks, explained Miller. Prior to the Agreement, said Miller, the accrual of personal leave was only on a one-time shot on December 1st for full-time employees and it was pro-rated for part-time employees.

Miller said that maximum amount of leave stayed at 40 hours. Management did not cross examine Carrie Smolik.

2. ARGUMENT

Initially Management reiterates that the issue is not arbitrable because Section 4117.10A of the Collective Bargaining Act states that if there is no specification about a matter of maximum credit, the matter is regulated by law and beyond the scope of arbitration and, therefore, not arbitrable.

The Employer asserts that the rate of accrual and the amount carried forward do not override the amount of leave available to an employee at any one time and it cites Employer Exhibit #1. The Employer limited the use and/or additions above 40 hours just as in the 1199 Contract.

The Employer goes on to say that the fundamental issue is if an individual carries forward personal leave up to a maximum of 40 hours, can that employee continue to accrue personal leave during the following year? If such were possible, notes the Employer, there would be an additional 72 hours accrued for use during such year.

The Employer argues that although the Union claims there is nothing in the Contract which limits that number, clearly the parties are subject to the limitation set forth in Section 124.386 of the Ohio Revised Code which points out that the maximum credit is only 40 hours.

The State stipulates that an employee may carry forward up to 40 hours of personal leave as requested by the grievance. However, the Employer goes on to say that one cannot add to those 40 hours and any new accruals mean that the employee shall be paid off.

The Employer points out that Article 27.07 of both the 1986-89 and the 1989-92 Contracts changed language to go from what was formerly called "years end" to "December 1st" as the date for determining unused personal leave balances. In addition, the language also indicated that subsection A of 27.07 of the current Agreement increased the balance of personal leave from 16 to 40 hours.

The State argues that it had consistently applied and administered personal leave from 1981 to the present and the idea of the 40 hour availability limit which was identified in Section 124.386 of ORC means that there has been no changes.

For these reasons, the Employer argues that the employees in question are attempting to gain through arbitration what they did not gain in bargaining.

V. DISCUSSION AND AWARD

The Union's claim that the question of arbitrability was raised after the fact is persuasive. Furthermore, Management's argument that the ORC mandates that the maximum credit available to an employee is 40 hours is not the basis to find that the grievance is not arbitrable. The language of 4117.10 states that if there is no agreement or there is no specification about a matter, then the Management and the Union are subject to State or Local laws. However, in this case the Contract provides specification about personal leave accrual and carry forward and a grievance based on this language is arbitrable.

The parties did not agree on the question on merits, but essentially Management asks whether Article 27.07(A) allows for personal leave to accrue over and above 40 hours whereas the Union asks whether the Contract was violated when employees were not allowed to carry forward 40 personal leave hours and also accrue an additional 32 hours of personal leave in the subsequent year.

The two pertinent sections of Article 27 are as follows:

27.02 - Personal Leave Accrual

1. Each full-time employee shall be credited with thirty-two (32) hours of personal leave on the pay period which includes December 1, 1989.
2. Each person who receives a full-time appointment subsequent to December 1, 1989 shall be credited with thirty-two (32) hours of personal leave on a prorated basis.
3. Beginning with the pay period which includes

December 1, 1990, all employees shall accrue personal leave at the rate of one and twenty-three hundredths (1.23) hours for each eighty (80) hours in active pay status, excluding overtime hours, not to exceed a total of thirty-two (32) hours accrued in one year.

27.07 - Conversion or Carry Forward of Personal Leave at Year's End

Personal leave not used prior to the pay period which includes December 1, may be carried forward or paid at the employee's option.

An employee shall have, pursuant to the following provisions, the option to:

- A. Carry forward the balance of personal leave up to a maximum of forty (40) hours.
- B. Convert the balance of personal leave to accumulated sick leave;
- C. Receive a cash benefit conversion for the unused balance of personal leave. The cash conversion shall equal one (1) hour at the employee's base rate of pay for every one (1) hour of unused credit that is converted.

An employee eligible to receive a cash conversion of accrued personal leave at year's end must indicate his/her desire to convert any personal leave no later than the end of the pay period that includes the first day of November. The Director of each department shall be responsible for reporting the conversion requests to the Department of Administrative Services.

The Employer argues that the maximum hours to accrue for personal leave is 40 and that if one, under 27.02(3), accrues more personal leave, those hours must be paid off either in sick leave or cash as noted under 27.07 (B) and (C). The Employer claims that the maximum credit available to an employee at any one time is 40 hours as noted in section 124.386 of the Ohio Revised Code.

The essential Union argument is that 27.02(3) states that employees shall accrue personal leave at the rate of 1.23 hours for each 80 hours of active pay to reach 32 hours per year. Thus, it argues that if one has already developed a bank of personal leave of up to 40 hours, the employee can then accrue an additional 32 during the following year for a total of 72 hours. The Union asserts that Article 27.02(3) overrides the Employer's position that 40 hours is the maximum with any additional hours being paid off.

As far back as 1981, the Employer's implementation of personal leave (see Employer Exhibits #5 and #6) was based on ORC requirements which stated:

124.386 Personal leave for state employees

(A) ... credited with twenty-four hours of personal leave each year....

(D) The director of administrative services shall allow employee to elect one of the following options with respect to the unused balance of personal leave:

(1) Carry forward the balance. The maximum credit that shall be available to an employee at any one time is forty hours.

The initial 1986-89 Contract between the Employer and SCOPE (see Joint Exhibit #3) adopted Contract language which reflected the then current practice in regard to personal leave. During the base pay period, employees were given options as to the unused balance at the end of one period and were credited with 24 hours. 27.07 (A) of the 1986-89 Contract allowed an employee to:

Carry forward the balance of personal leave up to a maximum of sixteen (16) hours.

