ARBITRATION DECISION NO.:
690

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

EMPLOYER:
Ohio Department of Transportation

DATE OF ARBITRATION:
November 20, 1998

DATE OF DECISION:
December 3, 1998

GRIEVANT:
Jamie Stewart
Scott Conley
Davie Flannery

OCB GRIEVANCE NO.:
31 09 (97 10 17) 0014 01 06
31 09 (97 10 06) 0012 01 06
31 09 (98 04 08) 0005 01 17

ARBITRATOR:
Harry Graham

FOR THE UNION:
Herman Whitter

FOR THE EMPLOYER:
Michael Duco

KEY WORDS:
Party to an Action
Witness Duty Pay

ARTICLES:
Article 30 – Other Leaves With Pay
§30.05 – Witness Duty

FACTS:

At the hearing the parties agreed upon the issue in dispute between them: Does Article 30.05 of the Collective Bargaining Agreement entitle the grievants to be released from their regular job duties with pay to testify? If so, what shall the remedy be?

There were three grievances at issue in this proceeding, in addition to a hypothetical fact situation. All of the grievants worked for the Ohio Department of Transportation. All of the grievants had second jobs: one

was a volunteer firefighter; one was an auxiliary police officer; one had his own practice as a surveyor. All three were subpoenaed in connection with their duties on their second jobs: the firefighter had knowledge of a domestic violence situation; the police officer was subpoenaed several times in connection with his duties; the surveyor was subpoenaed as a result of his relationship with a party to a lawsuit. In each instance, the grievant applied for Witness Duty Leave under Article 30.05 of the Agreement. In each case, the leave was denied. All Grievants were instructed to use some other form of leave to secure the necessary time off work.

The hypothetical situation presented is as follows: An employee of the State files a complaint or charge with an administrative agency (e.g. OCRC). The administrative agency finds probable cause and prosecutes the claim. During the prosecution of the claim, the employee is subpoenaed to be a witness either in a deposition or a hearing.

UNION'S POSITION:

The Union points to the bargaining history of the parties, the language of the agreement, and to the definition of "party " as a technical term, in support of its position in this case. It acknowledges that in the situation involving the police officer, multiple witness leave requests had been made; however, no limit is placed on the number of such requests by the language of the Agreement, and the State is attempting to secure in arbitration that which it did not secure in negotiations. Bargaining history shows that the parties agreed that Article 30.05 of the Agreement would reflect Section 123:34 03 of the Ohio Administrative Code, which provides that leave is to be granted to an employee who "is subpoenaed to appear before any court, commission, board or other legally constituted body authorized by law to compel the attendance of witnesses where the employee is not party to the action." The Union notes that "party" is a technical term, defined in Black's Law Dictionary, referring to "those by or against whom a legal suit is brought ... all others who may be affected by the suit, indirectly or consequently, are persons interested, but not parties." The three grievants, therefore, are not parties. The Union also relies on a 1992 award that Arbitrator Graham made dealing with this issue.

EMPLOYER 'S POSITION:

First, the State argues that when the parties came to negotiate this issue, they did not consider the possibility of employment outside of State service. The police officer grievant has sought 72 hours of witness leave to testify in his cases. Secondly, the State argues that the grievants are to be considered "parties" for purposes of witness leave under the agreement, because they were testifying as a function of their employment; hence, the Employer properly denied leave. Thirdly, the State puts forth the public policy argument that the State of Ohio should not be placed in a position of supporting such entities as the grievants' township, city, and private business.

ARBITRATOR'S OPINION:

First, the Arbitrator directs attention to the word "shall " in the first sentence of Article 30.05 of the agreement: "Employees subpoenaed to appear before any court, commission, board or other legally constituted body authorized by law to compel the attendance of witnesses shall be granted leave with pay at regular rate." The Arbitrator points out that the concept of "shall" is mandatory. It does not confer upon the Employer discretion to grant or not to grant the leave, no matter how extensive the amount of leave may be. Secondly, the Arbitrator calls it more than a bit of a stretch for the State to claim that the grievants in this proceeding were parties to the matters in which they were subpoenaed. They witnessed situations in the course of their duties; they were subpoenaed to testify in subsequent legal action. The grievants neither brought suit, nor were they persons against whom suit was brought, nor were they plaintiffs or defendants.

The observation of the State concerning the ridiculous nature of the number of times the police officer

had to testify in DUI situations is well taken, but if the State seeks change, it must do so in the form of negotiations. Under the contractual language in 30.05 and the appropriate provision of the Ohio Administrative Code, their leave requests were improperly denied.

