

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 745

OCB GRIEVANCE NUMBER: 15-03-890405-0046-04-01

GRIEVANT NAME: HEYMAN, WILLIAM

UNION: FOP1

DEPARTMENT: HIGHWAY PATROL

ARBITRATOR: BITTEL, PATRICIA

MANAGEMENT ADVOCATE: CORBIN, RICHARD

2ND CHAIR: THORNTON, ROBERT

UNION ADVOCATE: CREMEANS, KAY

ARBITRATION DATE: FEBRUARY 27, 1992

DECISION DATE: MARCH 27, 1992

DECISION: GRANTED

CONTRACT SECTIONS

AND/OR ISSUES: 47.10 - GRIEVANT WAS INSTRUCTED TO REPAY ALL MONIES DISTRIBUTED TO HIM UNDER HIS DISABILITY CLAIM WHEN WORKER'S COMP WAS SUBSEQUENTLY GRANTED, INCLUDING PAYMENTS FOR HEALTH COVERAGE.

HOLDING: GRIEVANT'S CLAIM WAS GRANTED THEREFORE, WAS COVERED BY THE GENERAL RULE THAT THE EMPLOYER WILL PAY HIS HEALTH INSURANCE DURING THE PROCESSING AND RECEIPT OF HIS DISABILITY LEAVE BENEFITS.

COST: \$635.51

March 27, 1992

In the Matter of Arbitration
between
Fraternal Order of Police
and
Ohio State Highway Patrol

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)15-03-
)890405-
)046-04-01
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) #745
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APPEARANCES

For the Employer:

Richard G. Corbin
Robert Thornton
Anne Arena
Nan Neff

Lieutenant - Advocate
OCB - 2nd Chair
OSHP
DAS-State Witness

For the FOP:

Kay Cremeans
Ed Baker
William M. Heyman

General Counsel
FOP/PLC
Trooper

Arbitrator:

Patricia Thomas Bittel

BACKGROUND

This case was heard on Feb. 27, 1992 at the Office of Collective Bargaining in Columbus, Ohio before permanent Arbitrator Patricia Thomas Bittel, mutually selected by the parties in accordance with Article 20.07 of the collective bargaining Agreement.

Grievant is a trooper with the Ohio State Highway Patrol. On approximately October 3, 1987 his seat belt caught on his gun holster while he was exiting his vehicle, causing him to injure his back. He subsequently applied for both disability leave and Worker's Compensation, and signed an agreement which states as follows in pertinent part:

"... [E]mployee promises to pay directly to the Disability Leave Benefit Program all monies advanced by the Disability Program for the same period of disability for which the employee received weekly payments from the Bureau of Worker's Compensation."

Grievant's disability leave was approved and he received payments from October 20 to December 16 which included the Employer's share of his health insurance premiums. When Worker's Compensation was subsequently granted, the Employer required that he repay the full amount of all monies distributed to him under his disability claim, including payments for health coverage.

Grievant repaid these amounts but filed a grievance alleging the required repayment was in violation of Article 47.10(3) of the collective bargaining Agreement. This provision states as follows in pertinent part:

"47.10 Payment of Disability Leave Benefits

3) Payment of Insurance Premiums

During the time an employee is in a no pay status while his or her claim for disability leave benefits is being processed and during the period that the employee is receiving disability leave benefits, the Employer, and the employee's share of the health, life and other insurance benefits will be

paid by the Employer. * * * If an employee's claim for disability leave benefits is subsequently denied and the employee had been in a no pay status while his or her claim was being processed, then it is the employee's responsibility to reimburse the Employer the insurance premiums paid on his or her behalf."

The parties also cited two other provisions:

"47.08 Conditions Precluding Receipt of Disability Leave Benefits

Disability Leave Benefits are not payable for any disability caused by or resulting from:

1) Any injury or illness received in the course of and arising out of any employment covered by any Worker's Compensation or federal compensation plan, unless the employee chooses to receive disability leave instead of Worker's Compensation benefits.

a) In the case of any injury or illness which may be covered by the Bureau of Worker's Compensation, an employee may receive up to one hundred and twenty (120) days of disability leave benefits in lieu of Worker's Compensation benefits. To be eligible for such a payment, an employee must simultaneously file a claim for Worker's Compensation lost time wages and a claim for disability leave benefits with the Superintendent. * * * Disability leave benefits may then be paid for a period up to one hundred and twenty (120) days in lieu of Worker's Compensation benefits."

"ARTICLE 55 - GROUP HEALTH INSURANCE

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 grievance was fully processed culminating in the instant arbitration proceeding. There was no objection to the arbitrability of the case. The parties stipulated to the issue before the Arbitrator as follows:

"Did the Employer violate Article 47, Section 47.10 of the collective bargaining agreement when it required the Grievant to reimburse the disability fund the employer and employee share of health care insurance (\$414.86) during the period from October 20, through December 16, 1987? If so, what shall the remedy be?"

