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IN THE MATTER OF ARBITRATION BETWEEN	
STATE OF OHIO OFFICE OF COLLECTIVE BARGAINING AND DEPARTMENT OF MENTAL RETARDATION AND DEVELOPMENTAL DISABILITIES	Grievance Case No. 24-09-920624-0665-01-04
-and-	
OCSEA/AFSCME,LOCAL 11	

ARBITRATOR: Mollie H. Bowers

Representing the State: Edith Bargar

Representing the Union: Brenda Goheeen

The Ohio Civil Service Employees Association/American Federation of State, County and Municipal Employees, Local 11 (the Union) and the State of Ohio Office of Collective Bargaining and Department of Mental Retardation and Developmental Disabilities (the Employer) submitted this case to arbitration based upon a stipulated arrangement. That stipulation provides:

JOINT STIPULATED ISSUE

> Under ARTICLE 35A.01 B,
> Part-time or fixed-term regular and irregular employees who have worked 1500 or more hours within the 12 calendar months preceding disability shall be entitled to disability benefits...
>
> Does the Employer have to include vacation leave, sick leave, personal leave or compensatory time in calculating the 1500 hours that a part-time employee must accumulate to be eligible for disability benefits?

> Both parties agree that the issue is properly before the Arbitrator. Both parties agree to dispense with the arbitration hearing and argue the merits (and only the merits) of the issue with briefs and rebuttal briefs.

That stipulation with attachments regarding the processing of the underlying grievance and the parties briefs and supporting attachments were received by the Arbitrator January 12, 1994. The parties' rebuttal briefs were received on February 10, 1994. The Arbitrator carefully considered the record in its entirety in reaching a decision in this case.

THE PARTIES' CONTENTIONS

Union Position:

The Union contends that the grievance should be upheld because the Employer has failed to properly determine part-time employee eligibility for disability benefits in accordance with Article 35A.01 B of the 1992 collective bargaining agreement. According to the Union, the Employer erroneously asserts that the term "hours worked" in that provision has a clear and unambiguous meaning, using a "generic dictionary definition" of "clocked hours or hours of actual job performance." The Union maintains, in contrast, that there is a "latent ambiguity" in the Employer's use of those words which becomes unclear when "applied to employees who accrue leave and who are allowed to supplement their scheduled hours in each pay period with this leave." That ambiguity, the Union emphasizes, becomes apparent in light of the parties' past practice as reflected in other Articles of the Agreement.

The Union maintains that it relies upon accepted rules of

contract construction to support its position that "hours worked" should be construed to mean the same as "active pay status" as that phrase is defined in Article 29.01[1] of the Agreement. The Union points out that "throughout the Agreement, the parties consistently, either through contractual definition or through past practice, include approved leave time in the calculation of the "hours worked." The Union acknowledges that, under various provisions of the Agreement, all employees derive benefits "which accrue based on hours, days or pay periods worked" and certain contractual limitations apply therein to the accrual of benefits by part-time employees. However, the Union emphasizes that all those limitations are based upon "the employee's scheduled hours or hours in active pay status."

According to the Union, Article 27[2], Personal Leave, is identical to Article 35A .01 B in its use of "hours worked" to calculate part-time employee benefits. Although Article 27

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[1] Article 29 - Sick Leave - provides under 29.01 - Definitions: Sick Leave for State Employees, A. "Active pay status" means the conditions under which an employee is eligible to receive pay, and includes, but is not limited to, vacation leave, sick leave, and personal leave.

[2] Article 27.02 - Personal Leave Accrual - states in pertinent part:

... Part-time employees shall accrue personal leave on a prorated basis. Proration shall be based upon a formula of .015 hours of non-overtime work.

... Employees that are on approved paid leave of absence, union leave or receiving Workers' Compensation benefits shall be credited with those personal leave hours which they would have accrued upon their approved return to work.

contains no definition of "work," the Union argues that there exists a past practice whereby the Employer "in calculating the accrual of personal leave, has used scheduled hours or hours in active pay status".

The Union acknowledges that Article 29.02[3], Sick Leave Accrual, requires part-time employees to work "eighty hours of completed service" and does not use the words "hours worked." It asserts, however, that a past practice exists whereby the Employer has consistently relied upon an employee's hours in an active pay status to calculate of completed service.

