#18

ARBITRATION PROCEEDING

In the matter of arbitration between:	)	Gr. Rocky Warren
	)	May 6, 2015
OHIO ATTORNEY GENERAL'S OFFICE	)	
	)	Hearing: June 14, 2017
and	)	at Columbus, Ohio
	)	
OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11, UNIT 45	)	Date of Award: July 12, 2017

OPINION AND AWARD

Before Mitchell B. Goldberg, Arbitrator

Appearances:

For the Union:

Buffy Andrews,	Operations Director
Doug Sollitto,	OCSEA Staff Representative
Rocky Warren,	Grievant
Randy Columbo,	Chapter President
Denise Oaks,	Chapter Vice President
Patricia Hill,	Bargaining Team Member

For the Employer ("Agency"):

Robert Fekete,	Sr. Assistant Attorney General
Sana Ahmed,	Assistant Attorney General
Kathleen C. Madden,	Director, Human Resources
Beth Mantle Rossi,	Manager of Human Resources Administration
Thomas Cruse,	Deputy Director, Human Resources Division, DAS
Aimee Szczerbacki,	OCB Policy Administrator

I. Introduction and Background.

This is a labor arbitration proceeding conducted under the terms and conditions of the parties collective bargaining agreement ("CBA") covering the term from September 1, 2012 through August 31, 2015. The parties selected the undersigned as the arbitrator of this dispute in accordance with Article 16, Section 16.3. Section 16.6 requires an arbitration decision to be made "as quickly as possible but . . . no later than thirty (30) calendar days after the conclusion of the hearing, unless the parties agree otherwise." The hearing in this matter was held and was concluded on June 14, 2017. The parties, however, decided to file post-hearing briefs with the arbitrator postmarked on or before June 30, 2017. The parties agreed that the arbitrator's decision would be issued on or before 30 calendar days after the arbitrator's receipt of both parties' briefs.

The Union filed a grievance on behalf of Rocky Warren, a Claims Account Representative I in the AG's office. The grievance alleges that the Agency violated the CBA on May 6, 2015 when it denied his request to obtain paid Childbirth Leave. It alleges that his request was denied because male bargaining unit members were not eligible for this benefit; the benefit was only available and applicable to female bargaining unit members, who were granted disability leave for childbirth. The grievance further states that because the CBA is silent with regards to Adoption/Childbirth Leave, the Grievant's benefit is available under the Attorney General's Office Policies & Procedures which state, in part: "This policy is applicable to all permanent AGO employees. To the extent provisions of this policy conflict with provisions in an employee's [CBA], the provisions of the [CBA] shall apply." The Union's requested remedy is that the Grievant be compensated for his childbirth leave, and that he be restored the lost leave that he used to take time off for the birth of his child.

The Agency denied the grievance throughout each step and the matter proceeded to hearing. There was no transcription of the proceeding or any official record. The parties presented testimonial evidence and they submitted documentary exhibits. Witnesses were examined and cross-examined. Post-hearing briefs were filed after the record was closed. The parties stipulated that all necessary and required substantive and procedural provisions of the CBA were complied with, and that the matter is properly before the arbitrator for a final and binding award.

II. Facts.

The Agency summarized the reasons for denying the grievance in its grievance response. It stated that there is no recognized CBA provision for childbirth leave for Unit 45 employees. It alleges that the parties have a longstanding past practice reflected by prior discussions and contract negotiations that support its position. All Unit 45 mothers have taken disability leaves for childbirth, but fathers have been granted FMLA leaves when requested for childbirth occasions. The Grievant's request for leave was approved to use his available paid CBA leave balances to coincide with his FMLA leave following the birth of his child.

It further stated that childbirth leave is a negotiated provision in the other AGO CBAs, and is provided to exempt (non-bargaining unit) employees. The other represented employees in the other bargaining units have reached negotiated agreements with respect to paid leaves for childbirth, but Unit 45 has no such negotiated provision for childbirth in its CBA.

