VOLUNTARY LABOR ARBITRATION TRIBUNAL

#930

In the Matter of Arbitration	*	
Between	*	
	*	OPINION AND AWARD
OHIO CIVIL SERVICE	*	
EMPLOYEES ASSOCIATION	*	Anna DuVal Smith, Arbitrator
LOCAL 11, AFSCME, AFL/CIO	*	
	*	Case No. 33-00-2004-1230-1568-01-04
and	*	
	*	
OHIO VETERANS HOME	*	Class Action
	*	Personal Leave

APPEARANCES

For the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO:

Robert Robinson, Staff Representative
Penny Lewis, Staff Representative
Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO

For the Ohio Veterans Home:

John F. Kinkela, Labor Relations Specialist
Andrew Shuman, Labor Relations Specialist
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on February 15, 2006, at the offices of the Ohio Civil Service Employees Association in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed and excluded, and to argue their respective positions. Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO (the "Union") were Torey Beckley, Becky Goble, Katrice Stovall, Renee Vannest, Carolyn Smith and Vanessa Brown. Testifying for the Ohio Veterans Home (the "State") were Donna Green and Marsha Van Barg. A number of documents were entered into evidence: Joint Exhibits 1-2, Union Exhibits 1-2 and State Exhibits 1-19. The Union was granted leave to submit additional exhibits with its written closing to rebut State Exhibits 10-19 which it had not previously seen. The oral hearing was concluded at 3:45 p.m. Written closing statements were timely filed and exchanged by the Arbitrator on March 10, 2006, whereupon the record was closed. The record was reopened on March 20 to hear objections to exhibits submitted with the Union's closing statement and then closed again that same day. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The Ohio Veterans Home in Sandusky, Ohio provides nursing home care and supervised and independent living assistance to disabled veterans. As such, it is required by Ohio Department of Health regulations to observe minimum staffing levels in its 24/7 operation.[1] It has also chosen to adopt a higher level of staffing to provide a safe level of care for its special need residents. Since 1986 it, along with numerous other State of Ohio departments, bureaus and

[1]3701-01-08 O.A.C.

other agencies, has been a party to collective bargaining agreements with OCSEA, which represents upwards of 36,000 State of Ohio employees. This case concerns the application of the personal leave benefit which predates collective bargaining between these parties and has appeared with few modifications in every contract since.

Over the years the Ohio Veterans Home has struggled with chronic shortages of direct care staff represented by the Union. A number of witnesses testified that mandatory overtime and, according to the Union, harsh discipline has contributed to the problem by creating staff burn-out and turnover. Inability to reach employees who are off duty has resulted in on-duty personnel being held over to work a second shift (or half shift in a sharing arrangement with another employee). Fear of being held over encourages employees to request leave for the last hour and a half of their shift so they will not be mandated. The Ohio Veterans Home does operate at reduced staffing on weekends so that employees might have every other weekend off according to a negotiated agency-specific agreement. Since it is a 24/7 operation, employees must also work holidays. Because the Contract explicitly prohibits use of personal leave on holidays, there is high demand for personal and other forms of leave on days contiguous to them so that employees can enjoy some time with their families during these periods.

The parties have not turned a blind eye to the problem, but have worked collaboratively to find solutions. They agreed to keep a number of positions open for two years while twelve STNAs were in training to become LPNs. Volunteers were sought and obtained; discipline was forgiven if the employee agreed to work a shift short of coverage; flexible schedules were created; a buddy system was employed for trading days; and a "get out of jail free" card allowed an employee to refuse a mandatory overtime shift if that employee had worked a specified number of overtime turns.

The Union complains that although some of these programs were effective, they were discontinued by upper management. Management has been deficient in other ways, too, it says. Ten to fifteen RN Nurse Managers were hired, but they do no floor work and were hired purely

to discipline employees. Meanwhile, the Ohio Veterans Home is still short-staffed in LPN and STNA positions. Executive staff is automatically off on holidays, it says, and some managers take off, too. In any event, they do not do LPN or STNA work.

The Grievances

On December 30, 2004, former Chapter President and now Chief Steward Vanessa Brown filed class action grievance 33-00-20041230-1568-01-04 citing Article 27.04's language that "Personal leave shall be granted if an employee makes the request with a forty-eight (48) hour notice" and requesting a remedy of triple time for denied personal leave. A grievance written for LPN Becky Goble citing denial of a December 22, 2004 request for personal leave on December 26 (also requesting a triple-time remedy) was subsequently consolidated with 1568, as were others, for the purpose of arbitration. By agreement of the parties, the incidents of personal leave denial included are:

Date Being Sought	Hours Sought	Employee
December 24, 2004	2.0	Teresa Mira
	1.5	Renee Vannest
		Becky Goble
December 31, 2004	8.0	Kimmie Smith
	2.0	Teresa Mira
	2.5	Janet Borton
	1.5	Doreen Ardner
	1.5	Renee Vannest
	2.5	Krystyn Ross
	1.5	Katrice Stovall
	8.0	Torey Beckley
	4.0	Debra Signs
January 2, 2005	2.0	Teresa Mira
	8.0	Janet Borton
March 27, 2005	8.0	Kenny Lucas
	8.0	Becky Fries
	8.0	Carolyn Smith
	4.0	Jody Lucas

The parties also stipulated to the issue to be decided: *Is the Ohio Veterans Home in violation of Article 27 by denying personal leave requests? If so, what shall the remedy be?*

Prior Arbitration Decisions and History of Bargaining

The matter of the State's authority to deny requests for personal leave has been addressed by three panel arbitrators in cases involving other State agencies. Except for changing the amount of notice required, the language at issue did not change for the first 13 years of collective bargaining under Chapter 4117 O.R.C.

