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In the Matter of the Procedural Question	)	
	)	
Between:	)	Grievance No. 45-Ytown-15-11
	)	
Ohio Civil Service Employees Association/AFSCME Local 11	)	OPINION
Unit 45	)	RE: Childbirth/Adoption Leave
and	)	
	)	
The State of Ohio	)	
Ohio Attorney General	)	

**ISSUE:** Did the Employer violate the parties' Labor Agreement by not providing Childbirth/Adoption Leave to the Grievant, Rocky Warren after the birth of his child? If so what is the proper remedy?

**Appearance for Local 11, Unit 45:**

Douglas Sollitto, OCSEA Staff Representative

**Appearance for the Ohio Attorney General:**

Kathleen Madden, Director of Human Resources – Office of the Attorney General

**Arbitrator:**

Dennis M. Byrne

RECEIVED / REVIEWED

JUL 19 2016

OCSEA - OFFICE OF  
GENERAL COUNSEL

**Introduction:**

The question to be answered is whether the grievance filed by Rocky Warren (45-Ytown-15-11) should proceed to an arbitration hearing. The Union argues that the grievance is timely and that there is language in the parties' labor agreement that states, or can be read, to substantiate the Union's claim that the grievant should have been eligible for Childbirth/Adoption leave at the time of the birth of his child. The Attorney General argues that the parties' contract does not cover this situation and that the grievance is flawed for a number of reasons and that it should not proceed to a formal hearing.

**Union Position:**

The Union's brief on this issue attempts to predict the objections that the Attorney General's Office will take in defense of its position that the grievance should be dismissed, and offers some rebuttals to the Employer's supposed positions. The Union believes that the Attorney General will argue that the grievance is untimely and that the grievance is procedurally defective (Union Brief pp. 2-6). The Union's argument of timeliness is that the Union met the timelines listed in Article 16 of the contract. In terms of the defectiveness argument, the Union argues that the Arbitrator will make that determination, and that the Attorney General's Office cannot simply dismiss the Union's valid arguments.

**Attorney General's Position:**

The Attorney General actually makes six (6) separate arguments in support of its position. These arguments are:

1. That Unit 45 has never negotiated a paid Childbirth/Adoption leave benefit for its membership;

2. That the alleged violation of the contract does not rise to the level of contractual violation;
3. That there is a valid Past Practice between the parties on this issue;
4. That the acceptance of the Union's position would lead to a nonsensical result whereby the father of the newborn (adoptee) would be eligible for more benefits than the mother;
5. That the Union is attempting to win in arbitration something that it refused to negotiate over during the last two rounds of negotiations; and
6. That the Union did not diligently pursue the grievance (timeliness argument).

**Discussion:**

The question to be answered is whether the grievance should proceed to arbitration? In that sense the Union's burden is much less than it would be if the question were whether the grievance should be sustained. The grievance procedure is the part of the contract that allows the employees the right to have their concerns adjudicated by an impartial neutral third party. That right of appeal is central to the entire process of collective bargaining. Without the grievance procedure, collective bargaining is an exercise in futility. Therefore, any appeal to have an issue heard by a neutral will be looked at in a way that protects the individual union member's rights. This means that the Union, in its attempt to prove that the Arbitrator should hold a hearing on an issue, must only prove that there is a potential violation of the contract. The Arbitrator believes that the Union has met that minimal burden.

The Union argues that the grievance is timely. This is an unusual situation where the original grievance was filed on May 12, 2015. The Union informed the Employer that it intended to arbitrate the grievance on July 8, 2015. A reading of the contract shows that the Union has, at least, seventy days to inform the Employer of its intent to

arbitrate a grievance. There are no other timelines in the contract that states any time limit on when the arbitration should occur. In this case the procedural hearing on the issue is taking place over a year after the Union's notification that it wished to arbitrate the issue. This is highly unusual, but does not violate the timelines in the agreement.<sup>1</sup>

The Employer argues that the Union did not diligently pursue the grievance. That is true from the evidence in the record (a listing of the parties' correspondence on the issue supplied by the Attorney General's Office in its brief). However, the contract lists no time lines that the parties must adhere to between the time the intent to arbitrate is given and when the hearing actually occurs. Therefore, the Arbitrator finds that the grievance is timely.

The Union's second contention is that the Employer violated the contract. The Arbitrator has read the submissions of both parties and finds that there is a statement in Article 26 that references Childbirth/Adoption leave:

26.1 Employees may elect to utilize sick leave to supplement an approved Disability Leave, Worker Compensation Claim or Childbirth Adoption Leave. Sick leave ...

The Attorney General's Office states that this language was inserted into the contract as boilerplate during negotiations for the 1997 contract. The Attorney General further claims that this phrase is not now nor has ever been applied to the relationship between the Attorney General's Office and the members of Unit 45.

The Attorney General makes a number of cogent arguments to support its position. However, many of these arguments are an attempt to prove its position that the grievance should be denied. This particular proceeding is to determine if the grievance

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<sup>1</sup> There is a statement that the parties agree to process grievances in a timely fashion and to move promptly through the arbitration practice. However, those words are not operationalized in any way.

should be decided on its merits; that is a separate question from whether the grievance is meritorious. The Union's burden on this issue is to prove that there may be a violation of the parties' contract. The Union has cleared this hurdle. There is language in the agreement that references Childbirth/Adoption leave, and the Union met the timelines stated in the contract.

The Attorney General's arguments often go to the merits of the grievance and, as such, are the evidence and arguments that it might (will) present at any hearing. That evidence covers a number of issues. However, the question at this time is not whether the Union or the Attorney General will prevail in the Arbitration proceeding, but whether the Union should have a forum to make its arguments. Given the facts of the situation, i.e., a finding that the issue was timely, which is a product of the language in question, and that the contract contains some language covering the substance of the grievance means that the Union has proved that there should be a forum for the issue to be decided.

Again it must be stressed, that the procedural issue decided here simply states that the Arbitrator finds that the Union should have to opportunity to try to prove that the grievant should have been granted Childbirth/Adoption leave. The merits of the issue are still to be decided

**AWARD:** The grievance should be moved forward to an arbitration hearing.

Signed this 18<sup>th</sup> day of July 2016, at Munroe Falls, Ohio.

/Dennis Byrne/  
Dennis M. Byrne, Arbitrator