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In the Matter of Arbitration	*	Before: Harry Graham
Between	*	Case Numbers:
Ohio Civil Service Employees Association/AFSCME Local 11	*	07-00-910717-0128-01-07 Randolph Burley
and	*	15-03-910717-0068-01-07 Pamela Sullivan
The State of Ohio, Departments of Commerce, Highway Safety, Taxation, Transportation and the Bureau of Workers' Compensation	*	30-01-910702-0272-01-09 Shirley Williams
	*	34-04-901231-0176-01-09 Gracie Flowers

Appearances: For OCSEA/AFSCME Local 11:

Donald Conley
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For The State of Ohio:

Robert Thornton
Office of Collective Bargaining
106 North High St., 6th & 7th Floors
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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on October 30, 1992 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of testimony and oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the Ohio Departments of Commerce, Highway Safety,

Taxation, Transportation and the Bureau of Workers' Compensation violate the terms of Article 30, Section 30.05 of the Collective Bargaining Agreement by denying to the Grievants witness duty leave as described by Section 30.05? If so, what shall be the remedy?

Background: This is a very significant proceeding for the parties. As will become obvious the outcome will have ramifications throughout the State. Notwithstanding that observation, the facts that prompted these grievances are simple and largely similar. Each of the Grievants at some time was involved in legal action. Each was subpoenaed (using the concept broadly to include summons or citation) to appear in a legal tribunal. When their presence was demanded it was in disputes to which they were a party eg. a plaintiff, defendant or complaining witness, or they were involved in disputes concerning a juvenile wherein they were the parent or guardian of that juvenile. In due course each of the Grievants applied for Witness Duty Leave under Section 30.05 of the Agreement. In each instance, that leave was denied by the Employer and the Grievants were instructed to utilize some other form of leave in order to secure pay for their time off work. Leaves that might have been used included vacation or personal leave. The Grievants could also have elected to use approved unpaid leave of absence.

The Grievants believed that the denial of Witness Duty Leave constituted a violation of Section 30.05 of the Agreement. In due course grievances protesting the denial of

Witness Duty Leave were filed. They were processed through the procedure of the parties without resolution and the parties agree that they are properly before the Arbitrator for determination on their merits.

Position of the Union: The Union points to the language of the Agreement in Section 30.05 and asserts that it clearly, unreservedly and unambiguously supports its position in this dispute. The language of 30.05 provides that:

> Employees subpoenaed to appear before any court, commission, board or other legally constituted body authorized by law to compel the attendance of witnesses shall be granted leave with pay. Second or third shift employees shall be permitted an equivalent amount of time off from scheduled work on their preceding or succeeding shift for such appearance.

This language is mandatory in nature. It includes the word "shall." In no way is the Employer permitted to deny leave to any employee who is in receipt of a subpoena.

The Union also points out that when there is clear, unambiguous language in an Agreement arbitrators do not hesitate to enforce it. In this situation there is but one reasonable interpretation to place upon the language in 30.05; that urged upon the Arbitrator by the Union. As that is the case, it seeks an award of witness leave for each of the Grievants.

Position of the Employer: The State does not dispute the fact that the language of Section 30.05 is clear. Were this dispute to come before an arbitrator without any preceding

history the Employer acknowledges that the Union would prevail. There is, however, a history of negotiations over this particular issue which must be considered when reaching a determination of this dispute according to the State. When that is done, it insists that it has the authority to deny witness leave in certain circumstances.

As the Employer relates the record of negotiations the parties came to negotiate witness leave when their initial agreement was negotiated in 1986. It was not a particularly contentious issue between them. The Union was concerned that the State not take away from employees any benefits they enjoyed with respect to witness leave. The State came to agree with the Union proposal on this issue. In 1986 witness leave benefits were provided to employees through the Ohio Administrative Code, Section 123:1-34-03. When discussion occurred across the table in 1986 on this issue the Chief Spokesmen for the parties, Russell Murray for the Union and Eugene Brundige for the State, agreed that the provisions of the Administrative Code would continue to govern the granting of witness leave. The Union sought to expand the provisions of the Code to ensure that second and third shift employees would be eligible for witness leave. The State agreed to that position and it is reflected in the language of the 1986-1989 Agreement when reference is made to second and third shift employees. As the State relates the history of negotiations

the parties understood and agreed that the provisions of the Administrative Code would govern the granting of witness leave. This is clearly shown by Employer Exhibit 4 in this proceeding which represents notes taken during the course of negotiations. On May 6, 1986 at 10:35 a.m. the parties agreed to utilize the administrative rule in granting of witness leave. In effect, the language of Section 30.05 does not precisely reflect the understanding of the parties on this issue.

