#1809

State of Ohio
Voluntary Rights Arbitration

IN THE MATTER OF ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF PUBLIC SAFETY

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFL-CIO, AFSCME, LOCAL 11

GRIEVANT: ROBERT BREECKNER
GRIEVANCE NO.: 15-00-(02-08-16)-0121001-14

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: MAY 19, 2005

APPEARANCES

For the Employer

John Kinkela	Labor Relations Specialist
Joseph Eckstein	Fiscal Supervisor
Christine Thompson	Policy Development Administrator
Charles J. Linek	Second Chair
Andrew Shuman	Advocate

For the Union

Robert Breeckner	Grievant
John Porter	Advocate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Public Safety, hereinafter referred to as the Employer, and the Ohio Civil

Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period March 1, 2000 through February 28, 2003 (Joint Exhibit 1).

The arbitration hearing was held on January 27, 2005 at the Office of Collective Bargaining, Columbus, Ohio. The two parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective position on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted briefs in accordance with the guidelines agreed to at the hearing.

PERTINENT CONTRACT PROVISIONS

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 four (4) personal leave days each year. Eight hours of personal leave shall be credited to each employee at the end of the pay period which includes the first day of January, April, July and October of each year. Full-time employees who are hired after the start of a calendar quarter shall

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

This method of accrual shall take effect April 1, 1992. Prior to that time, employees will continue to accrue personal leave pursuant to the provisions of the 1989 Agreement. Employees that are on approved paid leave of absence, union leave or receiving Workers' Compensation benefits shall be credited with those ...

Employees who are scheduled to work more than eight (8) hours in a day, will receive the holiday pay for the hours they are normally scheduled to work.

* * *

(Joint Exhibit 1, Pg. 83-84)

ARTICLE 28 - VACATIONS

28.01 - Rate of Accrual

Permanent employees shall be granted vacation leave with pay at regular rate as follows, except that those employees who have less than 80 hours in an active pay status in a pay period shall be credited with a prorated amount of leave according to the following schedule:

Length of State Service	**Accrual Rate**	
	Hours Earned Per 80 Hours in Active Pay Status Per Pay Period	Annual Amount Per 2080 Hours in Active Pay Status
Less than 1 year	3.1 hours	80 hours *(upon completion one year of service)*
1 year or more	3.1 hours	80 hours
5 years or more	4.6 hours	120 hours
10 years or more	6.2 hours	160 hours
15 years or more	6.9 hours	180 hours
20 years or more	7.7 hours	200 hours
25 years or more	9.2 hours	240 hours

Effective July 1, 1986, only service with state agencies, i.e. agencies whose employees are paid by the Auditor of State, will be computed for the purpose of determining the rate of accrual for new employees. Service time for vacation accrual for employees employed on that date will not be modified by the preceding sentence. An employee who has retired in accordance with the provisions of any retirement plan offered by the state and who is employed by the state or any political subdivision of the state on or after June 24, 1987, shall not have his/her prior service with the state or any political subdivision of the state counted for the purpose of computing vacation leave. The accrual rate for any employee who is currently receiving a higher rate of vacation accrual will not be retroactively adjusted. All previously accrued vacation will remain to the employee's credit. The prospective accrual rate will be adjusted effective with the pay period that

begins June 26, 1994.

28.02 - Maximum Accrual

Vacation credit may be accumulated to a maximum that can be earned in three (3) years. Further accumulation will not continue when the maximum is reached. When an employee's vacation reaches the maximum level, and if the employee has been denied vacation during the past twelve (12) months, the employee will be paid for the time denied but no more than 80 hours in a pay period.

Annual Rate of Vacation	Maximum Accumulation
80 hours	240 hours
120 hours	360 hours
160 hours	480 hours
180 hours	540 hours
200 hours	600 hours
240 hours	720 hours

* * *

(Joint Exhibit 1, Pgs. 84-85)

ARTICLE 29 - SICK LEAVE

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29.02 - Sick Leave Accrual

* * *

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.

