IN THE MATTER OF THE ARBITRATION BETWEEN *

Ohio Civil Service Employees Association *

-and- *Case No. 23
*27-05-(91-29)
*0138-01-06

Ohio Department of Rehabilitation and Correction *

ARBITRATOR: Mollie H. Bowers

APPEARANCES:

For the Association:

Linda K. Fiely, General Counsel
Kim Brown, Second Chair
Bruce Raines, Grievant
Marianne Steger, Witness
Ronald Alexander, Witness
Michael Clifford (Grievant)

For the Employer:

Rachel Livengood, Advocate
Robert Thornton, Second Chair
Renee Coil, OCB Observer
Eugene Brundige, Witness
Carol Clark, Witness
Nick Chibis, Correction Reception Center Representative

The Hearing was held on June 25, 1992, at 9:00 a.m. in Conference Room B of the Ohio Department of Rehabilitation and Correction. Both parties were represented and had a full and fair opportunity to present testimony and evidence in support of their case and to cross-examine that presented by the opposing party. At the conclusion of the Hearing, the parties requested, and were granted, the opportunity to file post-Hearing briefs on September 1, 1992. The parties also submitted additional responses. On

October 8, 1992, the Employer submitted a letter to the Arbitrator challenging the Union's reference and/or representation of information contained in its post-Hearing brief. On October 19, 1992, the Union submitted a response to the Arbitrator which addressed the Employer's post-hearing brief and reply of October 8, 1992. The entire record has been carefully reviewed by the Arbitrator.

ISSUE

The parties did not submit a stipulated issue. The Employer offered the following in their brief. The Association did not provide a statement of the issue in its brief. The Employer offered the following statement of the issue in its brief:

> Did the Employer violate the collective bargaining agreement when it denied Mr. Clifford's request for personal leave for March 30, 1991?

After reviewing the record in its entirety, the Arbitrator accepts the Employer's formulation of the issue.

PERTINENT CONTRACT CLAUSES

Article 13 - Work Week, Schedules and Overtime

§13.02 - Work Schedules

It is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time.

Article 25 - Grievance Procedure

§25.03 - ...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 expressed language of this Agreement.

Article 27 - Personal Leave

§27.01 - Eligibility for Personal Leave

Each employee shall be eligible for personal leave at his/her base rate of pay.

§27.02 - Personal Leave Accrual

Employees shall be entitled to three (3) personal leave days credited to the employee in the pay period which includes December 1, 1989. ...

§27.04 - Notification and Approval of Use of Personal Leave

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.

EXHIBITS

JX-1	Collective Bargaining Agreement in effect at time of grievance (1989-1991)
JX-2	Collective Bargaining Agreement, preceding agreement (1986-1989)
JX-3	Grievance trail
JX-4	Union Bargaining Notes (1986) on Articles 12, 13, and 27
JX-5	Leave Requests from Food Services Employees and Some Overtime Authorization
JX-6	Position Control Roster - All Employees in Food Services
JX-7	Employee Earnings and Leave History - Dept. of Administrative Services (1991)
JX-8	Master Time Cards from Each Employee PL or P - Personal Leave OT CA - Compensatory Time Accumulated CU - Compensatory Time Used S V + or less compensatory time accrual
JX-9	12/90 - 5/4/91 Work Schedules
JX-10	Table of Organizations 8/91

JX-11 Bargaining Proposals for 12, 13, 26

JX-12 Job Description - from Food Service Coordinator

JX-13 Job Handbook

UNION EXHIBITS:

UX-1 Sharon Brown grievances - Jonathan Dworkin decision (2/9/90)

AGENCY EXHIBITS:

MX-1 5/5/86 - Continuation

MX-2 11/17/89 Meeting Notes p. 54, 60, 61 except 1989

MX-3 3/31/89 Meeting Notes - Last day of bargaining p. 544

BACKGROUND

The Ohio Civil Service Employees Association, AFSCME Local 11 (hereinafter "the Union") brought this matter to arbitration asserting that Section 27.04 of the parties' collective bargaining agreement prohibited the Employer from denying a timely request for personal leave to Michael Clifford (hereinafter "the Grievant"). The Grievant, a five year employee, works as a Food Services Coordinator 1 in the Correctional Reception Center (CRC) of the Ohio Department of Rehabilitation and Correction (hereinafter "the Employer"). The CRC is one of two receiving institutions in the Ohio penal system and houses approximately 2,200 inmates of close to or maximum security.

