VOLUNTARY LABOR ARBITRATION

In the Matter of Arbitration Between:	Case #:32-00900405 0182-06-10
THE STATE OF OHIO OHIO VETERANS CHILDREN'S HOME -AND- THE STATE COUNCIL OF PROFESSIONAL EDUCATORS OEA/NEA	

IN RE: GRIEVANCE OF: Sharon Wren
(Arbitrability & Seniority, Vacation, etc. Credits)

OPINION AND AWARD OF ARBITRATION

Dennis E. Minni, Esquire
Arbitrator
Suite 104
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Date Of Hearing: November 24, 1992

Situs Of Hearing: Ohio Office of Collective Bargaining
Columbus, Ohio

Employer Representatives and Witnesses:

1. Louis Kitchen.....Asst. Chief-Special Projects-OCB
2. Sharon Hilliard,.....Labor Relations Specialist-OCB
3. Hazel Fife,.....Pers. Officer-OH Vets Child.Home
4. Linda Guckian,.....Sec'y, OH Vets Childrens'Home

Association Representatives and Witnesses:

1. Mrs. Sharon Wren,.....Grievant (Media Specialist)
2. Arthur C. Lunt,.....Fmr Scope President
3. Henry L. Stevens,.....Labor Relations Consultant-SCOPE OEA
4. Ellen A. Smith,.....Fmr V-Pres./Bargaining Team Chair

ISSUES:
1. Is the Grievance arbitrable?
2. Is the Employer required to grant a leave of absence under Section 29.01?
3. Did the Employer violate the Contract? If so, what shall the remedy be?

BACKGROUND INFORMATION

The parties to this dispute are the Ohio Veterans' Children's Home (hereafter "Management" or "Employer") and the State Council of Professional Educators, OEA/NEA, (hereafter the "Association" or "OEA"). They are signatories to a collective bargaining agreement (hereafter "cba" or the "contract") which was entered into the record as Joint Exhibit 1 (JX-1). Said contract imposes the following limitation on selected panel arbitrators in Article 6.04, which states:

"6.04-ARBITRATOR LIMITATIONS

Only disputes involving the interpretation, application or alleged violation of provisions of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement."

This limitation is especially noted because an issue concerning the arbitrability of this Grievance was raised by the Employer in addition to its opposition to the protest on the merits.

Both the procedural and substantive aspects were covered by the Employer's proffered statement of the issues. Although there is nothing inappropriate about the Union's proposed issue statement, I choose to work from Management's because it covered the arbitrability aspect in addition to the merits claim. Of course, the Union may not have been aware of a procedural defense at the time it drafted its issue statement but the inability of the parties to mutually settle on a statement prompts me to select the one which is more complete.

Simply put, the Grievant, after an absence from work the precise categorization of which needs resolution, appeals the Employer's computation of her service credit, vacation accrual rate, annual step increase and step indicator.

ARBITRABILITY

POSITION OF THE EMPLOYER

Management claims the grievance is untimely based on the contractual need to initiate the first stage (with the immediate supervisor per Art. %.05 A) "...within fifteen (15) working days of the date on which the employee knows or could reasonably could have had knowledge of the event giving rise to the grievance, but no later but than thirty (30) days after the event." The same section allows employees on approved paid leave an extension to

perfect their grievance for the time they were on the approved paid leave. This extension is itself capped at ninety (90) days.

Grievant's first pay check after her return to work was on 11/18/89, some five months prior to the date of her Grievance on 4/5/90. It must follow per se, that the issue is barred from arbitration because it is clearly untimely.

POSITION OF THE ASSOCIATION

There is not an untimely filing because the nature of Management's actions were recurrent so that each paycheck reflected another or continuing violation of the Grievant's contractual rights.

DISCUSSION AND ANALYSIS

The matter pivots upon showing the existence of a point in time where the Grievant "reasonably could have had knowledge of the event giving rise to the grievance...".

Management has the burden of proof on this argument's substantive validity. In support of the Employer's position it is claimed that each paystub's various "fields" depicted information on the Grievant's accumulation of benefits (or in this case non-accumulation) sufficient enough to exercise her contractual rights sooner than five months after her return to work.

