#1933

# OPINION AND AWARD

In the Matter of Arbitration

Between

SEIU/District 1199
The Health Care and Social Services Union

And

The State of Ohio, Office of Collective Bargaining and the
Department of Rehabilitation and Correction

Regarding

Grievance # 27-23-20060317-02-12
Greg Forcum

Date of Hearing
March 2, 2007

Date of Briefs
April 6, 2007

Date of Award
May 17, 2007

APPEARANCES:

FOR THE STATE:

Chris Lambert, Advocate
Michelle L. Ivey, LRO 2 & 2nd Chair
Joe Trejo, O.C.B.
Erica Berencsi, Intern

FOR THE UNION:

J. A. Tudas, Advocate & Organizer
Kevin Muhammed, Organizer & 2nd Chair
Greg Forcum, Grievant

An arbitration hearing was conducted March 2, 2007, at the Offices of SEIU/District 1199, Columbus, Ohio, before Panel Arbitrator N. Eugene Brundige. The parties stipulated that the matter was properly before the Arbitrator for determination.

The stipulated issue presented to the Arbitrator reads:

> "Did the Employer 1) violate Article and Section 26.01 of the SEIU/District 1199 Contract; 2) treat the grievant – Greg Forcum – disparately; and 3) unreasonably deny a requested leave of absence when it exercised its ability under § 26.01 to deny the grievant's request for a leave of absence for his stated purpose of working for a sub-contractor of the U.S. Government in Iraq? If so, what shall the remedy be?"

Much of the record in this matter was jointly stipulated by the parties including the relevant collective bargaining agreement, the grievance trail, numerous other documents, and eight (8) written stipulations.

All parties were given full opportunity to examine and cross examine witnesses and present evidence and arguments, which they did competently and professionally.

Post hearing briefs were filed in a timely manner.

## RELEVANT CONTRACT SECTIONS:

**ARTICLE 26.01**
**Unpaid Leaves**

A leave of absence may be granted upon written request for a period of up to six (6) months for personal reasons. Such reasons include, but are not limited to, non-disability maternity, paternity, and child-rearing leave, adoption leave, and such other purposes as may be approved at the sole discretion of the Employer. Such leave may be extended upon written request for a period of up to six (6) months.

A leave of absence may be granted upon written request by an employee for the purpose of entering an educational program leading to a degree or certification. The leave may be granted for a period of up to two (2) years and may be extended upon request for an additional period of up to two (2) years.

Such leaves of absence shall be not unreasonably requested by employees, nor shall they be unreasonably denied by the agency.

**ARTICLE 5 - MANAGEMENT RIGHTS**

Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08 (CXI)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this Agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

## BACKGROUND INFORMATION:

The grievant, Greg Forcum, is a Correctional Program Specialist or case manager, employed by the Ohio Department of Rehabilitation and Correction, at Ross Correctional Institution in Ross County, Ohio.

In February 2005 the Grievant decided to apply for a position as a corrections instructor for a US Government sub-contractor working in Iraq.

The Grievant testified that he saw postings of the opportunity at his work site. His application with the sub-contractor was approved in August, 2005 and he applied for leave without pay. His request for leave was denied.

The Grievant informed the sub-contractor that he was not approved and declined the offer.

The Grievant was apparently informed that his leave would be approved if he used vacation, personal and compensatory time that he had previously earned.

The sub-contractor offered the position to the Grievant again in March 2006. The Grievant submitted leave requests utilizing vacation, compensatory and personal leave time from April 2006 through September 2006. These

requests were originally denied for the stated reason of "operational impact" but were subsequently approved.

The Grievant also applied for leave without pay from September 2006 through May 2007. That request was denied.

The Grievant utilized the paid leave that was approved and worked in Iraq from April 2006 through September 2006.

The denial of the leave without pay prompted the grievance giving rise to this arbitration proceeding.

The grievance which was filed March 14, 2006, reads as follows, *"Denied leave without pay that other DR&C employees have received."*

The remedy requested states, *"allowed leave without pay. Return all leave to my books that I will have to use."*

**POSITION OF THE UNION:**

The Union argues that the denial was unreasonable and thus a violation of Section 26.01. The Union cites several actions on the part of Management that it believes prove this to be an unreasonable action.

