

ARBITRATION DECISION NO.:

546

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation

District Two

DATE OF ARBITRATION:

April 15, 1994

DATE OF DECISION:

June 9, 1994

GRIEVANT:

Charles Dersher

OCB GRIEVANCE NO.:

31-02-(93-06-29)-0010-01-13

ARBITRATOR:

Douglas Ray

FOR THE UNION:

Lois A. Haynes

FOR THE EMPLOYER:

Thomas Durkee

Don McMillen, 2nd Chair

KEY WORDS:

Arbitrability

Workers' Compensation

Contract Interpretation

Timely Filing of Grievance

Occupational Injury Leave

Continuing Violation

ARTICLES:

Article 16 - Seniority

§ 16.02 - Exceptions

Article 27 - Personal Leave

§ 27.02 - Personal Leave Accrual

Article 28 - Vacations

§ 28.01 - Rate of Accrual

Article 29 - Sick Leave

§ 29.02 - Sick Leave Accrual

FACTS:

The Grievant, a Bridge Lock Tender, was injured on December 3, 1990. He later filed for Worker's Compensation benefits. The Grievant was on Workers Compensation leave for a period of two years.

The first paycheck that the Grievant received after returning from leave contained his back accruals for personal and sick leave which he had accrued. This paycheck did not include accrued vacation time for the period that the Grievant was on leave. The Grievant then went to the Personnel office to question this, and he was told that personnel would work it out. This grievance was filed four pay periods later, when the problem was not corrected.

UNION'S POSITION:

The Union asserted that this matter was timely filed. The Union argued that this grievance was in the form of a "continuing violation", which means that a new violation occurred each time a paycheck was issued to the Grievant without the vacation leave included. The Union also asserts that the Grievant notified the Personnel Office about the problem and he had been advised to allow personnel to work the problem out.

The Union argued that the language of the contract entitled the Grievant to accrue vacation leave while on worker's compensation. Article 28 states that employees with one year or more of service accrue vacation time up to 80 hours a year. Article 16 provides that employees on workers compensation leave continue to accrue seniority and service credits. There was, therefore, no break in the Grievant's service so the Grievant would continue to accrue vacation leave during this period of time.

EMPLOYER'S POSITION:

The Employer argued that the grievance was not timely filed under Article 25 because the Grievant did not file within 10 days of when the Grievant became aware of the problem as required. The employer stated that the Grievant had been put on notice when he received the first paycheck with the vacation time missing. The period of 80 days between the first paycheck and the filing of the grievance is well in excess of the 10 day limit, so the grievance was untimely filed.

The employer further argued that the Union had not met its burden of proof. Management stated that the contract provides for the accrual of other benefits during worker's compensation leave, but does not include vacation time. The employer argued that this omission was intentional, therefore vacation time would not have accrued during the Grievant's Worker's Compensation leave.

ARBITRATOR'S OPINION:

The Arbitrator did not uphold the "continuing violation" argument that the Union put forward. The continuing violation argument is widely recognized as an exception to time limits for filing, it is generally narrowly construed. The present case did not involve a "new" violation. The continuing failure to enter the vacation leave on the Grievant's account was a consequence of the original failure to credit him. The violation occurred prior to the receipt of the first paycheck, not later. Here, there are no allegations that further rights accrued which were not observed.

The Arbitrator found that the grievance was timely filed. The Grievant went to the Personnel office and attempted to correct the problem as soon as he had received the first paycheck. There was evidence that he had been in touch with the Personnel office and that they had assured him that the problem would be corrected. The arbitrator found it to be reasonable for the Grievant to believe that the problem would be corrected. When he learned that nothing was going to be done about the problem, he filed a grievance.

The Arbitrator found that the contract does not provide for vacation leave to accrue while the Grievant is on worker's compensation leave. Article 16 only deals with the accrual of seniority, and Article 28 does not mention worker's compensation leave. Articles 27 and 29 both contain language which provides for employees to accrue benefits while on worker's compensation leave. Article 28, dealing with vacations, does not provide this. The failure of the contract to provide similar entitlements for vacation time as it does in Articles 27 and 29, is evidence that no entitlement was intended.

There was also some evidence of past practice which showed that vacation benefits had not accrued over a period of worker's compensation leave.