Management's argument is that on November 18, 1989 based on the paystub of the same date, Mrs. Wren either directly knew or at least reached the point where she reasonably had the knowledge, etc. to commence the thirty (30) day filing period. I say thirty (30) day filing period because this is what would be operative if not discovered within fifteen working days of the event giving rise to the grievance.

I have studied the paystubs presented at the hearing (JX-4) as proof that the "knowledge" was there for the taking. I cannot conclude that this matter became inarbitrable because an employee failed to protest several fields of numerical data for the first thirty (30) days after she returned from a leave of absence. The tenor of DAS's Mr. Daubenmire's letter of June 11, 1990 (JX-2) is that Mrs. Wren "should have checked to see whether (her benefits) were properly adjusted". No mention is made that her balances are correct as stated; only a pervasive sense of forfeiture comes across.

The point of knowledge that her balances were incorrect is a highly subjective concept. Management appears ready to stand on the fact that once printed and passed out, the information is made binding upon the employee; this occurs with each and every paystub.

I can only surmise what the Employer's position would be if there were errors favoring the employee, say, moving her ahead two steps in pay or doubling her vacation balance. Would the mere passage of time or a "reasonable time to acquire knowledge" of the mistake allow the matter to vest in favor of the employee? Now I realize there would be no paystub for the Employer or DAS to study and peruse but I do not see that as a basis for penalizing an employee by imputing knowledge from a highly numerical transactional form such as a paystub. I believe it is human nature to sever, endorse and deposit the negotiable portion of the payroll instrument while filing away the remaining paystub portion. To the extent that there is error in the later, either favoring the employee or not, a remedy for either side should be available.

The Association's argument that the error was on a continuing basis or compounded with each payday has not been overlooked. I feel that rather than conclude this matter is arbitrable because of the alleged recurrent nature of the successively issued paystubs, a better rationale for proceeding on the merits exists. That is it has not been demonstrated by a preponderance of the evidence that the Grievant "reasonably" absorbed the knowledge and once imputed to her, was forever bound by it, even if incorrect.

AWARD

The Grievance is arbitrable and shall proceed to be determined upon its merits.

MERITS

POSITION OF THE ASSOCIATION

The evidence shows that the Employer erred in not correcting the Grievant's service credits for annual step increases, seniority and vacation since she was in Leave Without Pay (hereafter "LWOP") status based on the circumstances. She did all she could do to make known her situation and comply with the requisite paperwork.

Mrs. Wren told Mr. Barcelo, the then Principal of the School in July, 1989 that she needed an operation in a matter of days. He bid her to look after her health, execute the necessary paperwork after her operation (and return to work) if necessary and approved her leave.

She was thus exempted from the fourteen day written notice requirement due to the extraordinary circumstances set forth in Art. 29.01 A of the cba. Subsection "F" makes it clear service credit applies to those on authorized leave. She did not receive these credits and grieved in order to have her benefits made correct. This what this Grievance seeks to accomplish.

POSITION OF THE EMPLOYER

There is no proof that the Grievant requested a leave of absence or that the Employer ever granted one. There is a distinction between leave without pay and leave of absence. It is covered in Art. 26.01 (C): "No pay status" means the conditions under which an employee is ineligible to receive pay, and includes, but is not limited to unpaid leave such as: leave without pay, leave of absence and disability leave."

There are distinct differences between a Leave of Absence and a Leave of Absence Without Pay. The Grievant took a Leave Without Pay retroactively. This was after the time set forth in the request form had passed.

The Grievant's status was that of leave of absence; this leave does not provide for continuation of service credits as does a leave of absence without pay.

Therefore the Grievance lacks merit and should be denied and dismissed.

DISCUSSION AND ANALYSIS

This case is the result of imprecise, confusing and practically cryptic contract language. The true intent of the parties in negotiating Article 29 is either to underscore and make known the difference between LWOP and a plain Leave of Absence, hereafter "LOA", as Management maintains. Or, to demonstrate that the service credit continuation for the benefits at issue herein are due and owing to the Grievant as the Association claims.