> Article 27 - Personal Leave
> ***
> Personal leave shall be granted if an employee makes the request with one (1) day notice.[2] In an emergency the request shall be made as soon as possible and the supervisor will respond promptly. The leave shall not be unreasonably denied.
> ***
> (1986-2000 contracts)

This language was first interpreted by Jonathan Dworkin in a 1990 case involving the Gallipolis Developmental Center, a facility of the Ohio Department of Mental Retardation and Developmental Disabilities. Arbitrator Dworkin held that "the leave shall not be unreasonably denied" applied only to emergency requests made with less than a one-day notice and that the Agreement "provides no supervisory discretion to deny personal leave requests submitted a day in advance." In 1992 the parties were in arbitration again, this time before Mollie Bowers after they had added a provision to Article 13 which stated, "It is understood that the Employer reserves the right to limit the number of persons to be scheduled off work at any one time." Arbitrator Bowers ruled that the new provision applies only to pre-scheduled work shifts, not to timely personal leave requests.

In 1997, after another labor organization gave notice of strike, State agencies were directed to cancel or deny all discretionary leaves and those seeking to use sick leave were required to supply medical verification. A number of OCSEA members whose leave requests were affected grieved. This time panel member Harry Graham interpreted the contract, finding

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[2]48 hours notice required beginning with the 1997-2000 Contract.

in 1999 that the grievants' actions did not constitute a wildcat strike and holding that the State had no discretion to deny personal leave requests that were timely made. The State thereafter sought and won new language in its 2000-2003 Contract with OCSEA which added two exceptions to Section 27.04's Notification and Approval of Use of Personal Leave language. Thus, the full provision at the time of the incidents giving rise to the grievances before this Arbitrator is:

> 27.04 - Notification and Approval of Use of Personal Leave
>
> Personal leave shall be granted if an employee makes the request with a forty-eight (48) hour notice. In an emergency the request shall be made as soon as possible and the supervisor will respond promptly. The leave shall not be unreasonably denied.
>
> When any bargaining unit, not covered by this Agreement, has filed a Notice of intent to strike or engages in a wildcat strike, the Employer reserves the right to cancel or deny all personal leave requests.
>
> Personal leave shall not be taken on a holiday.
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> (2000-2006 contracts)

III. ARGUMENTS OF THE PARTIES

Argument of the Union

The Union argues that the language on personal leave is clear. Timely requests "shall be granted" with only two exceptions, neither of which occurred here. Management's excuse of alleged staffing needs is an old story as it is always short staffed to the point of requiring employees to find their own replacements so that they might use their personal leave, vacation and compensatory time off. The Union has provided ideas to address the shortage, some of which Management has used, some of which it has not. Notably, it has never worked managerial staff in order to allow bargaining unit employees time off. The idea that this would provoke a grievance is laughable, says the Union, pointing to Article 1.05. The only grievance filed to protect bargaining unit work from management intrusion was in housekeeping where Management used supervisors, not to avoid mandatory overtime, but to avoid payment for overtime.

In violating Article 27, Management relies on advice given by the Ohio Office of Collective Bargaining to the effect that Management needs only to demonstrate it took extreme

measures to assure adequate staffing before denying personal leave. Yet after seven rounds of contract negotiations and three arbitration decisions, there is still no contractual language permitting Management to deny personal leave for operational reasons. Personal leave is precious to employees because it is the only leave they can count on since it is not subject to managerial discretion as are vacation and compensatory time.

As to remedy, the Veterans Home disciplines employees punitively when its policies are violated. The Union urges that it should be similarly treated when it violates the Collective Bargaining Agreement. A slap on the wrist will not be an effective deterrent, it claims. It therefore seeks punitive damages of triple time. The Union acknowledges that triple damages have been awarded only once before in the history of the parties' collective bargaining relationship. However, this case, it asserts, is more egregious than that one because there are many more grievants and incidents. It therefore asks that the grievance be granted and triple-time pay granted for every hour of personal leave denied, restoration of leave balances for employees who used sick, vacation or compensatory time and time for those who had to seek others to cover their shift to be allowed off.

Argument of the State

The State's position is that it has not "repeatedly and with malice" denied personal leave as alleged by the Union. It has always granted this leave except when to do so would have violated the law on minimum staffing requirements.