The Union maintains that Article 16[4] also uses "hours worked" to calculate seniority for part-time employees on a prorated basis. It points out that, in these comparable provisions, if the parties had wanted to exclude leave periods from seniority calculations,

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[3] That provision provides in pertinent part:

...

> Less than full-time employees shall receive 3.1 hours of sick leave for each eighty (80) hours of completed service, not to exceed eighty (80) hours in one year.
>
> Employees that are on approved leave of absence or receiving Workers' Compensation benefits shall be credited with those sick leave hours which they normally would have accrued upon their approved return to work.

[4] Article 16 states: "Part-time and fixed term seasonal employees covered by this Agreement will have their time prorated towards the calculation of seniority." For example, an employee who works twenty (20) hours per week will earn one years's seniority after two (2) years of work. Article 16 defines various types of seniority, e.g., state, classification, classification series, and institutional based upon "continuous service". Under 16.02, continuous service seniority is broken by specific situations, but not in other instances involving disability leave, workers' compensation and other express circumstances.

then they could have "explicitly" done so.

According to the Union, its position is consistent with the contract interpretation principle of "definition by association" in relation to the benefit full time employees receive under Article 35A (i.e., "in other words full-time employees receive 70% of their hourly rate multiplied by a forty hour work week."). This means, the Union asserts, that part-time employees are "entitled to 70% of their hourly rate multiplied by the average number of hours they were in active pay status as reflected in their weekly earnings."

The Union further contends that the Employer's position is inherently inconsistent, unreasonable, and not equitable by preventing numerous part-time employees from receiving disability leave inconsistent the Employer's "promise" to provide part-time employees various leave and disability payments.

In its rebuttal brief, the Union maintains it intended in its proposal[5] during negotiations to address the Employer's abuse of part-time employees by working them to schedules very close to 40

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[5]The Union proposal, dated September 24,1991, regarding disability eligibility for part-time employees states in relevant:

(1) Part-time employees on the payroll as of July 1, 1991, and who have worked more than 40 hours per pay period on the average in the period ... shall become eligible for disability leave ...
(2) Part-time employees who work more than 40 hours per pay period on the average during their first year of employment shall, on their anniversary date, shall become eligible for disability leave...
(3) Fixed term regular and irregular employees who have one or more terms of service in one or more calendar years ... shall become eligible for disability leave upon the first day of their return to service in 1992...

hours a week and thereby denying them disability benefits. According to the Union, it used the word "work" in its proposal in a manner consistent with the parties' use of that word in other provisions of the Agreement governing accrual of benefits for part-time employees. Based upon the foregoing considerations, the Union asks that the grievance be sustained and that the remedy requested be granted.

Employer Position:

The Employer asserts that the contract language is clear and unambiguous and, thus, that the Union's grievance should be denied. According to the Employer, prior to the parties' 1992 Agreement, part-time employees had no disability leave benefits. Those benefits were negotiated into the Agreement when the parties agreed to incorporate aspects of the fact finding report preapared by Harry Graham in January 1992[6].

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[6]The fact finder's report contains the following relevant discussion regarding his finding in support of the Union's proposal to extend disability benefits to part-time employees:

> It is the case that the State has in its service numbers of employees who are classified as part-time and fixed term employees. Nonetheless, numbers of these people are almost full-time employees. In many instances they work almost a 40 hour week. That schedule is worked week after week. In such circumstances it is patently inequitable to deny them disability insurance coverage. To do so may well impose other costs on the State. Should resort be had by such employees to the Medicaid program, the cost to the State will certainly exceed the cost of including part-time employees and fixed term employees in the disability benefits plan. To deal with this situation, which is a real problem for affected employees as well as the State, it is recommended that the disability benefits plan be extended to cover part-time and fixed term employees who have worked 1500 or more hours in the 12 months preceding illness or injury.

Part-time employees are eligible for disability benefits under Article 35A.01 B, the Employer maintains, when they have reached 1,500 hours of work. To support this interpretation, the Employer emphasizes the significance of the words "have worked" in Article 35A.01 B as determinative of this dispute. According to the Employer, there is no accrual for hours not worked such as leave related to vacation, personal, sick, and worker's compensation as the Union argues. This is not a matter, the Employer contends, to be resolved by "sympathy" for those part-time employees with less than 1500 hours worked. The Employer points out that the Union could have bargained for such a benefit, but did not and further argues that the Union should not now get in arbitration that which it did not seek nor was agreed to at the negotiations table.