Pursuant to Section 27.04 of the Agreement, the Grievant submitted a timely request on March 16, 1991, for personal leave to be taken on March 30, 1991. The Employer denied the request, citing as its basis that only three staff members were scheduled for duty on that date, including the Grievant. (JX-3)

The Union maintains that the denial of personal leave violated the Agreement and that the Employer was treating personal leave

requests the same as compensatory time off and vacation. It asks that the Employer be required to maintain adequate staffing levels so that requests for personal leave will not be adversely affected. (JX-3)

The past practice appears to be that, when requests for vacation and for compensatory time were denied, employees would then ask for personal leave. This practice seems to have evolved in response to the Employer's frequent denial of requests for vacation and for compensatory time off in order to maintain adequate staffing levels. The Employer has interpreted its authority to accede to requests for vacation and for compensatory time as discretionary.

There was considerable controversy under the preceding Agreement (JX-2) about the above-cited portion of Section 27.04. On February 9, 1990, Arbitrator Jonathan Dworkin ruled, in pertinent part, that "...Supervision has [no] discretion to deny timely personal leave applications whether or not granting them will jeopardize Life/Safety staffing requirements."[1] (UX-1) The Agreement was renegotiated in 1989. (JX-1) The referenced language in Section 27.04 was rolled over, although the Employer initially sought to change "shall" to "may" and to increase the notice period from 24 to 48 hours. The above-cited language in Section 13.02 was added to the Agreement as a result of the 1989 negotiations.

---

[1]The State of Ohio Department of Mental Retardation and Developmental Disabilities, Gallipolis Developmental Center and Ohio Civil Service Employees Association OCSEA/AFSCME, AFL-CIO, Local 11, Case No. G87-1687.

UNION POSITION

The Union presents a three-pronged argument challenging the Employer's denial of personal leave to the Grievant. It maintains that the language of Section 27.04 is clear and unambiguous, and thus, that application of the plain meaning rule requires a finding that the Employer has no discretion to deny a timely request made in accordance with the Section. The Union cites Mohawk Rubber Co., 83 LA 814, (Flannagan, 1984), Thunderbird Hotel, 69 LA 10 (Weiss, 1977), and F. Elkouri and E. Elkouri, How Arbitration Works 350, 351 (4th ed. 1985) as support for its position.

Since the language of Section 27.04 in the current Agreement is identical to that contained in the parties' first contract negotiated in 1986, the Union argues further that Arbitrator Dworkin's 1990 award interpreting the meaning of Section 27.04 is precedential. The Union maintains that Arbitrator Dworkin's findings that the first sentence of Section 27.04 is mandatory and that the third sentence, which modified the second sentence only, are binding on this Arbitrator.

Finally, the Union asserts that Section 13.02 of the Agreement has no application to Section 27.04. Specifically, it contends that Section 13.02, which provides that the Employer has the right to limit the number of employees scheduled to be off work, does not modify Section 27.04 to provide the Employer full discretion to grant or deny timely personal leave requests.

The Union submits that the bargaining history shows that the Employer attempted and failed to get the mandatory language in Section 27.04 changed and that Section 13.02 was agreed upon by the parties with the understanding that it would not adversely impact other parts of the Agreement. In support of its position, the

Union presented its president since 1984, Ronald Alexander, who has also worked twenty seven years for the Employer. He testified that the Agency sought to change the word "shall" in Section 27.04 to "may", and that this was resoundingly rejected by the Union.

In summary, the Union requests that the grievance be sustained and that a cease and desist order be issued requiring the Employer to stop denying personal leave requests and to comply with the collective bargaining agreement.

EMPLOYER POSITION

The Employer's first argument is that Arbitrator Dworkin's award is not binding on this Arbitrator. The reason the Employer gives is that the Agreement in effect at the time of the Dworkin award did not contain Section 13.02. It points out that this Section was added to the Agreement in 1989, and stresses that the language expressly and unambiguously gives management the right to limit the number of persons scheduled off work at any time.

Second, the Agency argues that the issue is one of contract interpretation, specifically whether Section 13.02 modifies Section 27.04 to afford the Employer discretion to deny personal leave so that minimum staffing levels can be maintained. The Employer urges the Arbitrator to find that Section 13.02 modifies Section 27.04, citing bargaining history for the current Agreement and the unrefuted testimony provided by Mr. Brundige, the Chief spokesperson for the state in the 1986 and 1989 negotiations, as support for its position. It emphasizes Mr. Brundige's testimony that one of the major concerns expressed by the Employer at the bargaining table was how to address the number of grievances about leave and how to clarify management's absolute right to maintain adequate staff at facilities. (MX-1, MX-2). The Employer also

points to Mr. Brundige's testimony that the language in Section 13.02 that was finally accepted by the parties was all encompassing and was intended to provide management with authority to deny personal leave in order to maintain minimum staffing levels.