The Arbitrator found that the contract does not promise vacation accrual to employees on workers compensation.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

In the Matter of Arbitration Between

**THE STATE OF OHIO
OHIO DEPARTMENT OF TRANSPORTATION**

and

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11,
AFSCME, AFL-CIO**

Re: Gr. No. 31-02-(93-06-29)-0010-01-13
Charles Dersher, Grievant

Hearing held April 15, 1994 in Columbus, Ohio

Post-hearing briefs mailed May 16, 1994

Decision issued June 9, 1994

APPEARANCES

Employer

Thomas Durkee, Labor Relations Officer, ODOT
Frank S. Kubovich, Labor Relations Officer
Don McMillen, OCB, Second Chair
Wayne Canfield, ODOT Payroll
Pamela Shanks, Personnel Officer 3

Union

Lois A. Haynes, Staff Representative
Charles L. Dersher, Grievant

Arbitrator

Douglas E. Ray

I. BACKGROUND

On June 29, 1993, a grievance was filed protesting the failure by the Employer to credit Grievant, a Bridge Lock Tender with the Ohio Department of Transportation, District Two, with accrued vacation for the period of time he had been on workers compensation leave. The Employer responded that the matter had not been timely filed and, further, that the contract had not been violated. The matter was processed to arbitration and a hearing held April 15, 1994. At hearing the parties stipulated to the following facts.

1. Grievant was hired October 29, 1990 as a Bridge Lock Tender.

2. Grievant was injured on December 3, 1990 and subsequently filed a Workers Compensation claim.
3. Grievant went on leave on March 4, 1991 and returned to work on March 8, 1993.
4. On the pay period ending March 20, 1993, Grievant was credited with his personal and sick leave accrual balances pursuant to Article 27, Section 02 and Article 29, Section 02.
5. The March 20 1993 paycheck was received by the Grievant on April 2, 1993.

II. ISSUES

The parties stipulated to the following framing of the issues:

Was the grievance filed timely pursuant to Article 25, Section 02 of the grievance steps?
 Is the Grievant entitled to vacation accrual when returning from workmen compensation benefits?
 If so, what should the remedy be?

III. COLLECTIVE BARGAINING AGREEMENT

At hearing and in post-hearing briefs, the parties referred to a number of sections of the collective bargaining agreement. Among the provisions reviewed by the arbitrator are:

Article 16, Seniority, which provides in Section 16.02 E. 3. that (a)n employee on Workers' Compensation has not experienced a break in service and shall continue to earn seniority and service credits while on Workers' Compensation.

Article 25, Grievance Procedure, Section 25.02 of which states in part 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 not to exceed a total of thirty (30) days after the event.

Article 27, Personal Leave, Section 27.02 of which provides that employees receiving workers' compensation benefits shall be credited with those personal leave hours which they normally would have accrued upon their approved return to work.

Article 28, Vacation, Section 28.01 of which provides in part that permanent full-time employees shall be granted vacation leave with pay at regular rate as follows: Length of State Service: 1 year or more

Accrual Rate Per Pay Period: 3.1 hours

Accrual Rate Per Year: 80 hours

The section goes on to provide different accrual rates for employees with 5 years of more State service.

Article 29, Sick Leave, Section 29.02 of which provides in part that employees receiving workers' compensation benefits shall be credited with those sick leave hours which they normally would have accrued upon their approved return to work.

IV. POSITIONS OF THE PARTIES

At hearing and in post-hearing briefs, the parties made a number of detailed arguments. Their positions are only briefly summarized below.

A. Timeliness Issue

1. The Employer

The Employer has asserted that the matter was not timely filed under Article 25 and asks that it be dismissed on this basis. The Employer points out that Grievant received a paycheck April 2, 1993, which credited him with personal and sick leave accruals for the period of his leave and that such paycheck did not contain any vacation accrual for this time period. This put Grievant on notice that he was not getting vacation leave accrued for the period of his absence and the Employer asserts that the contractual time period began running at that time. The Employer asserts that the language of Article 25 is clear and unambiguous in requiring that a grievance be filed within 10 days. The Employer cites a number of arbitration decisions, including many involving this contract, for the proposition that adherence to contractual time lines is critical. The Employer points out that Grievant signed the grievance some eighty days after receiving the paycheck that put him on notice. The Employer asked that the grievance be dismissed on timeliness grounds.

2. The Union

The Union asserts that the matter was timely filed. First, the Union asserts that the contract violation alleged here was in the form of a "continuing violation" that caused a new grievable event to occur each time a paycheck was issued that did not credit Grievant with the vacation leave at issue here. For this proposition, the Union cites a number of arbitration decisions including Case 04-00-(88-0107)-0003-01-07 (Smith 1991) involving a failure by the Ohio Department of Agriculture to pay mileage reimbursement to two meat inspectors and Case 12-00-(90-05-8)-0018-01-13 (Smith 1992) involving the failure of the Ohio EPA to provide stand-by pay to an on-call employee. In both cases, the grievances were filed far later than 10 days after the first violation but were allowed by the arbitrator under the continuing violation theory.