My criticism of the draftsmanship centers around formatting Art. 29.01 (A) so as to "bury" the concept of LOA in an Article entitled "Leaves Of Absence Without Pay" that has as its Section .01 the title "Unpaid Leaves Of Absence".

There are clues that the parties intended to differentiate between the two types of leave. Subpart "A" of 29.01 is entitled "Leaves and Duration". The plural form of "Leave" suggests that there are more than one type of leave. Also the text of Art. 26.01 (C), referred to by the Employer in its position on the matter, defines both LOA and LWOP as examples of "No Pay Status". Bear in mind that this clarifying effort appears in the "definitions" section of the Article entitled "Sick Leave". (Art. 26).

However, how one applies for only the LWOP is detailed. Note also that a LWOP does not have an enumerated length of time in 29.01 (A). Instead, the second sentence describes the LOA giving it two possible durations, but not stating how the LOA is obtained! When these two leave concepts are blended together in the same

paragraph as they are is there any wonder that a dichotomy in viewpoint arose? At a minimum, the title of Article 29 should be "Unpaid Leaves Of Absence". Then, 29.01 could be LWOP and LOA could be 29.02 thereby separating and distinguishing the two visually and operatively.

The Employer pre-hearing statement says "...the Grievant did not follow any of the procedure (sic) in Section 29.01 for requesting and being granted a leave of absence". I agree. She did not seek a LOA. She did follow in large measure the procedure for obtaining a LWOP, not a LOA. A LOA would do her no good from the standpoint of earning service credits because they are only extended to employees on LWOP, not LOA per 29.01 (F). The Employer continues on, claiming that Grievant was granted retroactive LWOP. I agree with this fact. However, LWOP kept her in the running for 29.01 (F)'s continued service credit; which is what the Association maintains.

Next, the Management representative states that "The Employer will show that procedures for LOA and the rights and status of employees are separate and distinct from unpaid leave." This is fallacious because a LOA is a type of Unpaid Leave.

Finally, at its last paragraph, the Employer states it will show that there is LWOP, a no pay status, in the contract. I agree with this position. The issue then remains did the Grievant obtain LWOP status thereby earning the 29.01(F) service credit accumulation.

The facts in the record show that Mrs. Wren, facing major surgery to her liver, had the "extraordinary circumstance(s)" Article 29.01 (A) states as a basis for relief from seeking a leave of absence without pay ("LWOP") in writing with fourteen days' notice. The form she executed, JX-3, on both 9/8/89 and 11/6/89 only states "Leave Without Pay", after which she inserted information relevant to her situation. This form (JX-3) does not contain a second type of unpaid leave entitled "leave of absence". The only possible argument for the presence of LOA is in the last line entitled "Other (Explain)". But when the form delineates "Sick Leave", "Bereavement", "Deceased", "Vacation"' "Personal"' "Court"' "Court Duty", "Jury Duty", "Military" with or without pay", "Compensatory" and the above noted "Other" it becomes clear and convincing to me that the average employee, (not one who deals with personnel forms daily) would check off the same box the Grievant did. There being no indication that a LOA could be sought per this form I conclude that the "recommended" and "approved" entries and signatures bound the Employer to granting the Grievant LWOP status.

I cannot fault the Employer for placing a different interpretation on these facts but a preponderance of the evidence supports the Association. If a LOA was what Management wanted Mr.

Barcelo to grant his inexperience in such matters cannot be used to reverse the outcome I have arrived at. Mrs. Wren, a non-supervisory employee of four years service, was equally at a disadvantage.

AWARD

Therefore, based upon the foregoing analysis and the record as a whole the Grievance is sustained . Mrs. Wren's service credits shall be adjusted to show credit for the duration of her time off in 1989. Her wage level and other affected benefits shall also be adjusted as prayed for in her Grievance.

Dated this 31st day of December, 1992 at Strongsville, Ohio.

Respectively submitted,

Dennis E. Minni

Dennis E. Minni
Panel Arbitrator