The Arbitrator also ruled on the hypothetical situation presented for resolution by agreement of the parties. If, upon receipt of a complaint or charge to a State administrative agency (e.g. SERB, OCRC), the agency determines that probable cause exists, it then assumes the burden of moving forward; that is, it is in essence the prosecutor of the claim. The status of the person or persons who brought the complaint or charge to the State agency consequently changes. It is then the relevant State agency that is the "party" to the action. The person who was initially the complainant or charging party no longer has that status. Were a person is such a circumstance to seek leave under Article 30.05 of the Agreement, such leave would have to be granted.

AWARD:

The Arbitrator awarded the three grievances in full. Leave was granted under Article 30.05 of the Agreement. The hypothetical situation presented for resolution was decided to require granting of leave under Article 30.05.

TEXT OF THE OPINION: *** * ***

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In the Matter of Arbitration	*	
	*	Case Numbers:
	*	
Between	*	31 09(971017) 0014 01 06,
	*	31 09(971006) 0012 01 06
	*	31 09(980408) 0005 01 17
OCSEA/AFSCME Local 11	*	
	*	Before: Harry Graham
and	*	
	*	
The State of Ohio, Department of Transportation	*	

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APPEARANCES: For OCSEA/AFSCME Local 11:

Herman Whitter
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For the State of Ohio:

Michael Duco

Office of Collective Bargaining
106 North High St., 7th Floor
Columbus, OH. 43215

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this case was closed at the conclusion of oral argument in Columbus, OH. On November 20, 1998.

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

> Does Section 30.05 of the Collective Bargaining Agreement entitle the Grievants to be released from their regular job duties with pay to testify? If so, what shall the **1**

remedy be?

BACKGROUND: There are three grievances at issue in this proceeding. In addition, there is presented a hypothetical fact situation for resolution. The facts involved in each of the grievances are agreed upon as is the hypothetical situation. In the first situation Grievant Jamie Stewart works for the Ohio Department of Transportation as do all other grievants. He also serves as a volunteer Firefighter with the Union Township Fire Department. He came to be subpoenaed by the State of Ohio in connection with his duties as a volunteer firefighter. He had knowledge of a domestic violence situation.

Scott Conley is a Auxiliary Police Officer with the Jackson City Police Department. He is the only person on the Department qualified to perform breathalyzer tests in DUI cases. Since June, 1997 he has made multiple requests for witness duty pay as a consequence of being subpoened in connection with his duties as a police officer.

David Flannery has his own practice as a surveyor in addition to his work for ODOT. He came to be subpoenaed as a result of his relationship with a party to a lawsuit.

In each instance above the Grievant applied for Witness Duty Leave under Section 30.05 of the Agreement. In each case, the leave was denied. All grievants were instructed to **2**

use some other form of leave to secure the necessary time off work.

The hypothetical situation presented is as follows: An employee of the State files a complaint or charge with an administrative agency (e.g. OCRC). The administrative agency finds probable cause and prosecutes the claim. During the prosecution of the claim the employee is subpoenaed to be a witness either in a deposition or a hearing. **POSITION OF THE UNION**: The Union points both to the bargaining history of the parties and the language of the Agreement in support of its position in this case. When the parties first came to bargain they agreed that Section 30.05 of the Agreement would reflect the operations of Section 123:34 03, Court Leave, of the Ohio Administrative Code. In 1992 I issued an award dealing with this issue.

The Union relies on that award's continued applicability. Section 123:1 34 03(2) provides that leave is to be granted to an employee who "Is subpoenaed to appear before any court, commission, board or other legally constituted body authorized by law to compel the attendance of witnessses (sic) where the employee is not party to the action." In the case of each of the Grievants they were not a party to the dispute. Citing Golatte v. Mathews, D.C. Ala. 394 F. Supp.1203, 1207, the Union notes that the concept of "party"

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is a technical one in legal terminology. It is defined in Golatte as:

> a technical word having a precise meaning in legal parlance; it refers to those by or against whom a legal suit is brought, whether in law or in equity, the party plaintiff or defendant, whether composed of one or more individuals and whether natural or legal persons; all others who may be affected by the suit, indirectly or consequently, are persons interested, but not parties. Quoting Black's Law Dictionary, Revised 4th ed. (1968).

The Union acknowledges that in the situation involving Scott Conley multiple witness leave requests have been made. No limit is placed on the number of such requests by the Agreement. Had the Employer sought such a limitation it would have been part of the negotiation process. It was not. Now, the State is attempting to secure in arbitration that which it did not secure in negotiations according to the Union. If the State desires a change in the witness leave provisions of the Agreement it should strive for it in negotiations, not arbitration.