Second, the Union argues that Grievant contacted Ms. Shanks, a Personnel Officer, about his vacation accrual and that she left a message that it was "OK" and that he had been advised to be patient in letting personnel work it out. Based on this advice, he waited another 4 pay periods before filing his grievance, a delay which the Union asserts was reasonable under the circumstances.

B. The Merits

At hearing, the Employer asked for a bench decision on the issue of timeliness. After reviewing the evidence and arguments of the parties, the arbitrator determined that he could not reasonably make a decision on the matter without further consideration. Section 25.03 of the contract directs that, in such circumstances, the arbitrator shall proceed to the merits. On this basis, the arbitrator asked the parties to put on their cases on the merits.

1. The Union

The Union argues that the clear and unambiguous language of the contract supports their position that Grievant was entitled to accrue vacation pay while on workers' compensation leave at a rate of 80 hours per year. The Union argues that, unlike sick leave, vacation leave is a set number of weeks directly based on an employee's length of state service without regard to the number of hours he or she actually worked. Thus, while a separate contract provision was necessary to provide accrual of sick leave to employees unable to work, no such contract provision was necessary to provide for accrual of vacation leave. In the Union's view, the contract clearly provides that a full time employee with 3 years of service is entitled to 3.1 hours of vacation per pay period whether they worked 80 hours or 30 hours.

The Union objected to a number of provisions from statute and administrative codes and regulations proffered by the Employer. The Union stresses that, under O.R.C. 4117, it is the negotiated collective bargaining agreement which is to control. The Union also attacks the Employer's argument based on the alleged failure to grieve with regard to the thousands of employees who had earlier not received vacation accrual while getting workers' compensation benefits. The Union notes that actively soliciting grievances can have a chilling effect on labor management relations. This grievance has now been brought and the Union

asks that the contract language be applied.

The Union asserts that Article 28 clearly and unequivocally states that employees with one year or more state service shall accrue 3.1 hours of vacation, up to 80 hours a year. The Union points to the language of Article 16, Section 16.02, which provides in part that "an employee on Worker's Compensation has not experienced a break in service and shall continue to earn seniority and service credits while on Worker's Compensation." Because vacation leave is accrued on the basis of length of service and Grievant experienced no break in service due to this provision, the Union argues that it follows Grievant was entitled to accrue vacation leave during the period of his disability. Grievant suffered an injury while performing job-related duties and the Union argues he should not be denied his contractual vacation leave. The Union asks that the grievance be sustained and that Grievant be granted vacation credit for the period of his service connected disability, March 4, 1991 to March 8, 1993.

2. The Employer

The Employer argues that the Union has not met its burden of proof and asks that the grievance be dismissed. It asserts that Grievant was not entitled to the same vacation leave benefits which he would have received had he been working.

First, the Employer points to the language of Article 27, Section 02, and Article 29, Section 02, which specifically provide for the accrual of personal leave and sick leave hours while an employee is receiving worker's compensation. The parties did not include such language in the vacation leave provisions of the contract and the Employer asserts that such omission was not inadvertent. The Employer argues that the Union has presented no evidence from negotiations indicating an intent to allow accrual of vacation benefits.

The Employer argues that its position is consistent with a long standing past practice, pointing to provisions of the Ohio Administrative Code (123:1-33-16) providing that while employees on disability leave may accrue service credit, they do not receive vacation leave benefits. The Employer argues, too, that it is the past practice to prorate the leave accrual benefit based on the actual number of hours worked in a pay period. The Employer asks that the grievance be denied.

V. DECISION AND ANALYSIS

In reaching a decision in this matter, the arbitrator has reviewed the collective bargaining agreement, the evidence presented at hearing and the positions and arguments of the parties.

A. Timeliness

This case presented a number of difficult issues with regard to the issues of timeliness. Because some of them involved reviewing past decisions of other arbitrators applying this contract and others involved credibility, the arbitrator was unable to decide the timeliness issue without further study. The Employer raised its timeliness objection early in the grievance processing and did not waive it.

Although an extremely close and difficult case on the issue of timeliness, the arbitrator believes that it is necessary to reach the merits and overrule the timeliness objection of the Employer. This decision was made after considering the following factors.

