ARBITRATION DECISION NO.:
497

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Transportation

DATE OF ARBITRATION:
April 15, 1993

DATE OF DECISION:
April 29, 1993

GRIEVANT:
Harold Bumgardner

OCB GRIEVANCE NO.:
31-11-(91-03-12)-0018-01-06 and
31-11-(91-04-03)-0021-01-06

ARBITRATOR:
Harry Graham

FOR THE UNION:
Donald Conley

FOR THE EMPLOYER:
Robert Thornton, Office of Collective Bargaining

KEY WORDS:
Unpaid Leave of Absence to be Union Representative

ARTICLES:
Article 3 - Union Rights
§3.10 - Union Leave
Article 31 - Leaves of Absence
§31.01 - Unpaid Leaves

FACTS:
The grievant applied for leave from his position with the Ohio Department of Transportation. He wished to accept a position with the Union, OCSEA AFSCME Local 11 as a staff representative. The request was denied and this grievance was filed.

UNION'S POSITION:
The language of Article 31.01 is clear and unambiguous. It states that the employer shall grant unpaid leaves of absence if an employee is serving as a union representative. In the past a number of State employees have been granted this type of leave. This past practice has given meaning to the language of Article 31.01(A).

Article 3.10 identifies situations when the Union President shall be granted leave. Interpreting Article 31.01 as just pertaining to the Union president would render this provision meaningless. Therefore, it is clear the language of 31.01(A) pertains to all union representatives.

Because the granting of leave for the appointment of a State employee as a Union Representative has occurred in the past, it should continue in the future. In the instant case, the grievant sought leave to serve as a "union representative" and it was denied. The grievance should be sustained and the grievant's request for leave should be granted.

EMPLOYER'S POSITION:

Intent testimony concerning contract negotiations demonstrates that the language of Article 31.01(A) pertains only to Union officers and not to Union Representatives. There is no binding past practice which controls the outcome of this dispute. At no time did the Office of Collective Bargaining grant employees leave at the departmental level for union activities. If the state guaranteed certain employees a fall-back position with the state in the event they did not like their work at the union, it could constitute an unfair labor practice. The Union is trying to secure in arbitration that which it did not secure in negotiations. The grievance should be denied in its entirety.

ARBITRATOR'S OPINION:

Article 31.01(A) clearly and unambiguously requires the employer to grant unpaid leaves of absence to employees serving as union representatives and officers. The dictionary definition of an "officer" encompasses the position of staff representative for the union. If the leave is not extended to people in the staff representative position then the wording in Article 31.01(A) would mean nothing. Based on rules of contract construction this result should be avoided. In this situation, a past practice exists which gives life to the agreement and serves as a guide to its interpretation. That the Office of Collective bargaining was unaware of these instances of approved employee leaves to be a staff representatives for the union is scant defense.

AWARD:

The grievance is sustained.

TEXT OF THE OPINION:

In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department
of Transportation

Case Numbers:
31-11-910312-0018-01-06
31-11-910403-0021-01-06

Before: Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

Donald Conley
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For The State of Ohio:

Robert Thornton
Office of Collective Bargaining
106 North High St., 6th & 7th Floors
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on April 15, 1993 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

"Did the Ohio Department of Transportation violate Section 31.01(A) of the Collective Bargaining Agreement between the parties by denying to the Grievant an unpaid leave of absence to be employed by OCSEA as a Staff Representative? If so, what shall be the remedy?

Background: There is no dispute over the events that prompt this controversy and they may be succinctly presented. The Grievant, Harold Bumgardner, on February 12, 1991 applied for leave from his position with the Ohio Department of Transportation. He wished to accept a position with the Union, OCSEA/AFSCME Local 11, as a Staff Representative. That leave request was denied. Mr. Bumgardner promptly filed a grievance to protest the denial of leave. It was not resolved in the procedure of the parties and they agree it is properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points to Section 31.01 of the Agreement and asserts that it has been violated in this instance. Section 31.01 provides that:

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

A. If an employee is serving as a union representative or union officers, for no longer than the duration of his/her term of office up to four (4) years."

This language is clear. It is unambiguous. It should be given its clear and unequivocal meaning in the Union's view. Mr. Bumgardner sought leave to serve as a "union representative." It was denied. Hence, the Agreement was violated according to the Union. This view is supported by past practice. There have been seven instances of people being granted leave by the Employer in precisely the same manner as urged to be correct by the Union. The language of Section 31.01 has been given life by its implementation over the years by the State. The same interpretation should be placed upon the language in all instances. Consequently the leave at issue in this dispute should be granted the Union asserts.

At Section 3.10 of the Agreement provision is made for granting leave to Union officials. It makes specific reference to the President of the Union and establishes the circumstances under which he or she should be granted leave from State service. If Section 31.01 is interpreted to exclude union representatives the question arises, who does it cover? It does not apply to anyone if it does not apply to union representatives according to the Union. It is not to be expected that the parties would put surplus verbiage into the Agreement. Its plain words must be given their normal force and effect. As granting of leave for appointment as a Union representative has occurred in the past, it should continue to occur in the future. By their actions

the parties have given life to the disputed language. The Union urges that the interpretation of Section 31.01 that has occurred in the past be continued without modification into the future. Specific to this grievance, it urges that Mr. Bumgardner be permitted to take the leave without pay that is at issue in this proceeding.

