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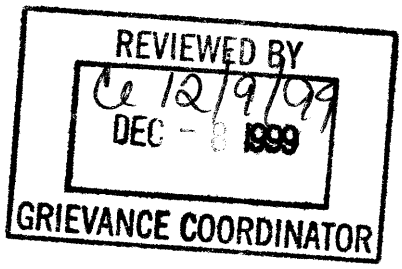


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| In the Matter of Arbitration | * | |
| Between | * | Case Number: |
| OCSEA/AFSCME Local 11 | * | 26-00-97-10-24-0012-01-14 |
| and | * | Before: Harry Graham |
| The State of Ohio, Public Utilities Commission | * | |

**APPEARANCES:** For OCSEA/AFSCME Local 11:

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For the State of Ohio:

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**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. Post-hearing briefs were filed in this dispute. They are dated November 10, 1999 and were exchanged directly between the parties.

**ISSUES:** At the hearing the parties agreed upon the issues in dispute between them. Those issues are:

1. Are these matters properly before the Arbitrator?

2. What is the proper calculation for determining disability leave as it relates to the lifetime maximum as set forth in Article 35A.01(B)?

3. What is the proper calculation for determining disability leave as it relates to the per-disability limitation as set forth in Article 35A.01(B)?

**BACKGROUND:** The parties agree upon the events that give rise to this proceeding. When the parties came to bargain the current Agreement they had recourse to Factfinding. Among the issues on the table prior to and at Factfinding were various aspects of the State of Ohio disability leave program. When the parties arrived at Factfinding the Union proposed a multi-level disability leave plan that it viewed as meeting its concerns and those of the State. The Union proposal incorporated the sentence "Only hours of paid disability leave benefits after the effective date of this contract will be counted for the determination of limitation." Various aspects of the Union proposal were found to be unacceptable by the State. Similarly, aspects of the State proposal regarding leave were unacceptable to the Union. The State had proposed counting all disability leave that had been used by an employee. As no agreement was reached between the parties on the matter of disability leave the matter was submitted to the Factfinder. He considered it in his report and recommended in relevant part that "The disability leave benefit plan will not become effective until July 1, 1998.

The hours of paid disability leave benefits prior to the effective date shall be counted toward the lifetime maximum limitation." It happened that sentence was not included in the Agreement as printed. When that was discovered Steve Gulyassy, Head of the State Office of Collective Bargaining sent a letter to Ron Alexander, President of the Union, pointing out the error of omission and readily agreeing to incorporate the sentence quoted above into the Agreement. It is properly regarded as being found at Article 35A.01 though it is not reflected in the text at page 160. Similarly, the language was presented by the Union to its membership and ratified by them as part of the contract ratification process.

In 1997 the Union filed a grievance on behalf of Jay Agranoff. It protested his status in the State's disability leave program. Specifically, the Grievant and the Union were concerned about the manner in which the State debited disability leave balances. The State was, and is, counting a partial day of work as constituting a full day of work for purposes of disability leave usage. It was the opinion of the Union that practice is impermissible under the Agreement as the report of the Factfinder referenced the word "hours" not days. As will be set forth fully below and as is reflected in the issue, the Employer does not regard this dispute to be

arbitrable at this time.

This decision will initially be concerned with the arbitrability issue raised by the Employer. If the dispute is determined to be arbitrable, attention will be devoted to the merits.

**POSITION OF THE UNION:** Turning initially to the contention of the State that this dispute is not arbitrable, the Union disagrees. On occasion in the past the parties have jointly made requests for clarification of an award to a Factfinder. This is unlike those past situations. When they occurred, it was early in the term of the Agreement. This time, only after the grievance was filed and had moved well into the grievance procedure and was being scheduled for arbitration was that notion suggested. It is simply too late to return to the Factfinder in the Union's view.

At Section 25.01(A) a grievance is defined as "any difference, complaint, or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement." That is what exists in this scenario: a dispute between the Employer and the Union and an employee over the application, meaning and interpretation of the Agreement. Hence, recourse to arbitration is appropriate according to the Union. This arbitrator lacks authority to direct the parties back to

Factfinder. A decision on the merits is required under these circumstances the Union insists. It is a simple question at issue here. The Agreement uses the word "hour." It should be enforced. The State is not using "hours" it is using days in making the disability leave balance computation. Charging an employee with a full day of leave use when only a half day is actually used is irrational and violates the clear terms of the Agreement the Union contends. Moreover, other leave benefits are calculated in hours. The Union proposal, embraced by the Factfinder, simply reflected the normal, accepted way of doing business. The State accepted the Factfinder's award as did the Union. Now, the Union urges that by the plain language of the Agreement in Article 25, the dispute must be reached on its merits and a decision made on its behalf.