1. The Arbitrator is not persuaded by the Union's argument that this is a "continuing violation." While the continuing violation argument is widely recognized by arbitrators as an exception to time limits for filing, it is generally narrowly construed. To read it broadly would be to render meaningless contractual time limits. A discharge case, for example, could be presented as a case where every day the employer refuses to reinstate the employee is a new and continuing violation. Arbitrators are generally unwilling to stretch the continuing violation theory so far. Here, Grievant is arguing about a failure to credit him with vacation leave. He became aware of the failure on April 2, 1993. This case is not like those cited by the Union. Where an employee drives his car in a pay period and is denied mileage reimbursement, a "new" violation has indeed occurred. Where an employee is available on call in a pay period and does not receive stand-by pay for that

pay period, this, too, can constitute a "new" violation whether or not there have been similar instances in the past. The instant case, by contrast, involves no "new" violation as it pertains to Grievant's individual case. The continuing failure to enter the vacation leave on Grievant's account was merely a consequence of the original failure to credit him which is at the heart of this dispute. There is no allegation that, after April 2, 1993, Grievant was denied vacation leave accruing after he returned from workers compensation leave. The violation, if there was one, occurred prior to April 2. Unlike the cases cited, there are no allegations that further rights accrued which were not observed. While it might be argued, were this the case of a "policy" class action grievance, that the Employer is "continuing" to follow the challenged policy, this case involves Grievant's individual claim which was itself not "continuing."

2. Rather, the arbitrator's ruling that the matter is arbitrable is based on the claims made by the Union and Grievant that he contacted Personnel as soon as he received his paycheck and inquired about his vacation accrual. He testified that he called Becky Vance in Payroll and advised her that his status should have been changed from provisional to certified and that his vacation credit was incorrect. He said he was told that he needed to talk to Pam Shanks in Personnel and the call was transferred. He testified that Personnel Officer Pam Shanks returned his call, said she would take care of the personnel action to get him certified, that vacation would be ok and to "be patient."

Grievant's testimony seems supported by the copies of the bridge telephone log presented at hearing. They show that he made an April 2 call to Personnel at 1020 and that the station received a call back from Personnel at 1358. The one line notation for this return call is. "Message from Pam Shanks. P.A. action Vac. ok." While the original log was not brought to hearing because it was still being used, there were no indications that the arbitrator had not been provided a true and correct copy of the actual telephone log and the page entered into evidence contained at least 20 entries. There was no indication that the notation "Vac. ok" was in different handwriting from the words "P.A. action" and no argument made that it was in different ink or had been later added to the log.

Union Exhibit 2, a Personnel Action Form, indicates that Grievant's civil service status was finally changed from provisional to certified consistent with the promise made. Although the change was to be effective 10/18/92, it was not signed by the appointing authority until May 25, 1993 and seems to have had to go through further administrative steps after that. Thus, Grievant's testimony is that he waited and had been assured both would be taken care of. When he learned that nothing had been done on his vacation leave, he filed a grievance. The delays experienced awaiting the processing of the personnel action form for certification seem to make his wait for the vacation accrual to be straightened out more reasonable because paycheck stubs during the period of delay showed that neither Grievant's status nor his vacation leave balances had been changed.

This finding is not intended to question the credibility of Ms. Shanks. She was a very credible witness but testified merely that she could not recall conversations about the vacation, not that they did not happen. She testified that she had notes on the personnel action but not on vacation. She did not present a contemporaneously made log of all calls. The arbitrator does not find necessarily that she agreed to credit Grievant's vacation account, merely that Grievant could have reasonably thought so. It is quite believable that people returning from leave sometimes have mistakes in their leave accrual accounts and that a personnel officer could say "be patient" when told that a leave account was in error. According to Grievant, he told the payroll office that his vacation credit was incorrect. It was not clear that the payroll or personnel office ever clearly understood why Grievant thought it was incorrect or put him on notice that it was not the Employer's policy to credit vacation for such leave periods.

The arbitrator agrees with the Employer that time limits are important and must be observed. Exceptions must be narrowly construed and the arbitrator does not wish to undermine the negotiated system.

Based on all the testimony in this case, however, the arbitrator finds that Grievant reasonably thought that there had been a payroll error and that he had been told it would be corrected and that he therefore had no reason to grieve. The Union's case would, of course, have been stronger were there written correspondence between Grievant and Personnel or had it established that Grievant regularly contacted Personnel and again been told the accrual would be forthcoming. Although the Union argues that further telephone contact did

occur, the testimony at hearing does not go so far leaving this a very close case based on its own particular circumstances. On balance, however, the testimony supports a finding of arbitrability.

