

# Arb Decision #1019

## ARBITRATION DECISION

January 18, 2009

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**JAN 20 2008**

OCSEA-OFFICE OF  
GENERAL COUNSEL

In the Matter of:

State of Ohio, Department of Mental	)	
Retardation & Developmental Disabilities	)	
	)	Case No. 24-14-20070514-0059-01-04
and	)	Leanna Russell, Grievant
	)	
Ohio Civil Service Employees Association,	)	
AFSCME Local 11	)	

## APPEARANCES

### For the State:

Ryan Sarni, Labor Counselor, Office of Collective Bargaining

### For the Union:

Robert Robinson, Advocate

### Arbitrator:

Nels E. Nelson

## BACKGROUND

The grievant is Leanna Russell. She works at the Warrensville Developmental Center as a Therapeutic Program Worker. It is a facility of the Department of Mental Retardation and Developmental Disabilities located in Warrensville. The grievant's job involves working with clients at the center. She is represented by the Ohio Civil Service Employees Association, AFSCME Local 11.

The events giving rise to the grievance began on February 22, 2005. On that date the grievant injured her back at work. She was off work on an approved leave and received temporary total disability payments from the Bureau of Workers' Compensation until June 13, 2005, when she returned to work. Since the grievant was unable to perform her regular job, she was placed in the Transitional Work Program.

On September 15, 2005, the 90 days an employee can spend in the Transitional Work Program ended. Because the grievant was still unable to perform all of the duties of her job, she was placed on a leave of absence and went back on workers' compensation.

On November 25, 2005, the grievant received a notice from the state. It indicated that the state intended to implement an involuntary disability separation and that a pre-separation hearing would be held on December 2, 2005. At the hearing, the grievant acknowledged that she was unable to perform her job and her employment with the state ended on January 1, 2006, and the grievant went back on workers' compensation. Under Section 123:1-30-01 of the Ohio Administrative Code she had reinstatement rights for two years or until September 13, 2008.

On December 2, 2006, the grievant was cleared to work by her doctor and on December 27, 2006, she went back to her job as a TPW. At that time, she requested the state to restore her personal and sick leave accruals from when she began work in the Transitional Work Program on June 13, 2005, through December 27, 2006, when she was reinstated from her involuntary disability separation.

On May 14, 2007, a grievance was filed on behalf of the grievant. It charged that she "received no sick time accrued at any time during [her] approved leave of absence." The grievance asked that the state "credit the grievant with all sick time while [she was] on approved leave."

The step three grievance meeting was held on July 2, 2007. The union complained that the grievant did not receive credit for sick leave hours while on approved leave of absence and receiving workers' compensation. The state claimed that the grievant was entitled to have her personal and sick leave accrual for February 22, 2005, to June 13, 2005, restored but that she was not entitled to the restoration of her leave for September 15, 2005 through December 27, 2006.

The hearing officer denied the grievance, citing collective bargaining clarification letter No. 00-05-02. She stated that pursuant to the letter "when an employee is disability separated directly from a period of approved unpaid leave, DLB, or WC benefits, the employee does not have "an approved return" from leave of absence [and thus] is not entitled to restoration of accrued lleave ." (State Exhibit 13)

When the grievance was not resolved, it was appealed to arbitration. The parties agreed to forgo a hearing and submit the case on briefs. On November 15, 2008, Robert Robinson, the union's advocate, emailed Ryan Sarni, the state's advocate, indicating that

the leave balances should be reinstated "from the time of disability to the time of separation." (State Exhibit 14) When Sarni asked Robinson to indicate the specific dates at issue, he responded that "the only time we are questioning is from September 15, 2005 to January 1, 2006." (State Exhibit 15)

The Arbitrator received the parties' briefs on December 17, 2008. The union's brief indicated that the parties were unable to reach "any stipulated agreements." As a result, the Arbitrator did not have a statement of the agreed-upon facts, an agreed-upon issue, or agreed-upon joint exhibits. Unfortunately, the briefs contained a number of assertions with no testimony or documentary evidence to support them.

### ISSUE

The issue as framed by the Arbitrator is:

Is the grievant entitled to accrued personal or sick leave for September 15, 2005, to January 1, 2006, and/or from January 1, 2006, to December 27, 2006?

### RELEVANT CONTRACT PROVISIONS

#### Article 27 - Personal Leave

\* \* \*

#### 27.02 - Personal Leave Accrual

\* \* \*

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

\* \* \*

Article 29 - Sick Leave

\* \* \*

29.02 - Sick Leave Accrual Process

\* \* \*

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.

\* \* \*

UNION POSITION

The union argues that the grievant is entitled to the restoration of her personal and sick leave accruals from September 15, 2005, to December 27, 2006. It states that Sections 27.02 and 29.02 of the collective bargaining agreement provide that when employees who have been on approved paid leave of absence or union leave or have been receiving workers' compensation return to work, they are to be credited with the personal and sick leave they accrued while they were off work. The union indicates that since it is undisputed that the grievant received workers' compensation for the full duration of her absence and was returned to work, she is entitled to have her accrued leave restored.