Position of the Employer: The State contends that in order to properly interpret the disputed language of the Agreement that reference must be had to the history of negotiations etween the parties. The phraseology in question was incorporated into the initial agreement of the parties. It has continued unchanged to the present time. When the parties first came to bargain it was proposed by the Union that leave be given to State employees who might come to serve the Union as an officer. The concept of a Union officer is different from that of a Union representative. In the first two rounds of negotiations between the parties the Chief Spokesman for the State was N. Eugene Brundige. He was given to understand by the Chief Spokesman of the Union in the initial negotiation, Russell Murray, that the Union was not seeking in the negotiations that the State release employees for service as Union staff representatives. At the arbitration hearing Mr. Brundige testified that he understood from his opposite number that the Union was seeking leave for officers, not staff representatives. He was under no misapprehension concerning the position of the Union. It was not seeking leave for staff representatives. As that was the case, the State agreed to the Union proposal. In this situation the State urges that the Union is seeking to secure in arbitration that which it did not secure in negotiations. That development should not occur.

There is no binding past practice that controls the outcome of this dispute according to the State. At no time was the Office of Collective Bargaining aware that State employees were being granted leave at the Departmental level. In the opinion of the former Director of OCB, Eugene Brundige, granting of the leave at issue in this proceeding could constitute an unfair labor practice. This is due to the fact that the State would be in the position of guaranteeing to certain employees a fall-back position with the State in the event they did not succeed or like their work with the Union. It is inconceivable that he would have agreed to such an arrangement had it been proposed to him he insists.

The State argues that this dispute is similar to a dispute I heard several months ago. That dispute involved witness duty leave. As was the case in this situation the Union argued that the Agreement mandated leave be granted to State employees subpoenaed to a judicial or administrative proceeding. Based upon the history of negotiations I found to the contrary. The State urges the same finding be made in this dispute as well.

Discussion: The language of Section 31.01 of the Agreement must be read in its entirety in order to discern its meaning. The Employer is required to give unpaid leaves of absence to employees serving as union representatives or union officers The distinction urged upon the Arbitrator by the State, that officers and representatives are somehow to be treated differently, is not well taken. The precise manner in which the President of OCSEA/AFSCME Local 11 is to be granted leave is covered elsewhere in the Agreement, at Section 3.10. In addition, the definition of an "office" is "A position in a corporate or governmental organization, esp. one entailing authority, responsibility or trust." (The Living Webster Encyclopedic Dictionary of the English Language, Chicago, Ill. 1975, p. 658). It is obvious that that definition encompasses the position of "representative" for the Union. There can be no doubt that the position of union staff representative is one that confers upon the holder authority, responsibility and trust.

The Union is correct to point out that if leave is not extended to people in the position of representative that the phraseology at issue will become a nullity. As is well known, such a result is to be avoided. The Agreement must be read in its totality and all its terms given full force and effect whenever possible. In this situation, the only way that can occur is if employees are granted the leave at issue in this proceeding.

While the State urges that the seven instances of leave granted to assume a representative function be given little weight it is in error. The granting of those leaves represents a critical difference from the situation confronting this Arbitrator in the dispute concerning witness leave which was decided some months ago. In that case there was nothing on the record which could possibly be construed as constituting a practice. In this situation a practice exists. That practice gives life to the agreement of the parties and serves as a guide to its interpretation. That the Office of Collective Bargaining was unaware of the granting of those leaves is

scant defense. If the State sought to police the granting or withholding of the leave at issue it might have done so. It did not. The leaves in question were granted in the fashion urged to be appropriate by the Union. No other instance of denial of this leave was proffered by the Employer. The evidence of the Union concerning the routine manner in which the leaves have been granted stands unrebutted and constitutes a substantial difference from the witness leave dispute decided earlier.

There is another difference between the two situations. In the former case the negotiating record indicated specific reference to Section 123:34-03 of the Administrative Code as the basis upon which witness leave was to be granted. The record expressed the clear understanding as to how the contract provision was to be interpreted. Such a record is lacking in this case. The testimony of Eugene Brundige concerning his understanding of the disputed language is given great respect by this Arbitrator. No doubt exists that his testimony is correct and accurate. The difficulty is that it flies in the face of clear contract language which has been given life by the practice of the parties regarding its interpretation. In addition, the position of the State in this dispute is unsupported with the sort of evidence that was on the record to bolster its contract interpretation in the witness leave case.

In this situation the disputed language has existed through three Agreements without alteration. It has been given vitality by the action of the Employer in granting the leave at issue in this proceeding. Given the practice as well as the absence of the sort of supporting documentation crucial to the Employer's position in the witness leave dispute a result different from that one is appropriate in this situation.

Award: The grievance is SUSTAINED. The Grievant is to be granted leave pursuant to Section 31.01 of the Agreement to serve as a union staff representative.

Signed and dated this 29th day of April, 1993 at South Russel, OH.

Harry Graham
Arbitrator