B. The Merits

The parties' presentations and arguments referred to a number of arbitration decisions, treatises, statutes, administrative regulations and policies. After reviewing the evidence and collective bargaining agreement as well as the oral and written arguments of the parties, the arbitrator determines that the Employer did not violate the collective bargaining agreement and that the grievance should be dismissed. This ruling is based on the following analysis.

1. Nowhere does the contract explicitly state that vacation leave will accrue while an employee is on workers' compensation leave. Article 16, dealing with seniority, provides merely that "An employee on Workers' Compensation has not experienced a break in service and shall continue to earn seniority and service credits while on Workers' Compensation." The Employer did credit Grievant with seniority earned while on Workers' Compensation. Article 28, dealing with vacations, states that "Permanent full-time employees shall be granted vacation leave with pay at regular rate as follows: The Article then sets out a system whereby an employee with Grievant's length of state service would accrue 3.1 hours per pay period and 80 hours per year. It does not mention workers compensation nor define "state service."

2. The Union argues that Article 28 nowhere excludes workers compensation leave from the definition of qualifying state service. This is a powerful argument but it is undercut by the language used by the parties in other sections of the contract. Article 27, dealing with personal leave, and Article 29, dealing with sick leave, both contain language which specifically provides that employees on approved leave of absence or receiving workers' compensation benefits shall be credited with those personal leave or sick leave hours "which they normally would have accrued upon their approved return to work." Article 28, dealing with vacations, contains no such provision allowing for vacation leave accrual while on workers' compensation.

The Union can validly argue that Article 29, Sick Leave, provides for accrual of sick leave "at the rate of 3.1 hours for each eighty (80) hours in active pay status . ." and that the vacation leave provisions provide for accrual based on "Length of State Service" rather than using the words "active pay status." This could provide an explanation why a specific entitlement clause would be necessary in Article 29 and not in Article 28 from the Union's perspective. This argument, however, is undercut by the use of the same entitlement clause in Article 27, dealing with personal leave. Under the contract, employees are entitled to four personal leave days "each year" and these days are to be credited at the end of each of four identified pay periods. Thus, even though the personal leave provisions said nothing explicitly about "active pay status" just as the vacation leave provisions do not, the parties found it necessary to include specific guarantees of personal leave accrual to those persons on workers compensation. The parties' failure to provide similar entitlements with regard to vacation leave is some evidence that they had no intent to provide such an entitlement.

3. By use of a "per pay period" means of accrual in Article 28, the parties may have given some indication that vacation accrual was not available to those not receiving pay for the period. This is mentioned only as a small potential indicator and is not necessary to the analysis.

4. The Employer presented statutes, regulations and testimony pointing to a long practice of not crediting vacation leave to employees off work due to workers' compensation. The arbitrator does agree that, pursuant to O.R.C. 4117, the instant contract would control over any inconsistent regulations, etc. Nonetheless, the evidence is admissible to show a past practice that, both before and after negotiation of the controlling contract, the Employer has had a consistent practice of not crediting employees with vacation accruals in circumstances such as those presented here. The silence of the contract on the issue, in light of this past practice, is an indication that there was never an agreement to provide for accrual of vacation credits in this situation.

5. Cases such as this present difficult problems for arbitrators where vacation leave entitlement provisions are not specifically and explicitly limited to "active service" but workers compensation leave and seniority provisions do not specifically provide for vacation accrual either. See Fort Loudon Elec. Cooperative, 92-1 CCH ARB para. 8172 (Odom, Jr. 1991) (excluding sick leave and leaves of absence from service time used to calculate vacation accrual in light of past practice and bargaining history.)

In this case, the arbitrator believes that the use of specific entitlement language in provisions dealing with sick leave and personal leave in light of an uncontested past practice of not extending vacation leave accrual to persons on workers compensation leave indicates that the parties have never agreed to vacation leave accrual for persons on workers compensation. There was no bargaining history presented that indicated any intent to change the past practice on vacation leave accrual and the contract provides clear evidence that the Union was able to achieve specific provisions which do provide for personal leave and sick leave accrual for an employee in Grievant's position. In summary, the arbitrator finds that the contract does not promise vacation accrual to employees on workers compensation.

VI. AWARD

The grievance is denied.

June 9, 1994

Toledo, Ohio, County of Lucas

DOUGLAS E. RAY, Arbitrator