1. It cites that Management posted the recruitment information concerning the opportunity. The Grievant testified that he was informed by a management person (Captain Shoop) that information had been posted by the Administration for corrections officers needed in Iraq.

2. The Grievant testified that he discussed the Iraq situation with Warden Hurley and concluded from those conversations that a request for leave would be approved.
3. Warden Saunders (who did serve in Iraq) testified that he made presentations concerning his experiences in Iraq to DRC employees. The Union believes that these presentations motivated employees, including the Grievant, to want to apply.
4. The Union cites several DRC publications touting the achievements of Warden Saunders thus again offering subtle support to persons seeking to serve in Iraq.
5. The Union refers to a communication from Acting Assistant Director Terry Collins describing the conditions under which leaves without pay might be considered by Wardens. The Union argues that if leaves were not contemplated, there would be no need for such a memo.

The Union notes that Warden Hurley and Warden Sheets listed three reasons for the denial. The Union lists them as budgetary issues, pressures from Central Office, and staffing levels.

The Union believes that the approval of the use of paid leaves while denying leave without pay negates this argument.

The Union also argues that no evidence was presented regarding Central Office pressure.

Finally, the Union argues that case manager staffing was 100% at Ross Correctional at the time of the request. It believes the Grievant and his supervisor could have worked out a plan to provide for coverage.

Another major thrust of the Union's position is disparate treatment "of the Union and the Grievant."[1]

The Union notes that no 1199 members who submitted leave requests for Iraq were approved. OCSEA and exempt employees were approved for a variety of reasons.

1199 cites one (1) corrections officer who took a year to get his pastoral education and six (6) RCI employees who took leave with pay to assist in New Orleans following Hurricane Katrina.

The Union requests the Grievant be granted a one (1) year leave without pay for another tour of duty and that his leave balances be restored.

**POSITION OF THE EMPLOYER:**

The Employer argues that its actions taken in this case did not violate the Contract.

Employer exercised its contractual right to deny a requested leave of absence without pay. Further the Employer believes the record demonstrates that its actions were reasonable.

The Employer argues that the language is clear and unambiguous. The "may" used in Section 26.01 clearly establishes the permissive nature of the Section.

---

[1] Union's Post Hearing Brief, Page 3

The language is strengthened when later in the section it states, "at the SOLE discretion of the Employer."

The Employer in addressing the reasonableness issue, states, *"It is not unreasonable, the troubles in Iraq not withstanding, for the Employer to operate its prison in the most efficient and effective manner possible."*[2]

The Employer calls the Arbitrator's attention to the testimony of Warden Sheets who was the Appointing Authority who made the decision at issue. DRC notes that Warden Sheets testified that he had budget limitation and that RCI was short staffed with an increasing inmate population.

Warden Sheets indicated that his overtime budget was severely limited and if he decided to use a temporary employee to cover the Grievant's vacancy, the institution would not be able to back fill the position this temporary employee would be leaving.

The Employer takes issue with the Union argument that other on-staff employees could cover the Grievant's work. The Employer argues, "if other case mangers can do the work assigned to the grievant, why have the position in the first place?"[3]

The Employer asserts that the language in 26.01 offers examples that clearly demonstrate that the intent of the Section is to accommodate the personal needs of employees rather than professional needs such as is the case here.

The Employer addresses the issue of disparate treatment by noting that it is usually raised as an affirmative defense in disciplinary matters rather than in

---

[2] Employer's Post Hearing Brief, Page 3.

contract interpretation issues such as the one which is at issue here. Further, none of the four (4) individuals identified by the Union was similarly situated. None of the four (4) individuals identified was (1) employed by Ross Correctional Institution or (2) a member of the SEIU/District 1199 bargaining unit.

The Employer notes that Mark Saunders was a warden at the time he went to Iraq and that he was recruited by the United States Justice and State Departments to serve in Iraq as an upper level administrator and did not ever make application to go to Iraq to work.

Finally, the Employer asserts that the Union argument that approval of paid leaves, in essence, caused the Employer to surrender its justification for refusing to grant unpaid leave is a "Red Herring."

**DISCUSSION:**

A careful analysis of all the documentary evidence leads me to agree with the Union that the Employer sent a very unclear and mixed message regarding service in Iraq.

The posting of the recruitment materials and the in house publications honoring the work of Warden Saunders certainly created the impression that the Department greatly honored and valued those who went to work in Iraq.