The union contends that even if the Arbitrator believes that the grievant's involuntary disability separation stopped the restoration of her accumulated personal and sick leave, she is entitled to have her leave restored from September 15, 2005, up to her separation on January 1, 2006. It observes that she returned to workers' compensation on September 15, 2005, after going through the Transitional Work Program and was not involuntarily separated until January 1, 2006.

The union challenges the state's reliance on collective bargaining letter No. 00-05-02. (Union Exhibit 1) It reports that the letter has no section describing a reinstatement from a disability separation. The union stresses that in any event, the letter "has no foundation in the contract or the Administrative Code." (Union Brief, page 2)

The union concludes that the grievance should be sustained. It asks the Arbitrator to grant the grievant all the personal and sick leave hours she accrued from September 15, 2005, to December 27, 2006.

### STATE POSITION

The state argues that a collective bargaining clarification letter, the collective bargaining agreement, and the Ohio Administrative Code support its position that the grievant is not entitled to sick leave accruals from the time she went out on workers' compensation on September 15, 2005, to the date of her involuntary separation on January 1, 2006. It states that each of the reasons center on the fact that "employees are not entitled to their sick leave accruals when they return after they go on workers' compensation, are disability separated, and then assert their re-instatement rights and come back to work." (State Brief, page 4)

The state contends that collective bargaining clarification letter No. 00-05-02, entitled "Restoration of Accrued Leaves Upon Approved Return," supports its position. It points out that the letter indicates that employees on workers' compensation who return directly back to regular employment are entitled to receive their accruals. The state notes, however, that the letter states:

An "approved return" from a leave of absence does not include a reinstatement from disability separation. Where an employee is disability separated directly from a period of approved paid leave, DLB or WC benefits,

the employee does not have an "approved return" from a leave of absence. Such employee is not entitled to restoration of accrued leave. (State Exhibit 16)

It stresses that the grievant "is not entitled to a restoration of accrued leave from her time spent on workers' compensation because she was not on workers' compensation when she returned to work ... instead, she spent eleven months ... as a non-state employee and therefore she is not entitled to her accruals." (State Brief, page 5)

The state maintains that when the grievant was disability separated, she was no longer a state employee. It observes that after her separation she merely retained reinstatement rights pursuant to the Ohio Administrative Code. The state indicates that "this is why Article 29.02 permits employees who return directly back to state employment from workers' compensation to receive the credits they accrued while they were off." (State Brief, pages 5-6)

The state rejects the union's argument that the clarification letter is not controlling. It asserts that it was released eight years ago and was distributed to every state agency and has been available on the Office of Collective Bargaining's website. The state claims that "any contest of the letter itself is untimely by more than eight years." (State Brief, page 6)

The state argues that the union should not be allowed to challenge the clarification letter. It observes that even though the decision to deny the grievant's original pre-grievance request was based on the letter, the grievance does not dispute it. The state insists that "the union should not be able to expand the scope of its grievance about a single issue to include an eight year old clarification letter." (State Brief, page 6)

The state contends that the plain language of the contract supports its position. It observes that Article 29.02 permits the restoration of accrued leave only when employees on workers' compensation or approved unpaid leave return to work. It states that when the grievant returned to work, she was not on workers' compensation or an approved absence and was not even a state employee.

The state maintains that the contract could have provided for the receipt of sick leave accruals under the case in dispute. It points out that the contract could have stated that "employees that have been involuntary disability separated shall be credited with those sick leave hours earned during any time on Workers' Compensation prior to their separation upon their approved return to work [or that] 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 or upon the exercise of their re-instatement rights from involuntary disability separation." (State Brief, page 7)

The state argues that the absence of the conditions at issue in the language regarding accruals and the presence of the other conditions strongly imply that the conditions at issue were not meant to be included. It reports that Article 29.02 provides that employees accrue sick leave while in "active pay status," which Article 29.01 defines as "conditions under which an employee is eligible to receive pay, and include, but is not limited to, vacation leave, sick leave, and personal leave." The state reports that Section 123:1-47-01 of the OAC adds bereavement leave, administrative leave, comp time, and holidays to the list in the contract. It emphasizes that the OAC does not mention periods



of workers' compensation prior to involuntary separation and subsequent reinstatement or periods of time spent on disability separation.