* * *

(Joint Exhibit 1, Pg. 87)

ARTICLE 31 - LEAVES OF ABSENCE

31.01 - Unpaid Leaves

The Employer shall grant unpaid leaves of absence to employees upon request for the following reasons:

* * *

Military Leave

E. If an employee enters military service, his/her employment will be separated with the right to reinstatement in accordance with federal statutes. An employee who is a member of the Ohio National Guard or any Reserve Component of the . . .

* * *

(Joint Exhibit 1, Pgs. 96-97)

STIPULATED ISSUE

Did the Ohio Department of Public Safety violate the Collective Bargaining Agreement when it did not credit the Grievant vacation leave and personal leave accruals for the entire period of his military leave?

STIPULATED FACTS

1. The grievance is properly before the Arbitrator.
2. The Grievant is a member of the Ohio National Guard Reserves and was deployed to Turkey on February 25, 2002, for active military duty.
3. The State provides 176 hours of paid military leave per calendar year in accordance with Section 30.02 of the

collective bargaining agreement.

4. If military duty exceeds 176 hours in a calendar year, employees may take leave under Section 31.01(E) of the collective bargaining agreement.

5. The Grievant was on paid military leave through March 21, 2002. During this time, he accrued vacation, sick and personal leaves.

6. From March 21, 2002 through July 2, 2002, the Grievant was on approved leave of absence for military duty in accordance with Section 31.01(E) of the collective bargaining agreement. During this time, the Grievant was not credited with vacation and personal leaves.

7. Section 27.02 of the collective bargaining agreement states that employees on approved paid leaves of absence shall be credited with those personal leave hours they normally would have accrued upon their return to work.

8. Vacation leave is accrued based on hours in active pay status.

9. While on military leave, the Grievant received healthcare benefits and paid only his Employee share for healthcare benefits.

10. In accordance with Ohio Revised Code Section 5923.05, the Grievant received payment for the difference between his military pay and the amount he would have been paid by the State if not on military leave.

11. The Grievant was overpaid difference in earnings and a repayment schedule was established. This overpayment is not an issue before the Arbitrator.

12. Sick leave accrual is not an issue before the Arbitrator.

13. Dana Warner would testify that prior to the Grievant taking military leave, Dana Warner overhead Joe Eckstein tell the Grievant he would receive all his accruals while on military duty.

CASE HISTORY

The Grievant was deployed to Turkey on February 25, 2002. From February 25, 2002 to March 21, 2002 the Grievant was on paid

military leave. As such, the Grievant accrued sick leave, personal leave and vacation leave during this period. From March 22, 2002 through June 2, 2002, however, the Grievant enjoyed approved leave of absence status. This status afforded the Grievant the opportunity to solely accrue sick leave.

At some point prior to deployment, the Grievant had a conversation with Joseph Eckstein, the Fiscal Supervisor. Eckstein purportedly told the Grievant he would receive all of his leave accruals while on military duty. The parties stipulated the conversation in the Grievant's pod was overheard by Dana Warner, a co-worker.

The Grievant returned to work on June 25, 2002. He assumed his pay had been supplemented correctly and that he was accruing all leave. A dispute concerning the pay supplement and leave accruals percolated resulting in the filing of a grievance on August 2, 2002. It states in pertinent part:

> "Mr. Breeckner a member of the Ohio National Guard Reserves was called to active duty on February 9, 02 for a period of 5 months with an expected return date of June 24, 02. During his active status there were admends made to his order extending his active status to July 02, 02. Before his deployment he followed all procedure req. & inq. As to his pay & time accrual - he was informed about SB164 & HB392 his military pay would be supplement & that

he would continue to accrue his time. Since his return he has been informed that he would not receive accrual time. Mr. Breeckner time be restored & the employee made whole. Vac 62.1 - Sick 27.9 - Personal 8 add to not have to pay 3,290.99 to State."

