Thomas J. Nowel, NAA
Arbitrator and Mediator
Cleveland, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT OF THE PARTIES

In The Matter of a Controversy Between:	)	Grievance No.
	)	OCS-02-10-15-
Ohio Civil Service Employees Association,	)	07-02-02174-
Local 11 AFSCME, AFL-CIO	)	01-00
	)	
and	)	ARBITRATION
	)	OPINION AND
State of Ohio, Department of Administrative	)	AWARD
Services	)	
	)	DATE: November
Re: Personal Leave	)	9, 2016

APPEARANCES:
Jessica R. Doogan, Esq., Associate General Counsel, OCSEA, Local 11 AFSCME, for the Union; Ronald G. Linville, Esq., Baker Hostetler, for the Employer; Aimee Szczerbacki for the Ohio Office of Collective Bargaining.

INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Ohio Civil Service Employees Association, Local 11 AFSCME. Following the completion of negotiations for a successor collective bargaining agreement between the parties in 2015, a disagreement arose regarding the interpretation of new language which had been negotiated in Article 27, Personal Leave, Section 27.03. Failing to resolve the dispute, the Union filed Grievance No. OCS-2015-02174-0 on July 2, 2015. The parties waived the ADR step (grievance mediation), and the matter was moved to arbitration.

The arbitrator was selected to hear this case pursuant to Article 25 of the collective bargaining agreement. Hearing was held on August 23, 2016 at the OCSEA hearing room in Westerville, Ohio. At hearing, the parties were afforded the opportunity for examination and cross examination of witnesses and for the introduction of exhibits. Prior to hearing, the parties stipulated to a series of joint exhibits.

The Employer utilized the services of a court reporter, Carolyn M. Burke, Fraley Cooper & Associates. The parties agreed that a copy of the transcript would be provided to the Arbitrator. At the close of the hearing, the parties agreed to submit post hearing briefs no later than September 21, 2016. The deadline was extended to October 12, 2016.

ISSUE

The parties stipulated to the following issue to be decided by the Arbitrator. "Has the State of Ohio violated the language of Article 27.03 of the Collective Bargaining Agreement? If so, what shall the remedy be?"

The parties stipulated that the issue is properly before the Arbitrator.

WITNESSES

TESTIFYING FOR THE UNION:
Steven Kreisberg, AFSCME International Union Representative and Chief Negotiator
Christopher Mabe, President, Ohio Civil Service Employees Association

TESTIFYING FOR THE EMPLOYER:
Daniel J. Guttman, Baker Hostetler, Chief Negotiator
Aimee Szczerbacki, Policy Administrator, Office of Collective Bargaining
Kristen Rankin, Deputy Director, Office of Collective Bargaining

RELEVANT PROVISION OF THE AGREEMENT

Article 27, Personal Leave
27.03 – Charge of Personal Leave
Personal leave which is used by an employee shall be charged in minimum units of two (2) hours.

GRIEVANCE

The Grievance of the Union was filed with the Employer on July 2, 2015 by Patty Rich, Grievance Manager. Statement of Grievance and Resolution Requested are as follows.

Statement of Grievance: The State of Ohio agencies have advised OCSEA members of policy changes that all Personal Leave must be used only in 2 hour increments, effective July 1, 2015. The agencies are cancelling any pre-approved personal leave and requiring that it be resubmitted to reflect the 2 hour increments. The Union

negotiated language in good faith that employees must initially request personal leave in a minimum of 2 hours. There was no agreement that personal leave beyond the initial amount be taken in any specific increments.

Resolution Requested: To follow what the parties negotiated at the table by allowing employees to take personal leave for an initial minimum of 2 hours, but that the additional time requested does not need to be in 2 hour increments. That any pre-approved personal leave cancelled by management and changed to only 2 hour increments, be changed back to the original request. That any employee who has already taken personal leave pursuant to the reflected management changes, they shall have all personal leave taken based upon this change reinstated to their balance. That any pending personal leave be changed to reflect the amounts negotiated by the parties.

BACKGROUND

The term of the previous collective bargaining agreement was March 1, 2012 through February 28, 2015. The parties commenced negotiations for a successor Contract in early 2015. In the past OCSEA and the State had engaged in interest based bargaining. During these negotiations, the parties mutually agreed to engage in a problem solving approach to bargaining for the successor agreement, not interest based per se, but a model which allowed each party to discuss issues which could lead to written hard proposals. While the interest based approach allows for joint problem solving through a brain storming process, the parties agreed that, following the initial problem solving model, a traditional approach of proposal submission by each party would follow. This was an effective and proactive approach to collective bargaining negotiations. The parties reached tentative agreement on most non economic issues and then focused on a package of economic issues which included the Employer's proposal to modify Article 27, Personal Leave.