Limiting the carry-over of unused personal leave hours to 16 hours when the December base pay period occurred meant that when added to the annual credit of 24 hours, the maximum credit available to an employee at any one time would be 40 hours which conformed to 124.386 and the Employer's past practice.

Employer Exhibits #7 and #8 dated in 1986, soon after the bargaining law went into effect, maintained that "Personal Leave balance may be carried forward except where it exceeds forty hours" and that "Personal leave balances in excess of the forty hours maximum accrual by law will be paid without request."

In effect, the contractual language of Joint Exhibit #3 made it impossible for a bargaining unit 10 employee to accumulate more than 40 hours and thus, contained an unexpressed, built-in limit of 40 hours.

The current Collective Bargaining Agreement for 1989-92 (see Joint Exhibit #1) incorporated changes in the Personal Leave provisions from the 1986-89 Agreement and the question is whether these changes allow employees to accumulate more than 40 hours in their personal leave "bank" so that they would have more than 40 hours of personal leave available at any one time?

The Contract increased the personal leave hours an employee receives each year from 24 to 32 hours. It also incorporated a major change in the crediting of these personal leave hours from a lump-sum, pre-earn basis to an accrual, as earned basis beginning with the pay period which includes December 1, 1990 [see 27.02(3)]. Section 27.07 regarding Conversion or Carry Forward of Personal Leave at Year's End was also changed from a

maximum of sixteen (16) hours in the 1986-89 Agreement to forty (40) hours.

The stipulated facts indicated that for December 1989, Nagy had 15.3 hours of unused personal leave hours; 8 were credited to her "bank" along with the 32 hours credited as a lump sum for December 1989 through December 1990 for a total of 40 hours available, and 7.3 hours were paid off in cash. Nagy grieved in December 1989 and apparently what she is claiming is that Article 27.07(A) of the new 1989-92 Contract allows an unused balance of up to 40 hours to be carried over and her entire 15.3 unused balance should be added to the 32 for a total of 47.3 hours in her bank. Furthermore, the Union (see Union Exhibit #1) is claiming that for December 1990, an employee could carry over a balance of 40 hours and then accrue increments of 1.23 hours as earned per Article 27.02(3) which would mean that if no hours were used, an employee accumulates 72 hours as of December 1991, 40 of which could then be carried forward for 1992 and 32 of which would be paid off either as sick leave or cash.

If the negotiated personal leave benefit were simply increased from 24 to 32 hours with no concurrent change in the method of crediting personal leave hours from an annual lump sum amount to periodic increments of 1.23 hours, maintaining the 40 hour ceiling on available hours would require changing 27.07(A) to allow a carry over of only eight (8) unused hours rather than sixteen (16) hours in the previous contract. Whereas the 16 hours clearly referred to the unused personal leave balance at

the end of one annual period prior to adding the new annual credit, it is reasonable that the change to 40 hours does not reflect the amount of unused hours to be carried over but a maximum accumulated balance consisting of both hours carried over and hours accrued during the year. The change in 27.07 (A) from 16 hours to 40 hours must be viewed as a response to changing the method of crediting personal leave hours and not related to the annual amount of hours.

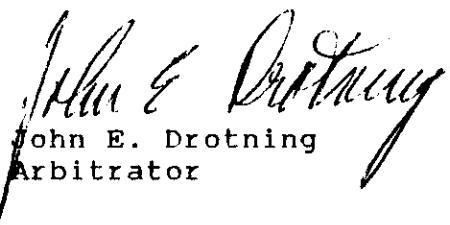
The language in the 1199 contract, which is based on the accrual method of crediting, precisely states that the "maximum accrual of personal leave shall be forty-eight (48) hours". In comparison, the SCOPE Contract does not specifically refer to a "maximum accrual" of forty (40) hours. It maintained language appropriate when using the annual lump sum crediting while the change in the maximum hours is reflective of the incremental accrual method. However, that the Contract does not specifically state that the 40 hours refers to the maximum number of hours that can be accrued before a payout is not the basis to conclude that the Union's interpretation is accurate. The Employer has consistently maintained a maximum balance of 40 hours for SCOPE employees and whereas 1199's maximum accrual is 48 hours, once it is reached, the excess is paid out either as sick leave or cash.

SCOPE language failed to specify that 40 was the maximum amount to be accrued and the language might support the Union interpretation if there were no consideration of past practice and intent. However, the Employer argues that the intent of

27.07(A) was to maintain the maximum number of hours at the employee's disposal at any one time at 40 hours and any hours in excess are paid off. The Union provided no testimony or evidence indicating that the parties viewed inserting "40 hours" in Article 27.07(A) as reflecting anything other than past practice or ORC 128.386. The Union did not show that there were any proposal or discussions during negotiations of an effective 72 hour maximum accrual.

The Employer's position is supported by: 1) its consistent past practice in regard to personal leave implementation; 2) the accrual method of the 1199 contract which has a maximum amount that can be accrued with any excess being paid off; and, 3) the lack of evidence showing that negotiations of the changes in 27.02 in conjunction with the change in 27.07 were considered in a unified fashion to clearly define that the personal leave balance during the year could exceed 40 hours. Thus, it is impossible to conclude that the language "Carry forward the balance of personal leave up to a maximum of forty (40) hours" means that under the accrual method of crediting, an employee can carry over as much as 40 hours and also add increments of 1.23 hours as earned to maintain a balance in excess of 40 hours.

The grievance is denied.


John E. Drotning
Arbitrator

May 7, 1991