The Union acknowledges that the Grievant has not been harmed by the State's application of its disability leave computation. That is irrelevant in the Union's view. The Grievant and all State employees have a fundamental right to know of, and keep track of, correct leave balances. In this situation the Grievant has determined the State is erroneously computing his disability leave balance. A grievance protesting that situation is permissible under these circumstances according to the Union. The Grievant and

all his colleagues in State service have a fundamental right to know their correct disability leave balance. As the leave balance being reported to them is incorrect, a grievance protesting that situation is appropriate the Union claims. Under the terms of Article 25 it is not the case that a grievance must be confined to a harm that has occurred. Given the fullness of time, harm will occur. To require the Union to wait to that instance is foolish and uneconomical.

This is not a theoretical situation. The Grievant took four hours of leave and was charged with eight. His account was improperly overcharged by 100%. This happened to the Grievant. He was harmed. In fact, his leave benefits were paid by the hour but he was charged by the day. His account currently shows more leave usage than what actually occurred.

Finally, this is a continuing, recurring situation. Employees are being harmed on a regular basis. This situation must be resolved. Arbitration is the forum agreed-upon by the parties to resolve disputes over application of the Agreement. As that is the fact, the grievance must be reached on its merits the Union contends.

**POSITION OF THE EMPLOYER:** The State contends this dispute is not ripe for decision on its merits. The Grievant, Jay Agranoff, has not been harmed by the terms of the Agreement. During his service with the State Mr. Agranoff has been

approved for 860 hours of disability in a 179 day period. At Section 35A.01(B) there is a sliding scale for disability income payments. It is based on length of service with the State. Under the terms of the Agreement a person with eight but less than sixteen years of service "shall be entitled to receive disability leave benefits up to twenty-four (24) months per disability not to exceed a total of thirty-six (36) months." The Grievant has more than ten years of State service. He is eligible for three years of disability leave or 1095 days. He has used 179 days. When Mr. Agranoff filed this grievance he had more than eight years of State service. He has 916 days of disability leave in his account. He has not been denied benefits. He has no grievance because the State has not done anything to prompt a grievable event. The dispute in this instance was filed by a single grievant. It is not a class action dispute. Hence, the Union cannot pursue it.

In the past the parties have mutually agreed to submit hypothetical questions to arbitration. This was done when the agreed that there existed an issue of contract interpretation which should be resolved. I have been arbitrator of two such disputes. One involved witness duty, the other the duty of the State to supply documents to the Union. The parties agreed to submit a question to arbitration. Here, that is not

the case. The State asserts that there is no grievance, hence no need to resolve a grievance. On the facts giving rise to this particular proceeding there cannot be a grievance as Mr. Agranoff is not in jeopardy of losing disability income benefits. Given his demographic situation it is impossible for him to reach the lifetime benefit cap while this contract is in effect. He lacks standing to grieve. As that is the case and the State does not agree to the sort of joint exercise which characterized the witness duty and document provision disputes referenced above, no decision should be reached on the merits of this case the State contends.

The dispute in this instance is essentially speculative in nature. There are no concrete instances of disability benefit denial before the Arbitrator. The principles of contract interpretation advanced by the Union should not be advanced in a vacuum. Lacking a bona-fide grievant, a decision cannot be fact-based. Hence, there exists the possibility of error in the decisionmaking process which is based on a hypothetical, rather than an actual dispute. This is to be avoided in the Employer's view.

The State points out that negotiations between the parties are pending. If there is a problem over this issue, it can be dealt with by the parties in negotiations. If there is a decision on the merits of this matter it will lead to a

more contentious round of negotiations the State hypothesizes. Further, it is impossible to properly determine the matter on its merits as the parties have stipulated that they never discussed the manner in which the lifetime maximum benefit would be calculated. In the absence of any discussion over this issue it is impossible to determine what the parties meant by the phraseology of the Agreement at Article 35A 01(B) in the State's view.

The State points to the Grievance Procedure of the Agreement in support of its view that the Grievance is not arbitrable. At Section 25.02 there is outlined the steps in the grievance procedure. The time limit for grievance filing and processing begins on "the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance." This contemplates an "occurrence." As noted above nothing in Mr. Agronoff's status can possibly be construed as an occurrence. He has not and cannot be harmed by operation of the Agreement during the remainder of its term. Thirteen people in State service have reached the maximum lifetime benefit cap. None were adversely affected.