The previous Contract allowed employees, based upon Section 27.03, to use personal leave in minimum units of one-tenth hour. Previous Contracts contained the same incremental use of the benefit. The Employer argued that the small incremental use of personal leave allowed employees to avoid mandated overtime, to cover periods of tardiness and to otherwise inconvenience managers and other bargaining unit employees. Past practice had developed over time in which the denial of personal leave, regardless of the amount requested, rarely occurred. The Employer, at the bargaining table, cited the heavy use of personal leave following an Ohio State University football championship game which left shifts short staffed especially in the Department of Rehabilitation and Correction. During the problem solving aspect of the bargaining, the Union agreed that one-tenth hour increments had been problematic and therefore agreed to consider an Employer proposal.

The parties met on March 25, 2016 to engage in bargaining over the remaining economic issues (and one or two non economic issues which had not been resolved in earlier negotiations). Both bargaining teams met to consider and discuss economic proposals including Article 27. The Employer's first proposal regarding Article 27 included a limitation of the use of personal leave to four times each year, the Employer's ability to deny a request and non use before and after a holiday. The Employer's proposal at the table included full language (Jt. Exb. 3).

Following the March 25, 2015 bargaining session, the parties agreed to proceed with negotiations by utilizing a process whereby the two chief negotiators would meet between themselves to discuss economic proposals and share counter-proposals. Following these "side-bar" meetings, each negotiator would meet with

the respective bargaining teams to consider proposals, counter-proposals or potential areas of agreement and then return to a side-bar meeting with his counter part. The Employer's chief negotiator was Daniel Guttman, a member of the Baker Hostetler Law Firm. Attorney Guttman is an experienced public sector negotiator. The Union's chief negotiator was Steven Kreisberg, the Director of Research and Collective Bargaining for the AFSCME International Union, the parent organization to which OCSEA is affiliated. Mr. Kreisberg, in his position, is likewise an experienced and skilled negotiator.

The March 31, 2015 bargaining session continued all day and night and into the early morning hours of April 1, 2015. The two chief negotiators met in a side-bar to consider individual proposals included in the economic package. The Employer's Article 27 proposal included a modification from the original position of March 25. The revised proposal allowed for the use of personal leave in four hour increments with the Employer's ability to deny based on an "unreasonable number of employees in the same agency, in the same facility, at the same time." Mr. Kreisberg carried the proposal to his bargaining committee which rejected the Employer's counter. The chief negotiators then met again to discuss counter-proposals which had been developed by each committee. During this side-bar session, the Union proposed language allowing the Employer to restrict the use of personal leave consistent with the collective bargaining agreement between SEIU District 1199 and the State. The proposal included an increase in the number of personal days while retaining the one-tenth hour usage consistent with the 1199 Agreement. During the next side-bar, the Employer agreed to incorporate 1199

language if the Union agreed to four hour increments. Mr. Kreisberg brought this proposal (along with other economic package proposals) to his full committee which then rejected the Employer's personal leave counter.

As the bargaining session continued into the night and early morning hours of April 1, the parties continued to narrow the issues in an attempt to achieve an overall tentative agreement for a successor Contract. In a side-bar meeting between the chief negotiators, the Employer proposed modifying the personal leave article by replacing one-tenth hour with two hour units of usage. The Employer's proposal included the maintaining, status quo, of all other provisions of Article 27. Tentative agreement was achieved based on this modification of the Employer's proposal and agreement to other economic issues. In the early morning hours of April 1, 2015, a tentative agreement was reached on all outstanding issues in full committee session, and a written agreement was reviewed and executed by the chief negotiators. The signed tentative agreement included Article 27, Personal Leave. All sections of the article remained unchanged from the prior Contract with the exception of Section 27.03. Two hours replaced the one-tenth hour minimum usage. "Personal leave which is used by an employee shall be charged in minimum units of two (2) hours."