Anticipating an argument by the Employer that either public policy or agency principles should govern the outcome of this dispute the Union objects. It asserts that as the concept of "party" is a technical one and the Agreement and Administrative Code as well as my prior decision control, the grievances should be sustained and the requested leaves granted.

POSITION OF THE EMPLOYER: When the parties came to negotiate

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this issue in 1986 and subsequently they did not consider the possibility of employment outside of State service. That is precisely the situation at issue in the cases of Messrs. Stewart, Conley and Flannery. The situation of Grievant Conley is particularly egregious in the State's view. He sought 72 hours of witness leave to testify in cases involving his duties as a police officer. The Agreement does not contemplate such situations. In the State's opinion, the Grievant's are all properly to be considered "parties" for purposes of witness leave under the Agreement. Conley had to testify as he functioned as a police officer. Flannery was involved in a situation when he was required to testify due to his employment with a litigant. Stewart witnessed a situation in the course of his work as a volunteer firefighter that resulted in the necessity of his testifying. All these situations placed the Grievants in the status of being a "party." Hence, the Employer properly denied leave it asserts.

Should the position of the Union be upheld in this instance the proverbial nonsensical result will occur. As the sachem's of arbitration, Frank and Edna Elkouri, observe in their standard treatise, such results are to be avoided. The State of Ohio should not be placed in a position of supporting such entities as Union Township,

a private surveying business. Such a situation is absurd. Consequently, the grievances should be denied according to the State.

DISCUSSION: Section 35.05 reads as follows:

> Employees subpoenaed to appear before any court, commission, board or other legally constituted body authorized by law to compel the attendance of witnesses shall be granted leave with pay at regular rate. Second or third shift employees shall be permitted an equivalent amount of time off from scheduled work on their preceding or succeeding shift for such appearance.

Attention is directed to the word "shall" in the first sentence. It need not be belabored to point out that the concept of "shall" is mandatory. It does not confer upon the Employer discretion to grant or not to grant the leave, no matter how extensive the amount of leave may be. Nor does it confer upon the State discretion to withhold leave per Section 123:1 34 03 A of the Ohio Administrative Code. (Cited above). It is more than a bit of a stretch for the State to claim that the Grievants in this proceeding were parties to the matter in which they were subpoeaned. Jamie Stewart witnessed a domestic violence situation in the course of his duties. He was subpoeaned to testify in subsequent legal action. Scott Conley administers breathalyzer test for Jackson City. Of course, the observation of the State concerning the ridiculous nature of the number of times he has had to testify in DUI situations is well taken. The State

is indeed subsidizing Jackson City in this case. That is an accident of circumstance. The Agreement does not permit the State the leeway it seeks in this instance. The same is the case with respect to Mr. Flannery. He has an outside business. He performed a service for a client. The client was subsequently involved in litigation and Mr. Flannery was subpoenaed. He was "not a party to the action" within the meaning of Section 123:1 34 03A of the Administrative Code. He must be granted the witness leave at issue in this proceeding.

The concept of "party" requires the Grievants be granted the leave they sought. Black's Law Dictionary (St. Paul, Mn. 1979) at page 1008 in relevant part defines "Parties" as those "who are directly interested in any affair, contract or conveyance." (emphasis supplied). That does not apply to the Grievants. The standard cited in Golatte is appropriate as well. Especially so the phrases "By it (party) is understood he or they by or against whom a legal suit is brought, whether in law or equity; the party plaintiff or defendant…." The Grievants neither brought suit, nor were they persons against whom suit was brought, nor were they plaintiffs or defendants. They were people who happened to get caught up in litigation and be subpoeaned. If the State
regards the circumstances giving rise to the Grievances of

Messrs. Stewart, Conely and Flannery to be onerous it may seek change in the forum of negotiations. Under the contractual language at 30.05 and the appropriate provision of the Ohio Administrative Code their leave requests were improperly denied.

Attention is now directed to the hypothetical situation presented for resolution by agreement of the parties. If, upon receipt of a complaint or charge to a State administrative agency (e.g. SERB, OCRC) the agency determines probable cause exists it assumes the burden of moving forward. That is, it is in essence the prosecutor of the claim. When the State agency assumes that role the status of the person or persons who brought the complaint or charge to the State agency changes. It is the relevant State agency that is the "party" to the action. The person who was initially the complainant or charging party no longer has that status. Were a person in such circumstance to seek leave under Section 30.05 of the Agreement such leave must be granted.

AWARD: The grievances of Jamie Stewart, Scott Conley and David Flannery are granted in full. They are to be granted leave under Section 30.05 of the Agreement. The hypothetical situation presented for resolution is decided to require granting of leave under Section 30.05. **8**

Signed and dated this 3rd day of December, 1998
at Solon, OH.

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Harry Graham
Arbitrator **9**