While there is a lack of clarity about the actual conversations between the Grievant and various DRC officials, it is not unreasonable to assume that he concluded a request for leave would be granted when he begun the application process.

---

[3] Employer's Post Hearing Brief, page 5.

In the mind of this Arbitrator the actions that most conveyed this "mixed message" were the presentations by Warden Saunders on work time to bargaining unit employees.

The question before the Arbitrator is whether these "mixed messages" are adequate to meet the standard necessary to prove the unpaid leave request was "unreasonably denied."

An examination of Article 26, Section 26.01 establishes the permissive nature of *Leaves of Absence.*

The introductory language clearly states, *"A leave of absence **MAY** be granted upon written request."*

Section 26.01 goes on to offer a litany of possibilities but none of them refers to the current situation.

Other situations not listed are covered by the language "*...and such other purposes as may be approved at the **SOLE DISCRETION OF THE EMPLOYER."***

These permissive references establish a very high barrier for the Union to overcome.

Clearly the intent of those who drafted the language was to provide maximum flexibility to the Employer when it comes to the matter of approving unpaid leave.

The concluding sentence of 26.01 provides protection to the Union and bargaining unit members against unreasonableness when it states, "*Such leaves*

*of absence shall not be unreasonably requested by employees, nor shall they be unreasonably denied by the agency."*

Different arbitrators apply different tests to the "unreasonably denied" standard.

Arbitrator James Odom Jr. uses "bias, prejudice or other abuse of discretion."[4]

In the Nashville Gas Co. Case he stated:

> "Most authorities agree that as a general proposition, a company cannot base a personnel decision on an improper reason. Certainly, an action grounded in personal prejudice is subject to reversal. But this is not to say that all management decisions are open to challenge on the grounds of error. I have already held that the refusal of C 's extension request was not motivated by or tainted with bias. Whether light-up season began on August 1 or September 1 is immaterial, as is the question whether the Company could have performed its essential functions without C at work during August. Absent bias, or prejudice or other showing of abuse of discretion, management has no duty to justify to the union its decision to deny a leave or an extension of a leave for family purposes."

Another common practice which this Arbitrator observes is whether the action was arbitrary, or capricious.

To examine if the denial of leave in the instant case meets any or all of these tests, we must decide who the authorized decision maker is.

Joint Exhibit 6 provides a clear answer to that question. The memo from Acting Assistant Director Terry Collins dated January 5, 2005, states, *"The approval of such requests is at the discretion of the appointing authority."*

---

[4] 79 LA 802, Nashville Gas Company and United Association of Journeymen and apprentices of Plumbing and Pipefitting Industry, Local 702, August 10, 1982

The decision maker authorized by the Department to grant or deny the request for an unpaid leave of the Grievant was Warden Sheets.

While the Employer is correct that the concept of disparate treatment is generally limited to employee discipline, it seems appropriate in this case to use the concept as a tool in determining if the "unreasonably denied" requirement has been violated.

Warden Sheets did not grant unpaid leave in order to work in Iraq to any other RCI employee.

The Union offers a creative argument that disparate treatment crosses bargaining unit lines. The very fact that different bargaining units share different communities of interest negates that argument.

I cannot find a basis for determining that disparate treatment occurred in granting leave for similarly situated employees to work in Iraq.

The purpose of Article 26, Section 26.01 is clearly to provide unpaid leaves for personal needs of the employee. Ordinarily an employee seeking a leave in order to work for another employer would not fall under the intent of this section.

This case falls into a bit of a gray area though. While there is no question that the Grievant was seeking to work for another employer, the public service aspects, the desire to serve one's country, and the dangers involved, allow it to be viewed from a different perspective than simply career development.

But whether or not the goals were laudable, the permissive language of 26.01 does not require the Employer to grant an unpaid leave of absence to the Grievant.

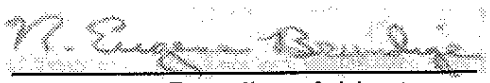
While the Agency could certainly improve its communications strategies to avoid sending mixed messages to employees who might want to serve in similar situations, that situation does not change the realities embodied in the collective bargaining agreement.

I find no violation of Article 26, Section 26.01.

**AWARD:**

The grievance is denied.

Respectfully submitted this 16th day of May, 2007 at London, Ohio.



N. Eugene Brundige, Arbitrator