The parties ratified the new Contract which became effective July 1, 2015. Managers cancelled approved personal leave of less than two hour units beginning on July 1, 2015. The Union believed that initial personal leave was limited to two hour units, but that employees continued to have the right to use personal leave in other units or increments following the initial usage including the ability to use personal leave in one-tenth hour units. OCSEA filed a state-wide grievance on July 2,

2015 challenging the Employer's position that all personal leave usage was limited to two hour increments. Following discussions between the parties the grievance was submitted to arbitration.

POSITION OF THE UNION

The Union states that the intent of Section 27.03 requires employees to take an initial two hour unit of personal leave and that following the initial increment, employees have the ability to utilize personal leave in the minimum timekeeping increments of one-tenth hour. The Union states that the OCSEA President, Chris Mabe, believed that the issue at the table involved only the initial unit or increment, and he indicated that the Union bargaining committee believed this to be accurate and true. The Union states further that its chief negotiator, Mr. Kreisberg, was of the understanding that the negotiations were over the initial use of personal leave only. The Union argues that it gave serious consideration to the Employer's concerns, avoidance of overtime, tardiness and other operational issues. Clearly a minimum usage modification would resolve the issues and concerns brought to the table by the Employer during the problem solving portion of bargaining between the respective committees. It is clear then that the Union believed it was bargaining over initial usage and this was the intent of the parties. The Union argues that the Employer led the Union to believe that the bargaining related specifically to initial usage only. The Employer's interpretation now is completely different than what had been negotiated as a tentative agreement. The Union emphasizes that

modifying initial use of personal leave resolves the issues the Employer presented during the problem solving sessions leading up to tentative agreement.

The Union asks the Arbitrator to restore the intent of the parties at the bargaining table, initial use of personal leave is limited to two hours. Following the initial increment, employees may use personal leave in minimum units of one-tenth hour or other increments. In addition, the resolution of the Union's grievance is the restoration of other leaves employees may have had to utilize to substitute for denied personal leave since July 1, 2015.

POSITION OF THE EMPLOYER

The Employer states that the Contract is clear. Personal leave is charged in units of two hours. Section 27.03 is clear and unambiguous in that this provision says nothing about initial use or any other unit outside of two hour minimum units. This is what the parties agreed at the bargaining table. Further, the Employer states that historically personal leave has been used in consistent units. The Employer states that the Union never made a proposal to allow for a different unit of personal leave following an initial increment of two hours. The language does not say this. The Union never made a proposal or raised a question regarding this concept.

The Employer emphasizes that the exchange of proposals regarding personal leave occurred between the chief negotiators only, Mr. Kreisberg and Mr. Guttman. Although OCSEA President Mabe suggested he may have been involved in the side-bar, shuttle bargaining, the Employer states that only the two chief negotiators met in this fashion. The Employer argues that the Union is now attempting to gain what

it failed to obtain during negotiations. The Employer states that the Union has the burden to prove its position but failed to do so at hearing. The Employer states that modifying personal leave usage was one of its top priorities in negotiations, and the Union was aware, through the problem solving process, that relief was needed from the one-tenth hour usage which potentially allowed an employee to use personal leave 320 times each year.

The Employer states that employees have always been required to use personal leave in consistent units of time, one hour during the 1986 Contract, then 30 minutes and finally one-tenth hour since 2000. The Employer states that historically employees never had the option of using personal leave in anything but consistent units as delineated in the collective bargaining agreements.

The Employer states that during all of the give and take, trading of proposals and discussion, all of which occurred in the side-bar meetings between the chief negotiators, there was never a proposal or discussion regarding initial unit. The concept was never discussed or considered by either party.

The Employer argues that the plain language in Section 27.03 is not ambiguous. The Arbitrator is therefore obligated to interpret the language based on its ordinary meaning. The Employer cites arbitration case law regarding plain language interpretation in its post hearing brief and charges the Arbitrator to deny the Union's grievance in its entirety.

ANALYSIS AND OPINION

The one-tenth hour utilization of personal leave, as contained in the previous and earlier Contracts, had become a problem for the Employer, and, as the chief negotiator for the Union, Steven Kreisberg, stated at hearing, the language had become an issue with the Union as well. The use of the minimum unit of personal leave to avoid mandated overtime in certain departments had become a problem for managers and bargaining unit employees. Mr. Kreisberg testified that an employee consistently used the minimum units to cover habitual tardiness. He testified that the practice had become almost automatic approval on the part the Employer. The parties used an interest based approach in identifying problem areas which led the Employer to submit its proposal to amend Article 27.