Finally, the Agency argues that the Arbitrator should deny the grievance because to do otherwise eviscerates Section 13.02 and could render an institution unable to provide even minimum staffing levels.

OPINION

Based upon all the evidence and testimony of record, the Arbitrator finds that the Employer violated Section 27.04 when it denied the Grievant's timely request for personal leave. It is well settled that the plain meaning rule applies to language which appears clear and unambiguous on its face. Section 27.04 contains clear, unambiguous language, and thus, its meaning must be determined from the four corners of the Agreement without resort to evidence external to it. This interpretation leads to the inescapable conclusion that the language in the first sentence of Section 27.04, "Personal leave shall be granted if an employee makes the request with one (1) day notice" is mandatory.

The Employer's argument that Section 13.02 was agreed upon by the parties to modify the mandatory language of Section 27.04 fails. Its position that the Union understood and accepted that Section 13.02 gave management authority to deny personal leave under Section 27.04 is simply not supported by the bargaining history. This history was given more weight in the decision than Mr. Brundige's testimony since it is evident from the record that he was not at the table when most of the discussions of Sections 13.02 and 27.04 took place. The evidence of record shows that the

Employer unsuccessfully sought to modify the language of Section 27.04 in the 1989 negotiations. (JX-14) The Union strongly objected to any modification. The Union's robust rejection of any changes to Section 27.04 is persuasive in proving that it was not its intent to agree that Section 13.02 would have a broad application to all other contract provisions, including Section 27.04.

The Employer next sought to add Section 13.02 to the Agreement to clarify its management right to "limit the number of persons to be scheduled off work at any one time." The rejection by the Union of the Employer's attempts to directly change the mandatory language in Section 27.04 to discretionary language does not support its position that the Union agreed to an indirect modification of Section 27.04 by Section 13.02. (JX-11).

In so ruling, the Arbitrator does recognize management's right to schedule work. She did believe, however, that since Section 13.02 was so hotly contested, then the parties would have been very careful to say exactly what they meant in drafting the language. The bulk of this Section addresses pre-scheduled work shifts. Limiting the number of persons scheduled to be off work at one time, therefore, pertains to long range planning of schedules, not to the granting of personal leave.

This conclusion is bolstered by the lack of any express language in the contract stating the Section 13.02 would apply to Section 27.04. Additionally, on March 30, 1989 at the 24th bargaining session on the current Agreement, the Union (represented by Russell G. Murray, spokesperson) asked the Employer (represented by Eugene Brundige, spokesperson) to explain the meaning of the statement: "It is understood the employer reserves the right to

limit the number of persons to be off at any one time." (JX-14, p. 544). Mr. Brundige replied: "Approved vacation time and we are hit with a flu or something and sick leave usage escalates. We have the right to cancel vacations or other leaves if that's the only way (emphasis added) we can maintain staffing level in the institution or that operation." (JX 14, p. 544).

The Employer indicates by its answer that denial of leave requests because of staffing level concerns will occur as a last resort. Yet, in Grievant's case, his leave request was denied because there were only three people scheduled for work that day, including him. (JX-3). The Employer did not proffer any evidence demonstrating that other options were sought before a decision was made to deny the Grievant's request. The Union, however, outlined the options available under the Agreement to insure that minimum staffing levels were maintained. Some of the options are voluntary overtime, mandatory overtime, and requiring supervisory employees make up any staffing deficiencies. (Union's Brief, p. 10).

Throughout the bargaining notes of February and March 1989, references are made by both the Union and the Employer to inadequate staffing levels and their impact on employees' leave and work schedules. (JX-14). The Union maintains that inadequate staffing levels are a consequence of an inadequate workforce, suggesting that until the Employer directly addresses this issue, that problems with all leaves will persist. Reading the Employer's answer in its most favorable light would require it to deny personal leave to employees only as a last resort. This the Employer did not do.

Finally, the parties disagree as to whether this proceeding concerns an individual or a class action grievance. Since the

notation regarding a class action complaint was added to the grievance (JX-3), no foundation for this addition was laid, and the grievance has been processed as an individual complaint based on the record presented at the Hearing, the Arbitrator rules that this is an individual grievance.

AWARD

The grievance is sustained. The Agency shall cease and desist from violating the Agreement by denying employees' timely request for personal leave under Section 27.04.

Mollie H. Bowers
ARBITRATOR

November 19, 1992
DATE