The State points out that the disputed language was drafted by the Factfinder. These parties have been to Factfinding on other occasions. When the need has arisen they have returned to the Factfinder and jointly sought

clarification of the award. The Union has declined to do that in this situation. The State views that as a subterfuge. In its opinion, it represents a tacit recognition that the Factfinder made a simple error in drafting his recommendation to the parties. Were he asked to clarify it, the State is confident he would state the unit of account is days, not hours. Failing recourse to the Factfinder the State urges this neutral not reach the merits of this dispute.

**DISCUSSION:** These parties have a background of joint submission of potential or hypothetical issues to arbitration. As will be recalled, this Arbitrator has been involved in two such proceedings, one involving document production, the other, witness duty pay. It is entirely appropriate that the parties jointly submit agreed upon issues to arbitration in order to secure a statement regarding how they should act and what their mutual rights are under the Agreement. The touchstone for such proceedings is their joint nature and the mutual interest of the parties in securing an award from an arbitrator. That joint and mutual interest is conspicuously lacking in this matter. As set forth above, the State strenuously objects to reaching this dispute on its merits.

Article 25, Section 25.01A defines a grievance. It is defined as "any difference, complaint or dispute between the

Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement." There has been no application of the Agreement. The question presented by the Union is hypothetical. Absent mutual agreement, hypothetical questions do not provide grist for the mill of arbitration.

Further support for the position of the State is found elsewhere in the Agreement. Article 25.02, Grievance Steps, at Step One provides that "All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the **occurrence** giving rise to the grievance...." Further, the same paragraph indicates that "If being on approved paid leave prevents a grievant from having knowledge of an **occurrence,...."** Step Two of the grievance procedure requires that the written grievance include **"the date of the alleged violation."** Step Three of the grievance procedure requires a response from the Employer that includes **"a description of the events giving rise to the grievance...."** (Emphasis supplied). Use of the words "occurrence" and "events" means that something must have happened to trigger the grievance. The State must have done something, to someone, to prompt the filing of a grievance. That is not the case in this situation. The Grievant, Mr. Agranoff, has not been denied

benefits. He is not close to being denied benefits. There is no scenario under which he can be denied benefits during the short life left of the present Agreement. There has not been and cannot be an "occurrence" as provided for by the Agreement. The contractually mandated event which is prelude to grievance filing has not transpired. Further, there cannot be a "date of the alleged violation" as there cannot be a violation in the case of the Grievant. Finally, there is no "event giving rise to the grievance." The Grievant has not been denied a benefit based on a computation based on days, rather than hours. There cannot properly be a grievance under such circumstances. This is completely different from those instances in which the parties jointly sought a determination of a hypothetical question from this Arbitrator. Arbitration is not a forum for resolving hypothetical disputes unless the parties desire that be the case. Grievance arbitration should deal with concrete cases, in which an actual, as opposed to a potential, contract violation is alleged to have occurred. That is not the situation in this instance.

When the parties were at Factfinding the Factfinder was made familiar with the arguments of both sides on the question of disability leave. The State argues that use of the word "hours" in his decision and subsequently in the Agreement represents error. The Union argues to the contrary.

There is an easy way to resolve that controversy: ask the Factfinder! If that occurs and the Factfinder indicates he intended "hours" this controversy is resolved. The same is the case if he indicates the text should read "days." This controversy illustrates the pitfalls of reliance upon a neutral to craft terms of a collective bargaining agreement. No matter how experienced, no matter how skilled, no matter how conscientious the neutral, errors are inevitable. This is particularly the case in situations involving a multiplicity of issues. It is humanly unlikely an error-free award can be issued by a neutral in interest disputes. The parties could easily ask the Factfinder his intent as they have done with him and another Factfinder.

Among the voluminous materials provided by the parties in this dispute are their various stipulations of fact. They have stipulated to this Arbitrator that during the course of negotiations they never discussed the manner in which the disability benefit would be debited. There is no indication that either party can make reference to their "intent" as is frequently the case when construing disputed language. In this situation the word "hours" in the Agreement is stark. If and when an employee is denied benefits due to the interpretation of the State on the manner in which balances are to be computed the controversy will be ripe for a

grievance and, perhaps, subsequent arbitration. Until then, the merits of this controversy cannot be reached.

**AWARD:** The merits of the grievance are not reachable at this time.

Signed and dated this 6th day of December, 1999 at Solon, OH.

Harry Graham
Arbitrator