The parties agreed, during a bargaining session of the full committees, that the economic package would be bargained by using side-bar meetings and shuttling between the full committees by the two chief negotiators, an excellent mechanism in the search for a complete settlement of all outstanding issues. The Employer states that all side-bar meetings were conducted only by the chief negotiators and no one else participated. While President Mabe testified that he may have participated in one or more of these meetings, evidence clearly indicates that only the two chief negotiators were involved. It would not have been unusual that the Union's chief negotiator may have met with President Mabe immediately following a side-bar with Mr. Guttman prior to addressing the entire Union committee, and this may have been what the president remembered. As President Mabe was considered second chair to Mr. Kreisberg, this is a plausible explanation.

The modified language in Section 27.03 states that personal leave "shall be charged in minimum units of two (2) hours." The Union argues that the intent of the new language is the initial use of personal leave is limited to a unit of two hours and that other units of personal leave may be utilized thereafter including units of one-tenth hour as in the past. The Employer's argument, that there was no discussion regarding initial use and something different thereafter, is compelling. When asked on cross examination if the Union made a proposal regarding initial use and a different unit of personal leave thereafter, Mr. Kreisberg stated "We never made a formal proposal as you describe." When asked if there had been a verbal proposal or discussion, Mr. Kreisberg responded "I don't believe so." Although President Mabe testified that he remembered discussions regarding the retention of the one-tenth hour units after an initial two hour unit during full committee sessions, he was asked by the Employer's advocate, Mr. Linville, "Am I correct that the Union never made any written proposal that included language, 4 hours and 10 minutes, correct?" President Mabe responded "That would be correct." During the hearing at arbitration, Mr. Mabe mistakenly referred to one-tenth hour as 10 minutes on a number of occasions. Mr. Guttman, the Employer's chief negotiator, described each open session with the full committees on March 31, 2015 going into April 1, and he described each side-bar session which eventually led to a signed tentative agreement. He testified that there was never a proposal to include smaller units of personal leave following an initial use of the benefit during the various counter-proposals which were exchanged between Mr. Kreisberg and himself. Further, he testified that there never was any conversation regarding this concept during the

side-bars or any other forum. The testimony of Mr. Guttman was uncontroverted. The burden, of course, is on the Union to show that the language and intent of the parties was an initial unit of two hours followed by something else. There is no evidence that the parties ever discussed this concept during the economic package negotiations of March 31 and April 1. The Employer asserts that the history of personal leave use has always been by a specified unit, one hour, thirty minutes, one-tenth hour, with no deviation from the negotiated unit and no "initial usage." Evidence indicates that personal leave had always been taken in the unit specified in Section 27.03. This argument regarding the practice is compelling. In determining the intent of contract language in a dispute regarding holiday pay, Arbitrator Imundo made the following observation.

> . . . the Parties spent considerable time and energy constructing the language of Article XX, Section 20.1. When discussion is intense and lengthy, the Parties to the collective bargaining process give considerable thought to each specific word and the construction of sentences . . . . when language is specific and unambiguous, there is little, if any, room for misunderstanding what the language means and how it applies.
> *City of Tipp City and AFSCME Local 1342, Louis V. Immundo*
> *88 LA 315 318*

In the instant matter, the parties were in the process of completing negotiations in a traditional all day and into the night bargaining session. The Union may have intended to bargain the utilization of an initial unit of personal leave as a way of mitigating problems caused by the one-tenth unit benefit with an understanding that there would be additional flexibility after the initial request and usage. It was a long and tiring bargaining session. Perhaps there was a lack of communication between the larger committee and chief negotiator. There is no way to reconstruct

the events of March 31 and April 1, 2015. What we do know is that the two chief negotiators signed a tentative agreement for Article 27 on April 1, 2015. The TA was complete contract language, and the only modification from the previous Contract is in Section 27.03 as follows.

27.03 – Charge of Personal Leave
Personal leave which is used by an employee shall be charged in minimum units of two (2) hours.

This is the language to which the parties agreed. Evidence indicates that the tentative agreement was discussed in full committee session. Evidence also indicates that the Union did not raise an issue regarding initial use of personal leave with the Employer when the final language was presented in full committee, and the tentative agreement was signed.