EVIDENCE PRESENTED

By the FOP

Grievant testified his injury occurred on approximately October 3, 1987. He said there a waiting period before his disability benefits began on October 20. He asserted he never elected to take Worker's Compensation, but filed for it only because this was required. He said after he had been receiving disability benefits he then received a check from Worker's Compensation. He explained he was asked to fully repay his disability benefits and did so.

Grievant said he understood he could not be paid twice but contended he was never told he would have to repay the insurance benefits he had received while on disability leave. He claimed he did not agree to repay insurance premiums and asserted it was of no benefit for him to be under Worker's Compensation.

By the Employer

Nan Neff, Administrator of Disability Benefits for the Department of Administrative Services, testified Grievant received 70% of his wages and insurance benefits, paid by the State from the disability fund. She asserted the agreement Grievant signed obliged him to pay back "all monies" distributed from the disability fund upon receipt of Worker's Compensation. She identified this agreement as a form agreement signed by all employees filing for disability benefits.

She referenced an internal office memorandum which specified that under the parties' collective bargaining Agreement there is no provision for the State to pay health insurance for employees on Worker's Compensation. She explained other collective bargaining units of the State do in fact require health insurance to be paid or partially paid while an employee is on Worker's Compensation. According to Neff, collection of health insurance advancements has been a practice since 1983.

ARGUMENTS OF THE PARTIES

By the FOP

The FOP asserts the language of Article 47.10 is clear in requiring the Employer to pay an employee's share of insurance benefits while that employee's claim for disability leave benefits is being processed or while the employee is receiving disability leave benefits. It points out there is only one exception: where the employee's claim for disability leave benefits is subsequently denied. In that event and only in that event does the Agreement require the employee to reimburse the Employer, argues the FOP.

The language is specific and clear in the FOP's view. It maintains Article 44.01 1(a) is extremely telling in this case. It interprets the words "in lieu of" to evidence the parties' intent that an employee not be required to reimburse for insurance benefits. It points out no provision of the collective bargaining Agreement mentions "advancement" or "reimbursement".

In the FOP's view, the form agreement signed by Grievant is void because it directly conflicts with the requisites of the collective bargaining Agreement. It argues this form agreement is ineffective as a waiver of those rights.

The FOP discounts Management's attempt to compare the FOP Agreement with other collective bargaining agreements with the State. It maintains the FOP believed at the time of negotiation that it had procured insurance coverage for employees on Worker's Compensation. It distinguishes the FOP Agreement from the agreements of other bargaining units because others incorporated language from Ohio Administrative Code 123:1-33-14 by reference. Since this statute makes no provision for insurance while an employee is on Worker's Compensation, it was necessary for the parties to spell out this benefit in their collective bargaining Agreements, explains the FOP.

By contrast, it notes the FOP Agreement does not reference 123:1-33-14 but rather adopts large portions of its language with a few significant changes. A change of language from "advancement" to "in lieu of" is significant, it maintains, particularly in view of the fact that the paragraph requiring reimbursement was intentionally left out of the FOP Agreement. This paragraph from OAC 121:1-33-14 states as follows:

"All disability leave benefits received from the employee as an advancement, must be reimbursed by the employee to the disability leave benefits program if the employee has been awarded weekly wage payments by the Bureau of Worker's Compensation for the same time period for which the advancement was made."

Because this language was intentionally left out of the FOP Agreement, the FOP claims the intent of the parties was clearly to dispense with a reimbursement requirement.

By the Employer

The Employer maintains the language in the FOP Agreement was taken from an FOP proposal. It claims the burden is therefore on the FOP to make the benefits derived from its proposal clear. In its view there was no mutual intent to have the State assume the health insurance benefits for an employee on Worker's Compensation. Rather, it claims, this was the FOP's idea, not shared by both parties. It asserts it is up to the proposing party to make it clear what their words mean.

As to the form agreement, the Employer maintains this was signed before anyone knew whether the Worker's Compensation claim would be approved. There was no grievance filed over the form agreement, maintains the Employer, and nothing in the collective bargaining Agreement requires payment of insurance while an employee is on Worker's Compensation.

Referencing Article 47.08(1) (which says disability leave benefits are not payable "unless the employee chooses to receive disability leave instead of Worker's

Compensation benefits"), the Employer maintains this is the choice Grievant made. It asserts the FOP is trying to obtain in arbitration what it has failed to obtain through contract negotiations. It points out the FOP has raised this very issue in current negotiations, and contends the attempt to negotiate the issue constitutes an acknowledgment that the Agreement does not confer this benefit.

DISCUSSION

Article 55

The language of Article 55 regarding group health insurance is mandatory. It requires the Employer to provide health insurance to employees of the bargaining unit. It makes no exceptions; the only exceptions to this provision are carved out in other provisions of the Agreement.