The Employer also maintains that the dictionary definition of the word "worked" involves an exertion of one's "strength or faculties to do or perform something." The Employer notes that by definition, it is "impossible for part-time employees to "work" when they are on "leave or compensatory time. Adding to the 1500 hours with accrual ratios by the Union for categories of nonworking time, the Employer contends, is irrelevant. Furthermore, the Employer asserts that the Arbitrator is precluded from modifying the Agreement by deciding that it must provide disability benefits for employees who work less than 1500 hours.

It is also the Employer's position that the Agreement shows that the parties understand the difference between eligibility for benefits based upon active pay status versus those based upon hours

worked. According to the Employer, the Union has failed to meet its burden of production or persuasion that a past practice supports its position or offered any rebuttal to the clear and unambiguous meaning of the language "have worked." The Employer therefore asks that this grievance be denied.

DECISION

The Union, as the moving party in this contract interpretation controversy, has the burden of persuasion to establish that its construction of Article 35A .01 B reflects the parties' intent for purposes of determining the eligibility of part-time employees for disability benefits. Well recognized principles of labor arbitration are that clear and unambiguous language is the best evidence of such intent and that language is to be enforced by its precise terms. If the wording and meaning of the language used is clear and unambiguous, those words are treated as undisputed facts and enforced pursuant to their plain or regular meaning without regard to extrinsic evidence, even if one party can show that to do so will create situations or problems not fully considered at the time the language was agreed upon. Where the language is unclear or ambiguous, it is generally accepted that extrinsic evidence may be relied upon to determine the parties' intent.

Thus, the critical issue in this controversy is whether or not the language in Article 35A .01 B is clear and unambiguous. Each party interprets the operative language of that provision differently. The Union claims that there is a latent ambiguity in

the meaning and application of the terms of that provision in light of other comparable provisions of the Agreement and of the past practice in the administration of those provisions. The Employer argues that the language in that provision is clear and unambiguous. While such conflicts may be indicative of unclear or ambiguous language, that in itself is not determinative that the language is unclear and ambiguous. It is the words, themselves, that here are the most instructive on the issue at bar. After a careful examination of the subject language in Article 35 and of the entire record in this case, it is found that the Union is not correct in its interpretation and, therefore, the grievance is denied.

The language of Article 35A .01 B is clear on it face having the commonly understood meaning that in order to be eligible for disability benefits, part-time or fixed term regular and irregular employees must work at least 1500 hours in the 12 calendar months preceding that disability. There is insufficient evidence in the record to support the Union's assertion that a past practice exits as to that provision by which the 1500 hours work eligibility requirement can be somehow achieved by credits accrued by active pay status components of leave and/or worker's compensation time as provided in other provisions of the Agreement establishing other benefits or terms of employment. This is not a case of latent ambiguity as the Union maintains.

It is clear that under other provisions of the Agreement the parties have expressly provided for various types of accrual and

crediting of leave and/or compensation time for different benefits including seniority. Therefore, it is reasonable to conclude that the absence of such factors in Article 35A .01 B is indicative that it was not the parties' intent to make those factors applicable for purposes of disability eligibility. While that may seem to suggest a lack of consistency in various provisions of the Agreement, there is no absolute requirement cited by the Union or otherwise to the effect that the parties must always be consistent in their Agreement as to how they go about establishing and treating various and different benefits. In this instance, that lack of consistency is reflective of the parties method of addressing that particular benefit and is not determinative that a latent ambiguity exists. If the inconsistency had been within the wording of Article 35, then this could have potentially given rise to a problem with ambiguity. To reiterate, this simply is not the reality in the instant case.

Under the circumstances of this case, to grant the Union's interpretation would, in effect, amend the Agreement by the addition of language not now present in Article 35. Such a determination would be unacceptable under basic contract interpretation principles and not within the scope of the Arbitrator's authority under Article 25.03. That Article provides: "The arbitrator shall have no power to add to, subtract from or modify any 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." Establishing or

changing eligibility restrictions for part-time employees are clearly matters best addressed by the parties in their contract negotiations rather than in grievance arbitration .

AWARD

The grievance is denied.

The Employer does not have to include vacation leave, sick leave, personal leave, or compensatory time in calculating the 1500 hours that a part-time employee must accumulate to be eligible for disability benefits.

Dated: February 22, 1994

Mollie H. Bowers

Mollie Bowers, Arbitrator