This case is not like the previous three cases which the Union claims Management has ignored. None of those involved the application of law setting forth staffing requirements for nursing homes and none involved Management denying personal leave only after exhausting all reasonable alternatives. Arbitrator Dworkin was not asked to consider the effect of law or regulatory rule and he did not hear about extraordinary measures attempted before personal leave was denied. Although Arbitrator Bowers found that Article 13.02 does not modify Article 27.04, she did not shut the door on the possibility that personal leave could legitimately be denied under

rare circumstances. Moreover, in that case, the employer did not proffer evidence that it sought other alternatives before denying personal leave requests and there was no reference to laws or rules fixing staff-to-patient ratios. The circumstances of Arbitrator Graham's case (in which the employer claimed a wildcat strike exception) did not include minimum staffing levels to provide safe care and/or custody of residents. The State commends to the Arbitrator a more recent decision involving the Ohio Veterans Home in which Arbitrator John Murphy found contractual basis for balancing the employer's interest in limiting the number of employees scheduled off at one time and maintaining minimum staffing.

The State continues that the logical extension of the Union's argument is that the word "shall" in the Collective Bargaining Agreement trumps minimum staffing requirements set by law, a proposition rejected by the Ohio Supreme Court in *State ex rel. Dispatch Printing Co. V. City of Columbus, et al.* 90 Ohio St.3d 39 (2000) wherein it reaffirmed a prior holding that a collective bargaining agreement cannot be used to modify governmental obligations set by law.

The State challenges factual claims of the Union. In fact, the overwhelming majority of personal leave requests are granted. Looking at one of the dates in question, 43 such requests were approved for December 24 and only 2 percent of the 290 hours requested were denied. The Union's claim that the Ohio Veterans Home is always short 30-40 direct care employees is a gross exaggeration and its contention of unduly harsh discipline is also false. Discipline for tardiness is not initiated until an employee's cumulation reaches 60 minutes and then it is progressive. Threats of grievances on management encroachment into bargaining unit work has inhibited exempt employees from working to allow staff to use personal time, as has the State's contract with District 1199/SEIU, but the claim that supervisors never work weekends or holidays is false.

Turning to the requested remedy, the State submits that punitive damages should be awarded only when there is evidence of bad faith such as to shock the conscience of the arbitrator. There is no such proof here, just a demand for a vendetta. In fact, the Ohio Veterans

Home relied on Office of Collective Bargaining advice, always granting personal leave except when the safety of residents was imperiled by insufficient staff. But should the Arbitrator find the State has violated the Contract, a cease-and-desist order is the appropriate remedy inasmuch as the Union brought no proof of harm. Some employees used other time, some took a payout, some carried the time forward, and some did not work the day requested because they found a substitute, traded assignments or were not scheduled to work.

The State concludes that the grievance should be denied.

IV. OPINION OF THE ARBITRATOR

When the language of a contract is clear, the arbitrator's task is to apply it to the facts at hand, not to interpret it. Three seasoned panel arbitrators have found the language at issue here clear and unambiguous. This Arbitrator does as well. There is simply no question that the Ohio Veterans Home must grant personal leave if it has been properly requested. This is not about the "promptness" vacation notification requirement, which was what Arbitrator Murphy had before him and where a balancing of rights apparently aided interpretation of the term.[3] Here there is both clear language and only two bargained-for exceptions: notice of strikes (or wildcat strikes) by other bargaining units[4] and holidays. Maintenance of minimum staffing levels, whether chosen by Management or imposed by law, is not one of them. If there were any question that the parties intended to suspend employees' rights regarding the use of properly requested personal leave in order to maintain mandatory or voluntary minimum staffing levels, which there is not, the presence of the two exceptions spelled out in 27.04 would put that question to rest. If the application of the mandatory personal leave benefit brings staffing level below the minimum required by law or management policy, it is Management's responsibility to find a way–using

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[3]I rely on OCB Summary #1805, being unable to locate online the full text decision cited by the State.

[4]A wildcat strike in the OCSEA bargaining unit would constitute a violation of Article 41.

discretion provided elsewhere in the Contract or other lawful means if necessary–to achieve its goal without breaking its bargain with OCSEA.

As to remedy, OCSEA admits what it requests is punitive. It argues that this is necessary to force compliance and deserved because OVH is punitive in its discipline of employees. First with respect to OVH's disciplinary practice, that is a mater appropriately addressed through discipline grievances. Second, it is this Arbitrator's view that punitive damages have extremely limited utility in grievance arbitration because of the permanent nature of the collective bargaining relationship. On occasion, where an employer has deliberately and repeatedly violated the contract relying on the lack of effective monetary relief for the aggrieved, punitive damages may be appropriate. That is not the case here. OVH, in good faith, relied on language in an arbitration decision that its labor relations advisors viewed as providing an exception to Article 27.04's mandate. This was a mistake, but an honest one which OVH, through Labor Relations Officer Donna Green's sworn testimony, promises to correct by abiding by the Arbitrator's decision. Thus, there being no proof of damages other than a temporary postponement of benefit, a cease-and-desist order is in order.

V. AWARD

The Ohio Veterans Home violated Article 27 by denying personal leave requests. It is directed to cease and desist from denying such requests when they are properly filed.

Anna DuVal Smith

Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
June 13, 2006

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