Article 47.08

This is a general provision addressing "Conditions Precluding Receipt of Disability Leave Benefits". It specifies that an employee cannot receive disability leave benefits for a disability covered by Worker's Compensation unless the employee chooses them over Worker's Compensation. It then states the employee may receive 120 days of disability leave benefits "in lieu of" Worker's Compensation.

The FOP's argument about the parties' adaptation of OAC 123:1-33-14 is well-taken. A comparison of the statutory language with the terms of Article 47 does indeed indicate direct adoption of language from the statute with some specific changes, including elimination of the term "advancement" and adoption of the term "in lieu of".

If disability leave were an "advancement" of Worker's Compensation, then it would be clear that insurance premiums, not being a benefit of Worker's Compensation, would not be accorded to the employee. Elimination of the term "advancement" implies that disability leave payments are not simply advance or early

payments of Worker's Compensation benefits. However, the parties utterly failed to delineate any difference between the two. The choice referred to in Article 47.08 does not have to be a choice among equals. The term "in lieu of" means "in place of" and does not necessarily imply either equivalency or sameness. Article 47.08 therefore implies that disability benefits are distinguishable from Worker's Compensation benefits, but does not explain how.

Article 47.10

Article 41.10 speaks to payment of disability leave benefits, and subsection three specifically addresses "payment of insurance premiums". It establishes a general rule that during the time an employee is no pay status pending disability leave benefits or is receiving disability leave benefits, the Employer will undertake to pay that employee's health insurance benefits.

Under this general rule Grievant would receive payment for his health insurance benefits while disability leave benefits were being processed and during the time he received disability leave benefits prior to receipt of his Worker's Compensation check. Subsection three makes only one exception to this general rule: where the employee's claim for disability leave benefits is subsequently denied. In this event the employee is specifically required to reimburse the Employer for the insurance premium's paid on his or her behalf. This repayment obligation is clearly spelled out. It is narrowly carved to apply only to the employee whose disability leave benefit claim was denied.

Grievant does not fit into this exception because his claim was granted. He therefore was covered by the general rule that the Employer will pay his health insurance during the processing and receipt of his disability leave benefits.

The responsibility of the Arbitrator is to divine the mutual intent of the parties as accurately as possible. There was no evidence in this case of a relevant course of dealing or past practice between the parties. While there was some allusion to a

practice since 1983 of requiring repayment of insurance premiums, no member of the bargaining unit was identified on the record as having been required to repay insurance premiums with the knowledge of the FOP. There is therefore no evidence of course of dealing or past practice which can serve to assist the Arbitrator in this case.

While the Employer cited a number of other collective bargaining agreements with the State, there was no testimony that the language of these agreements was available to or referred to by the parties during negotiations. The fact that the FOP submitted a proposal at negotiations addressing this same question is simply an effort to resolve future questions of interpretation by mutual agreement rather than through arbitration. Bringing a dispute to the bargaining table for negotiation is not a waiver of pre-existing contract rights.

An agreement is to be construed as a whole, giving effect to all clauses and words whenever possible. Article 47.08, by its title and substance, addresses disability benefits generally and is not focused on the question of insurance premiums. The fact that an employee may choose between Worker's Compensation and disability benefits does not specify whether insurance premiums are forfeited by that choice.

By contrast, Article 47.10(3) is specifically focused on the issue of insurance premiums and is the section of the Agreement where the parties pointedly addressed this very question. Because they broached the issue of insurance premiums with the greatest particularity in Article 47.10(3), this provision dominates over more general provisions.

The parties carved out only one exception to the general 'Employer pays' rule, evidencing an intent that there be only one exception to this rule. The expression of one single and narrowly defined exception to the general requirement that the Employer pay insurance premiums constitutes the exclusion of other exceptions. This interpretation is fully consistent with the language of Article 47.08 and operates to construe the two provisions together, avoiding creation of conflict.

While the Employer's argument that the provision should be construed against the drafter is valid, this rule of interpretation is only to be used as a last resort when a satisfactory interpretation cannot be reached by any other rule of construction (Elkouri & Elkouri, *How Arbitration Works*, pg. 362). The reason for avoiding this rule of construction is to promote a sharing of responsibility by the parties in conforming their words to their intent. Given that an appropriate interpretation of the collective bargaining Agreement can be reached without reference to the rule of construction against the drafter, this argument must therefore fall by the wayside.

AWARD

The grievance is granted. The Employer violated Article 47.10 by requiring Grievant to repay health insurance premiums received as part of his disability leave benefits. The Employer shall repay Grievant in the amount of \$414.86.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Patricia Thomas Bittel".

Patricia Thomas Bittel,

Arbitrator

Dated: March 27, 1992