III. Contract Provisions, Laws, Rules and Policies.

Article 26, Sick Leave, Section 1 states:

> Employees may elect to utilize sick leave to supplement an approved Disability Leave, Workers Compensation Claim or Childbirth Adoption Leave. Sick leave used for these supplements shall be paid at a rate of one hundred percent (100%) notwithstanding the schedule previously specified. In addition, the eighty-five percent (85%) rule will not apply

to sick leave used for the fourteen (14) day waiting period prior to receipt of disability benefits or qualified FMLA.

After employees have used all of their accrued sick leave, they may, at the Employer's discretion, use accrued vacation, compensatory time or personal leave. Sick leave may accumulate without limit.

Article 40, Savings, states:

To the extent that this Agreement addresses matters covered by conflicting State Statutes or Administrative Rules in effect at the time of the signing of this Agreement, this Agreement shall take precedence and supersede all conflicting State laws. Where State Statutes or administrative rules provide benefits to employees in areas where this Agreement is silent, such benefits shall continue and be determined by The applicable Statutes or Rules.

Personnel policies and work rules shall be reasonable and shall be consistent with this Agreement. The Union shall be notified prior to the implementation of any new work rules, and shall have the opportunity to discuss them.

State of Ohio Policy Regarding Adoption/Childbirth Leave, Eligibility

All permanent exempt employees, and permanent bargaining unit employees covered by the following [CBAs], who work an average of thirty or more hours per week are eligible for Adoption/Childbirth leave.

Collective Bargaining Agreements -- [OSTA], [FOP 2], FOP 48 (Attorney General), [OCSEA], OCSEA 50 (Auditor), OCSEA 55 (Treasurer of State), (SEIU) 1199, and [SCPE], [OEA] SCOPE.

Effective Date and Triggering Event
Eligibility for taking Adoption/Childbirth leave shall begin on the date of the birth of an employee's child . . . in the case of a birth, the employee must be the biological parent.

AGO Policy (February 20, 2015)

II. SCOPE
This policy is applicable to all permanent AGO employees. To the extent provisions of this policy conflict with provisions in an employee's [CBA], the provisions of the [CBA] shall apply.

III. PROVISIONS
Permanent AGO employees have the opportunity to take up to a maximum of six (6) weeks of continuous leave to provide parental care Immediately following the birth . . of a . . . child.

A. Eligibility
All full-time and part-time permanent employees working an average of thirty (30) or more hours per week are eligible for Adoption/Childbirth leave, regardless of the employee's length of service with the AGO. The employee must be the biological parent of the newly born child.

Section 4117.10 of the Ohio Revised Code provides;

> Where no agreement [CBA] exists or where an agreement [CBA] makes no specification about a matter, the public employer and public employees are subject to all applicable state . . . laws . . . pertaining to wages, hours, and terms and conditions of employment for public employees.

IV. Positions.

The Union contends that the Grievant's request for childbirth leave benefits should have been granted. He is the biological parent of his child. There is no provision for childbirth leave in the CBA. Because of the CBA's silence on the subject, state statutes or administrative rules that provide such benefits must be applied. There is no dispute over the fact that childbirth leave is a matter that involves wages, hours, terms and conditions of employment. The state policy provides that OCSEA members are eligible under its policy. The AGO policy mirrors the state policy. Neither policy excludes males from getting the leave. The CBA in Section 26.1 permits employees to utilize their sick leave to supplement the Childbirth leave. Article 40 is applicable -- the CBA is silent, so the policies of the state and the AGO control the Grievant's entitlement to his childbirth leave benefit.

The Agency believes that the CBA's silence works to its benefit. The CBA language is clear and unambiguous that no childbirth benefit exists. To the extent that any ambiguity exists, one must look to the parties' longstanding past practice with regard to the granting of childbirth leave benefits. Mothers have been permitted to use their disability leave benefits, and fathers have taken FMLA leave and were permitted, as the Grievant was, to supplement their FMLA leave with the use of available paid leave such as sick leave, personal leave, and vacation

leave. It relies upon further evidence that the parties have negotiated over the Agency's granting of childbirth leave, in exchange for concessions from the Union over other issues. The Union rejected these proposals. The FOP units were successful in negotiating the childbirth leave benefit in their CBAs, but the OCSEA 45 unit rejected the Agency's proposals in their negotiations.