(Joint Exhibit 2A)

The parties were unable to resolve the grievance in subsequent stages of the grievance procedure. Neither party raised procedural nor substantive arbitrability issues. As such, the grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Union's Position

The Union opines the Grievant should have continued to accrue vacation and personal leave from March 22, 2002 through July 2, 2002.[1] These accruals should have been paid since the Grievant was paid his regular State salary while on active duty.

The focal point of the argument rests with the Grievant's status and selected method of payment made to reservists when called to active duty. In the past, a maximum cap of $500.00 was used for computation purposes. That is, the reservists were paid the difference between their military pay and their State salary up to his specified maximum. Ohio Revised Code Section 5923 (Joint

[1]It should be noted that the pay supplement was not an issue under review nor properly in front of the Arbitrator.

Exhibit 7) changed the payment formula. This provision uncapped the previously designated maximum by paying reservists the full difference between his/her military pay and the salary earned as a State employee. The statute, moreover, allowed State employees to continue their health insurance. They continued to pay their normal share of the premium while the State of Ohio continued to pay its required percentage.

The Union urged that Section 31.01(E) is inapplicable in this instance. Since the Grievant was receiving full salary and health care benefits, he should not have been viewed as enjoying unpaid leave of absence status. Rather, the conflict between Article 31.01(E) and ORC Section 5923 should result in an application of the Code because the Grievant was on a paid leave of absence.

Several Ohio Administrative Code Sections (Joint Exhibit 10) were referenced in support of the previous interpretation. OAC Section 123:1-47(A)(2) defines active pay status. With the change in law governing reservists' pay while on active duty, military leave can now be construed as a type of "active pay status." OAC Section 123:1-47(A)51 defines leave of absence without pay. By receiving "full State pay" and regular health care benefits this provision does not apply to the present fact pattern. Similarly, OAC Section 123:1-47(A)54 cannot be applied since the situation under review cannot be characterized as a "no-pay status."

The Union provided an alternative argument in the event the

proposed interpretation is not upheld. Denial of the proposed accruals is estopped because the Grievant detrimentally relied on information provided by Joe Eckstein his supervisor. Prior to his eventual departure on military duty, Eckstein advised the Grievant he would receive all his leave accruals while on active duty. Per a stipulation, Dana Warner, a co-worker, would have testified he was a witness to the conversation. Since the employer never asked Eckstein about the conversation, the Union asserted it met its burden regarding this argument.

On May 2, 2000, Stephen V. Galyassy, the former Deputy Director at the Office of Collective Bargaining, issued a Clarification Letter (Joint Exhibit 9) regarding restoration of accrued leaves upon approved returns from approved leaves of absence and Workers' Compensation. The reference to the leaves to be restored is not applicable to the present dispute. The clarification was issued more than a year prior to the enactment of ORC Section 5923. Also, the proposed comparison is inappropriate because the discussed leaves are for State employees returning from approved unpaid leaves of absence. Here, the Grievant received full pay while not providing State service.

Any conflict between OAC Section 123:1-34-05(F) and ORC Section 5923 should be resolved in favor of ORC Section 5923. Rules promulgated through a rule-making process cannot trump legislative acts passed by a legislative process.

The Grievant should not be held to any statement contained in the signed military leave request form regarding his status. He merely made several elections regarding leave accruals and health insurance. The Employer, moreover, cannot negotiate directly with an employee resulting in reduced contractual benefits and violating the Union's representation rights.

The Employer's Position

The Employer opines that the Grievant was not entitled to vacation and personal leave accruals while on active duty in the military. This opinion, more specifically, was based on a series of contract construction arguments and the application of statutes and administrative rules.

Collective bargaining provisions are unambiguous regarding vacation leave, personal leave and military leave. Section 28.01 allows vacation leave accruals when an employee enjoys active pay status. Section 27.02 allows for personal leave accruals when an employee is on a paid leave of absence. Section 30.02 deals with military leave with pay "... not to exceed twenty-two (22) work days or one hundred seventy-six (176) hours per calendar year..." Finally, Section 31.01(E) provides for unpaid leave of absence for a period in excess of that allowed under Section 30.02.