The state rejects any argument that the clarification letter and Article 29.02 mean that an employee who is off on workers' compensation and eventually comes back to work is entitled to his or her accruals for the time spent on workers' compensation. It suggests that if the union were correct, an employee who took a state job at 18 years of age, was injured at work, and involuntarily separated at 20 years of age, could work at a private company for 30 years and then return to state employment at 51 years of age and be entitled to sick leave accruals for the time spent on workers' compensation 30 years earlier. The state claims that "this would be both a financial and administrative nightmare." (State Brief, page 8)

The state argues that nothing in Chapter 123:1-30 of the OAC states or implies that sick leave accrual from a previous period of workers' compensation must be granted when an employee who has been separated exercises his or her reinstatement rights or that an involuntarily separated employee is entitled to accruals from the time he or she was separated. It points out that Section 123:1-33-17 of the OAC states that employees on occupational injury leave continue to receive sick leave credit. The state claims that occupational injury leave is similar to workers' compensation and involuntary disability separation because they mean that an employee is unable to perform his or her job. It maintains that "the absence of such language in Chapter 123:1-30 and the presence of it in Section 123:1-33-17(F) suggests that the rulemaking authority clearly intended that employees covered by 123:1-30 not receive accruals for their time on workers'

compensation prior to involuntary disability separation or during involuntary disability separation.” (State Brief, page 9)

The state concludes that employees who have been disability separated are not entitled to receive accruals for time spent on workers’ compensation immediately prior to their separation. It asks the Arbitrator to deny the grievance in its entirety.

### ANALYSIS

The issue before the Arbitrator is whether the grievant is entitled to the restoration of accrued personal and sick leave. The union claims that she is due accrued time for two time periods.<sup>1</sup> The first is from September 15, 2005, to January 1, 2006, which is the time between when the grievant left the Transitional Work Program and went back on workers’ compensation and when she was involuntarily separated due to her disability. The second time period is from January 1, 2006, to December 27, 2006, which is the time after the grievant was separated until she was re-employed.

The union argues that Article 27, Section 27.02, and Article 29, Section 29.02, require the state to restore the grievant’s personal and sick leave accruals for both of the time periods at issue. It points out that these provisions indicate that an employee on an approved leave of absence or workers’ compensation is entitled to have his or her accrued leave restored when he or she returns to work. The state responds that the provisions of the collective bargaining agreement cited by the union, collective bargaining clarification letter no. 00-05-02, and the Ohio Administrative Code fail to support the union’s position.

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<sup>1</sup> The Arbitrator acknowledges that the state submitted an email, marked as State Exhibit 15, which it received from the union on December 1, 2008, indicating that the sole issue was the time between September 15, 2005, and January 1, 2006.

The Arbitrator must agree with the state. With respect to the time between September 15, 2005, and January 1, 2006, the grievant was on leave and accruing personal and sick leave. If she had returned to work, under the contract she would have been entitled to her accrued leave. However, the grievant was subjected to an involuntary disability separation on January 1, 2006, so that on December 27, 2006, she was not an employee returning to work under the contract but was an individual who was re-hired pursuant to Section 123:1-30-01 of the OAC, which has no provision for the restoration of accrued personal or sick leave.

The analysis of the period from January 1, 2006, to December 27, 2006, is similar. As with the earlier time period, the grievant was not an employee returning to work under the collective bargaining agreement but was an individual being re-hired pursuant to the OAC. In addition, in the second time period no personal or sick leave was accrued to be restored to the grievant. As indicated above, the grievant was not an employee of the state between January 1, 2006, and December 27, 2006, and the accrual of sick leave is limited to employees.

The Arbitrator must comment on the clarification letter relied upon by the state. The letter clearly indicates that an employee reinstated from an involuntary disability separation is not entitled to leave accruals. The state asserts in its brief that the letter was distributed to every agency and suggests that the union did not challenge it and that its failure to do so would now make any challenge untimely.

The union rejects the state's reliance of the clarification letter. It stated that the letter has no section dealing with a reinstatement from an involuntary disability

separation. The union also complained that the letter has no basis in the collective bargaining agreement or the OAC.

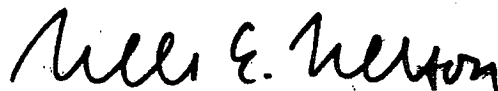
The Arbitrator must ignore the clarification letter. The letter represents the Office of Collective Bargaining's interpretation of the contract and its instructions to the agencies about how to handle the restoration of accrued leaves. The state's assertions regarding the distribution of the clarification and the union's failure to challenge the content of the letter must be rejected as nothing more than unsupported claims.

Finally, the Arbitrator does not believe it is necessary to examine the provisions of the OAC relating to separations. The union did not claim that the OAC requires the restoration of accrued leaves but relied on the collective bargaining agreement. Furthermore, it is clear that while Section 123:1-33-17(F) of the OAC provides for the accrual of sick leave while an employee is on occupational injury leave, there is no such requirement in Chapter 123:1-30 relating to separations.

Based on the above analysis, the Arbitrator must deny the grievance.

AWARD

The grievance is denied.



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Nels E. Nelson  
Arbitrator

January 18, 2009  
Russell Township  
Geauga County, Ohio