Bargaining notes may be an important tool in determining intent of contract language which may not be clear or ambiguous. Section 27.03 language is not ambiguous, and the Employer's bargaining notes from March 31 and April 1, 2015, as taken by Employer committee member Aimee Szczerbacki during the two full committee sessions, include no discussion between the parties regarding a different unit of personal leave following usage of an initial unit. While it is true that the bargaining notes reflect only the Employer's notion of events, the Union provided no written evidence of a different understanding.

The Employer argues emphatically that Section 27.03 is clear and unambiguous, and therefore the Arbitrator possesses no authority to determine intent beyond the clear meaning of the provision. This assertion is meritorious.

> This is the so-called "plain meaning rule," which states that if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used.
> *How Arbitration Works, Elkouri and Elkouri, Sixth Edition, Pg. 434*

There is nothing in Section 27.03 which might suggest an initial two hour unit with the ability to utilize a different numerical unit. The language dictates that an employee may utilize a two hour unit, four hours, six hours, eight hours and so forth. The clear language prohibits an employee from using a two hour unit and subsequently taking one-tenth hour, three hours and so forth.

Arbitrator Fieger commented regarding clear and unambiguous language in determining an employee's right to witness pay.

> Not only is it axiomatic that the clear and unambiguous language of the agreement must be honored, but here the contract in exact terms forbids the arbitrator from ignoring "in any way" the specific provisions of the contract nor giving, to either party, rights which were not "obtained in a negotiating process."
> *Michigan Department of Social Services and Michigan State Employees Association, Bernard J. Fieger*
> *82 LA 114 116*

The editors of How Arbitration Works consider the plain meaning doctrine in the case of mistake made at the bargaining table.

> Arbitrators who subscribe to the "plain meaning" doctrine nevertheless recognize an exception to this rule in the case of a mutual mistake. "A mutual mistake exists when both parties sign off on contract language that does not correspond with their actual agreement. In this limited circumstance, an arbitrator may reform the contract to reflect the true intent of the parties." In order to nullify the clear language of the collective bargaining agreement, however, those arbitrators require that the mistake must be mutual. A

> unilateral mistake by one party does not provide a sufficient basis for contract reformation.
> *How Arbitration Works, Elkouri and Elkouri, Sixth Edition, pages 439 – 440*

The Union may have mistakenly failed to counter-propose something more than a two hour personal leave unit, but there is no evidence that it communicated to the Employer, during bargaining over the economic package, that this was its proposal or intent. The Employer in this matter argues that there was agreement regarding two hour increments and nothing more or less. Evidence at hearing bears this out.

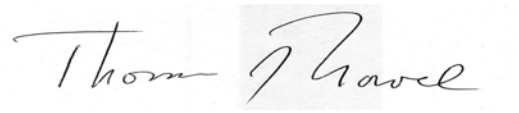
The Employer's initial proposal was a modification of Article 27 which would limit personal leave to four eight hour usages each year with additional provisions giving the Employer the ability to deny personal leave requests and prohibit the utilization of personal days the day before and after a holiday. Utilizing the side-bar bargaining approach between the chief negotiators, the Employer next proposed minimum units of four hours with the Employer's right to deny personal leave in the case of an unreasonable number of requests in the same agency or work area. Although the Union rejected this proposal as part of the trading and narrowing of the economic package, there is no evidence of a Union counter-proposal regarding an initial unit. Evidence indicates that the next personal leave proposal included language from the SEIU District 1199 Agreement. There is no evidence of a Union counter which included an initial unit and then some other formula. Finally, the Employer presented its last proposal requiring the use of personal leave in two hour units. Evidence indicates that the Union accepted the Employer's compromise as part of an overall revised economic package proposal and signed a Tentative Agreement without proposing or discussing anything beyond the "minimum units of

two (2) hours." The Arbitrator cannot attach a different interpretation as the language is clear and unambiguous. The State of Ohio did not violate the language of Article 27, Section 27.03, of the collective bargaining agreement. Grievance is therefore denied.

AWARD

Grievance is denied.

Signed and dated this 9th Day of November at Cleveland, Ohio.



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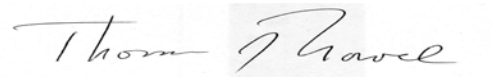
Thomas J. Nowel, NAA
Arbitrator

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th Day of November 2016, a copy of the foregoing Award was served, by electronic mail, upon Jessica Doogan, Advocate for the Union; Ronald G. Linville, Advocate for the Employer; Aimee Szczerbacki and Alicyn Carrel from the Office of Collective Bargaining.



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Thomas J. Nowel, NAA
Arbitrator