These various provisions do not modify the Grievant's unpaid leave of absence status as a consequence of the legislative

enactment of Senate Bill 2000 in 2001.[2] The payment of a differential wage adjustment does not directly nor inferentially change the Grievant's status from unpaid leave of absence to leave with pay.

Neither the definition of "active pay" nor the definition of "no-pay" supports the Union's claim that the Grievant was in paid status for the duration of his military leave. Section 30.02 does provide pay for a specific duration of paid leave. Ohio Administrative Rule 123:1-47-01(2) defines active pay status and does not reference military leave. Similarly, this same rule does not reference military leave under the "no-pay status" provision.

The Union's interpretation fails to support the notion that supplementing employees' military pay via R.C. Section 5923.05(B) resulted in the granting of leave accruals. The Grievant more specifically, did not maintain his "paid" status because of the military differential. The Legislature emphasized the loss of pay while on military duty without ever mentioning leave accruals. Also, the language, itself, never changed an employee's status while receiving the differential. Those employees are merely enjoying a leave of absence and are paid the differential.

The previously noted contract provisions make no specification about accrual entitlements beyond the benefits contained in Section 30.02. As such, R.C. 4117.10(A) allows statutory law to supplement

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[2]Senate Bill 164 amended Ohio Revised Code Section 5923.05.

the Collective Bargaining Agreement (Joint Exhibit 1). Here, Rule 123:1-34-05(F) supplements the contract by allowing those on a military leave of absence to vacation leave and personal leave accumulated at the time he/she entered service. These same individuals, however, are not entitled credit for personal leave and vacation leave that would have normally accrued but for their military leave of absence.

The Union failed to prove the tendered detrimental reliance theory. The Union never queried Eckstein about the conversation he had with the Grievant prior to his departure for active duty. Eckstein, however, did recall explaining to the Grievant upon his return the reason he failed to receive vacation and personal leave accruals while he was on military leave. To award this remedy would generate a windfall outside the scope of the Collective Bargaining Agreement.

The Grievant's alleged reliance is not deemed reasonable under the circumstances. A number of information sources were used by the Employer to communicate to all employees their rights to benefits while on unpaid leaves of absence, and particularly military leave. References were made regarding information found in the military request form (Joint Exhibit 4), Rule 123:1-34-05 (Joint Exhibit 8), and information found on the Department of Administrative Services website (Joint Exhibit 6).

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the arbitration hearing, a complete review of the record including pertinent contract provisions and the parties' briefs, it is the opinion of the Arbitrator that the Employer did not violate the Collective Bargaining Agreement (Joint Exhibit 1) when it did not credit the Grievant vacation leave and personal leave accruals for the entire period of his military leave. The leaves requested were neither sanctioned by the Collective Bargaining Agreement (Joint Exhibit 1), Senate Bill 164 (Amending R.C. 5923.05), nor specified Administrative Rules. A ruling in the Union's favor, within this present context, would lead to prohibitions mutually negotiated and articulated in Section 25.03. This provision limits the scope of any arbitrator's authority by precluding the addition, subtraction or modification of any terms of the Agreement. The Union is attempting to gain certain benefits through the arbitration process which it failed to achieve during negotiations or sanctioned by statutory dictate.

Provisions in the Collective Bargaining Agreement (Joint Exhibit 1) fail to provide necessary standing for the accruals in question. Vacation leave accruals as specified in Section 28.01 require active pay status which the Grievant did not possess. Similarly, personal leave accruals only arise when an employee is on a paid leave of absence.

These preconditions cannot be triggered since Article 31, Section 31.01(E) defines military leave as unpaid leave with a proviso. Section 31.01(E) references Section 30.02 which allows military leave with pay for a specified term "... not to exceed twenty-two (22) work days or one hundred and seventy-six (176) hours per calendar year." No other provision in the Agreement makes this specific reference to military leave with pay or any direct reference to the desired accruals. That is, the Agreement (Joint Exhibit 1) fails to specify an entitlement to the accruals in dispute while an employee is called to military duty beyond the pay benefit contained in Section 30.02.