V. Contract Interpretation Principles.

The Union has the burden to prove that its interpretation of the CBA is more plausible and that it better reflects the parties' intent. The burden of proof, however, is the same as that used in any civil court proceeding that involves alleged contract breaches. It is proof only by a preponderance or the greater weight of the evidence. The arbitrator's duty is to determine and execute the parties' mutual intent when the contract was formed, later amended, or modified by a binding past practice.. This must first be ascertained from the written contract language. Unambiguous language must be given its plain meaning. This may be drawn from the document with the assistance of plain/dictionary definitions and other well known and accepted rules of contract construction and interpretation. Language is unambiguous when the meaning can be determined without more than the parties' chosen language from the four corners of the contract. If the language is reasonably susceptible to more than one meaning, the language may be considered as being ambiguous. The arbitrator may then rely upon other interpretive aids such as the bargaining history, the parties' past practices or other extrinsic evidence.

The Restatement (Second) of Contracts explains the process as focusing heavily upon the parties' chosen language, but requires the interpreter to examine the context in which the words are used, and the surrounding and prevailing circumstances. It states that meanings are not to be viewed in a vacuum, they can almost never be "plain" except in a context. An interpreter may obtain the context by examining the relevant evidence of the situation and the

relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties. "But, after the transaction has been shown in all its length and breath, the words of the integrated agreement remain the most important evidence of intention."[1]

VI. Evidence, Discussion and Findings.

The CBA Language

The CBA is silent with respect to the ability of a father to obtain the same type of childbirth leave benefits as a mother, but the CBA provisions have been applied to both fathers and mothers to permit leaves for childbirth in each case, under separate leave provisions within the CBA. Mothers have been taking childbirth leaves under the disability leave provisions that provide for pay for no less than 70% of total pay for six months. Article 26, Section 26.1 provides that the mothers who have taken disability leaves for childbirth purposes could use their sick leave accrual to supplement their approved disability leaves to reach the 100% level.

The Union contends that the Section 26.1 language also specifically provides for the supplemental use of sick leave for "childbirth/adoption leave." The Union argues that these specific words express the Agency's and the Union's intention to have a childbirth/adoption leave included in the contract, notwithstanding that that specific type of leave is not described or contained in the CBA.

The Union attempts to include that specific leave by incorporating the AGO policy into the CBA. The policy provides to all AGO permanent employees, except it would not apply to bargaining unit employees who are parties to a CBA that has provisions that conflict with the AGO policy on Adoption/Childbirth leave. The Union believes that the AGO policy does not

[1] *Restatement (Second) of Contracts,* Section 212, cmt B (1979).

conflict with CBA provisions, because the policy language and the CBA are not in opposition with each other.

However, the AGO policy is clear that the purpose of the Adoption/Childbirth policy is to provide guidance to employees regarding options available for parental (mothers and fathers) care following the birth or adoption of a minor child. There is no such language in the CBA expressing any such purpose to provide benefits for either or both parents upon the birth of their child. There is no provision for the specific leave or for supplementing the 6-week benefit with accrued paid leave or compensatory time. Accordingly, it must be found that this specific type of leave as stated in the AGO policy conflicts with the CBA language that omits any mention of this benefit and its terms. The evidence is that the parties have been operating in opposition to the specific terms of the AGO policy by providing childbirth as a type of disability leave for mothers, and an FMLA leave that could be paid leave for a father with accrued sick leave benefits. These are divergent policies and provisions that are in conflict with each other such that under the language of the AGO, the provisions of the CBA must apply.