When the parties came to bargain the 1989-1991 Agreement the State had in mind revised language that would slightly narrow the eligibility for witness leave. The Union proposed language that would broaden the eligibility somewhat. On March 30, 1989 the parties came to discuss witness leave. The bargaining notes of the State indicate that the Union's Chief Spokesman, once again Russell Murray, recalled to Gene Brundige that the parties had come to rely upon the Administrative Code rule in 1986. Mr. Brundige agreed with that recollection. In the final analysis which is reflected on page 532 of the bargaining notes Mr. Murray unequivocally agreed that the parties would continue to rely upon the existing contract language which he referenced as reflecting the administrative code rule. He proposed that the Union would accept this interpretation if the State would accept the Union's view of the concept of "significant other." This

was agreed upon by Mr. Brundige and is reflected on page 533 of the bargaining history. Page 535 of the notes indicates that Article 30 was ready for signing by the parties. As the State views this history all concerned knew, understood and accepted that witness leave would be governed by the provisions of the Administrative Code. As that is the case, the leave denials under scrutiny in this proceeding were proper and should not be disturbed it insists.

Discussion: This situation is highly unusual. The Union relies upon contract language that is indeed clear, unambiguous and not susceptible of any interpretation other than that the Union places upon it. That position is strong. The Union is correct to indicate that the arbitration community of the nation routinely enforces language literally. Should that occur in this dispute it is obvious that the Union must prevail.

This case is also unusual in that the Employer has proffered to the Arbitrator an undisputed record of the bargaining history covering two agreements that contradicts the interpretation of the language urged upon the Arbitrator by the Union. Examination of that bargaining history indicates without doubt that the parties had reached an agreement on this issue in 1986 that indicated their understanding that the administrative code would be applied to witness leave situations. Its provisions would be expanded

to accommodate employees who worked on the second and third shifts. When the parties came to bargain again in 1989 they had what may be termed a perfunctory discussion over this issue. They continued in the Agreement unaltered the existing language. The Chief Negotiators for both parties indicated their understanding that the provisions of the administrative code would continue to govern the granting of witness leave. The record of negotiations over this issue is not susceptible of doubt or interpretation. It is not contested by the Union. In essence, the Union seeks in this proceeding a revision of the clearly expressed bargaining history of the parties. When the understandings of the parties are explicit, well understood, and mutually agreed upon it is not the function of an arbitrator to disturb them. In this situation, notwithstanding the clear language of Section 30.05 of the Agreement, it must be read in connection with the explicit agreements of the parties that lead to the imprecise expression of their resolution of this issue. When that is done it is obvious that the position of the Employer on this issue must prevail. Section 30.05 of the Agreement is to be interpreted as reflecting the operation of Section 123:34-03, Court Leave, of the Ohio Administrative Code.

Award: The Grievances are denied with one modification which is indicated below. Section 30.05 of the Agreement is to be interpreted to mean that:

1. Employees subpoenaed to appear before any court, commission, board or other legally constituted body authorized by law to compel the attendance of a witness shall be granted leave with pay at the regular rate of that employee EXCEPT that if that employee is a party to the dispute he or she may be granted use of vacation time, personal leave, compensatory time or leave of absence without pay.

2. A party shall be considered to be an employee who is either the plaintiff, petitioner or defendant in a judicial or administrative proceeding. This should be considered to include those proceedings which may involve juveniles.

3. A Grievant under the Collective Bargaining Agreement would not be considered a party for purposes of Section 30.05. of the Agreement.

Examination of the record produced for the Arbitrator indicates that Gracie Flowers was subpoenaed for a Court appearance on November 13, 1990 in connection with a juvenile proceeding. Ms. Flowers would be eligible for witness leave under the Agreement per the material contained in Joint Exhibit 5, her Grievance and its subsequent disposition. The State should make the appropriate witness pay to Ms. Flowers for that date.

Signed and dated this 13th day of November, 1992 at South Russell, OH.

Harry Graham
Arbitrator