Interestingly, Section 29.02 contains the type of accrual language sought by the Union. This Section, however, is confined to accruals of sick leave while on approved leave of absence. The Grievant admitted he received this benefit, and thus, it is not in dispute. This provision, however, discounts the Union's argument. If the parties had intended to confer similar accrual benefits for vacation and personal leave situations, similar or identical language could have been negotiated; failure to do so itself reflects the lack of mutual intent.

The Revised Code, as well, fails to articulate the type of benefit anticipated by the Union. The pay supplement contained in R.C. 5923.05(B) does not place an employee on paid leave of absence, it merely places an employee on a leave of absence for the

remainder of the absence while on military leave. As such, the military leave is no different than any other form of unpaid leave which would trigger Administrative Rule 123:1-34-05(F). This rule deals with benefits upon reinstatement and only allows for "vacation leave and personal leave which had been accumulated at the time of entering service."[3]

With no other form of relevant accrual during military leave anticipated contractually by the parties, R.C. 4117.10(A) allows the Administrative Rule 123:1-34-05(F)to supplement the Collective Bargaining Agreement (Joint Exhibit 1). Here, the rule is viewed as properly promulgated with the force and effect of law since it does not conflict with a statute unreasonable under the circumstances. *Chicago Pacific Corporation v. Limbach, Tax Commr.*, 65 Ohio St.3d 432 (1992); *The State ex rel., Reyna v. Natalucci-Persichetti*, 83 Ohio St.3d 194 (1998).

The Union failed to rebut testimony provided by Christine Thompson, DAS Policy Development Administrator, regarding the impact of the differential or supplement on an employee's pay status. She maintained, and the Arbitrator agrees, that the supplement should not be viewed as wages earned by an employee in "active pay status." Rather, the military supplement is a benefit conferred by the Legislature via R.C. 5923.05 and distributed by

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[3]The sick leave portion of this provision would not apply since the parties fashioned an exception contained in Section 29.03.

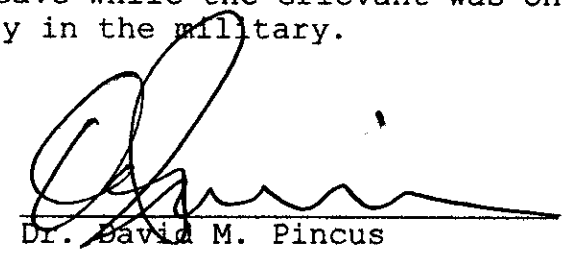
the State of Ohio. A benefit disbursement of this type is considered to be "no-pay status" per Rule 123:1-47-01(54), which approximates the distribution of disability leave benefits format. This status, moreover, means an employee may not receive pay, let alone vacation and personal leave accruals.

A reading of R.C. 5923.05 surfaces the Legislature's intent to ensure that an employee on military leave not suffer a loss of pay. Leave accruals are never specified in this statute. The vacation and personal leave accrual issues cannot be "bootstrapped" because of the employee status specified in R.C. 5923.05(B). Reference is made to "a leave of absence" and "to be paid." The statute never references "paid leave of absence" and "be paid wages." The requested entitlements can only be triggered by similar references which would change the status of those on military leave, after Section 30.02 or R.C. 5923.05(A) benefits have been exhausted.

The detrimental reliance argument is also deemed unpersuasive. It is axiomatic that a right, contractual or otherwise, must be established for a claim of this sort to have any resonance. Based on the analysis provided by the Arbitrator, the Union failed to establish the accrual requests as bona fide rights subject to any reliance or construction.

AWARD

The grievance is denied. The Employer neither violated Section 31.01 of the Collective Bargaining Agreement nor relevant sections of the Ohio Revised Code when it failed to allow the accrual of vacation and personal leave while the Grievant was on a leave of absence and on active duty in the military.



May 19, 2005
Beachwood, Ohio

Dr. David M. Pincus
Arbitrator