One nevertheless must recognize that Article 26, Section 26.1 states that utilization of sick leave to supplement both "an approved disability leave," or a "Childbirth Adoption Leave" is permitted, notwithstanding that there is no such Childbirth Adoption Leave anywhere in the CBA. There are specific disability leave benefits provided under Article 29. Ordinarily, arbitrators must attempt to give meaning to every provision contained in a CBA, based upon the presumption that parties do not ordinarily insert meaningless language into their contracts. However, in this case, it must be found that the insertion of "Childbirth Adoption Leave" was superfluous for purposes of this CBA, because no such benefit is explained or contained within the CBA. The parties could have at anytime agreed to incorporate the AGO policy into the CBA, but this was not done. Moreover, the term "childbirth adoption leave" could be ambiguous. It

could refer as the Union claims to the AGO specific policy, or it could refer to childbirth benefits that are otherwise provided within the CBA, such as through the use of disability leaves, or sick leaves.

The Union also refers to Article 40 of the CBA to support its position that the AGO must provide childbirth leave benefits to the Grievant. It contends that because the CBA does not mention the specific childbirth leave benefit and is terms, applicable State Statutes or Administrative rules that contain the benefit "in areas" in which the CBA is silent must apply.

However, I find that the general benefit for childbirth leaves is contained in the CBA, based upon the parties' practice in providing for such leaves. While the leaves for fathers is treated differently than the leaves for mothers, childbirth leaves have been granted under the disability provisions for mothers, and under FMLA with paid sick leaves for fathers. The "area" was addressed as between the parties and their practices. Accordingly, to the extent that any state laws or administrative rules differ from the practice of the parties in the manner which they have interpreted and applied their CBA provisions regarding childbirth leaves, their interpretations and practices must prevail.

State Policy

The Union contends that the State policy that provides for childbirth leaves to exempt employees and bargaining unit members covered by specific CBAs applies in this case because one of the CBAs listed is "OCSEA" and the Grievant is an OCSEA member. However, the State policy language is referring to "employees covered by the following [CBAs]," and the list does not identify the CBA between the AGO and OCSEA, Local 11 Unit 45. The Union states that FOP Units 46 is not listed, but it is nevertheless covered by the State policy. This is explained by the fact that Unit 46 negotiated language in its 2015-2018 CBA incorporating the AGO policy

regarding paid adoption/childbirth leave. Unit 45 has not negotiated to incorporate the AGO policy into its CBA.

Section 4117.10 of the Ohio Revised Code

This section defers to applicable state laws pertaining to wages, hours, and terms and conditions of employment when no CBA exists "or" where the agreement makes no specification about a matter. That section does not apply in this situation: (1) because a CBA is in existence between these parties; and (2) because the subject of childbirth leaves in the CBA is covered within the disability leave provisions for mothers, and within the sick leave and FMLA provisions for fathers. If a CBA provides for final and binding arbitration of grievances, there are only a few state laws or local ordinances (not applicable here) that would prevail over a CBA.[2]

The Parties' Past Practice

A past practice is a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action. The proof requirements by the party asserting the existence of the practice are: (1) clarity and consistency of the pattern of conduct; (2) longevity and repetition of the activity; (3) acceptability of the pattern; and (4) the mutual acknowledgement of the pattern by the parties.[3]

The AGO has met the above requirements to show that the parties have either through their actions, clarified ambiguous language, implemented general contract language, or created a separate enforceable condition of employment by continuously handling childbirth leaves over the years by providing such leaves within the disability leave provisions in the CBA for mothers,

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[2] These would be those pertaining to workers' compensation, retirement, civil rights, unemployment compensation, residency requirements, and educational standards. *Public Sector Collective Bargaining*, The Ohio System, p. 69, Labor Relations Press, (1964).

[3] See Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1017 (1961).

and by providing the use of sick leave and other paid leave benefits to fathers who chose to take FMLA leaves for the births of their children.

Summary

Accordingly, the Union has not met its burden to prove that the Grievant was entitled to a childbirth leave that was in accordance with the existing AGO policy for exempt employees, or in accordance with the State policy for exempt employees, or those who are members of certain bargaining units that have incorporated the State policy. The CBA does not incorporate the State policy, as does other bargaining units that have negotiated CBAs with the AGO.

VII. Award.

The grievance is denied for the above reasons.

Date of Award: July 12, 2017

Mitchell B. Goldberg, Arbitrator