

IN THE MATTER OF

STATE OF WASHINGTON

AND

WASHINGTON FEDERATION OF STATE EMPLOYEES

Grievance: Steven Mack – Sick/FMLA Leave

AAA No.: 75 390 00290 08

Date Issued: October 5, 2009

ARBITRATION OPINION AND AWARD

OF

ALAN R. KREBS

Appearances:

STATE OF WASHINGTON

WASHINGTON FEDERATION OF STATE EMPLOYEES

Kari Hanson

Kurt M. Spiegel

IN THE MATTER OF
STATE OF WASHINGTON
AND
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OPINION OF THE ARBITRATOR

PROCEDURAL MATTERS

The Arbitrator was selected by the parties with the assistance of the American Arbitration Association in accordance with Section 29.5, Step 4 of their 2007-09 Collective Bargaining Agreement. A hearing was held on July 17, 2009 in Tacoma, Washington. State of Washington was represented by Kari Hanson, Assistant Attorney General. Washington Federation of State Employees was represented by Kurt M. Spiegel, Labor Advocate.

At the hearing, witnesses testified under oath and the parties presented documentary evidence. A court reporter was present, and a copy of the transcript was later submitted to the Arbitrator. The parties' briefs were received by the Arbitrator on September 10 and 14, 2009.

ISSUE

The parties, being unable to agree upon a stipulated statement of the issue to be decided, agreed to have it framed by the Arbitrator. Having considered the testimony and arguments, your Arbitrator frames the issue as follows:

Did the Employer violate the Collective Bargaining Agreement when it denied the Grievant's request to use his accrued sick leave to care for his healthy infant son during such time as he was on approved FMLA leave for that purpose?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

* * *

ARTICLE 12 SICK LEAVE

12.1 Sick Leave Accrual

A full-time employee will accrue eight (8) hours of sick leave after he or she has been in pay status for eighty (80) non-overtime hours in a calendar month. . . .

12.2 Sick Leave Use

Sick leave will be charged in one-tenth (1/10th) of an hour increments and may be used for the following reasons:

- A. A personal illness, injury or medical disability that prevents the employee from performing his or her job, or personal medical or dental appointments.
- B. Care of family members as required by the Family Care Act, WAC 296-130.
- C. Qualifying absences for Family and Medical Leave (Article 15).
- D. Exposure of the employee to contagious disease when attendance at work would jeopardize the health of others.
- E. Preventative health care of relatives or household members, up to one (1) day for each occurrence.
- F. Illness of a child.

- G. Illness of relatives or household members, up to five (5) days for each occurrence or as extended by the Employer.

12.3 Use of Compensatory Time or Vacation Leave for Sick Leave Purposes

The Employer will allow an employee to use compensatory time or vacation leave for sick leave purposes. . . .

* * *

ARTICLE 15

FAMILY AND MEDICAL LEAVE – PREGNANCY DISABILITY LEAVE

- 15.1** A. Consistent with federal Family and Medical Leave Act of 1993 (FMLA) and the state Family and Medical Leave Act of 2006, an employee who has worked for the state for at least twelve (12) months and for at least one thousand two hundred fifty (1,250) hours during the twelve (12) months prior to the requested leave is entitled to up to twelve (12) workweeks of FMLA leave in a twelve (12) month period for any combination of the following:
1. Parental leave for the birth and to care for a newborn child, or placement for adoption or foster care of a child and to care for that child; or
 2. Personal medical leave due to the employee’s own serious health condition that requires the employee’s absence from work; or
 3. Family medical leave to care for a spouse, son, daughter, parent, or domestic partner as defined by WAC 182-12-260 (2) who suffers from a serious health condition that requires on-site care or supervision by the employee. Son or daughter means a biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under eighteen (18) years of age or eighteen (18) years of age or older and incapable of self-care because of a mental or physical disability.
- B. Entitlement to FMLA leave for the care of a newborn child or newly adopted or foster child ends twelve (12) months from the date of birth or the placement of the foster or adopted child.
- C. The one thousand two hundred fifty (1,250) hour eligibility requirement noted above does not count paid time off such as time used as vacation leave, sick leave, exchange time, personal holidays, compensatory time off, or shared leave.
- 15.2** The twelve (12) week FMLA leave entitlement is available to the employee, provided that eligibility requirements listed in Section 15.1 are met. The FMLA leave entitlement period will be a rolling twelve (12) month period measured forward from the date an employee begins FMLA leave. Each time

an employee takes FMLA leave during the twelve (12) month period, the leave will be subtracted from the twelve (12) weeks of available leave.

* * *

15.4 The Employer has the authority to designate absences that meet the criteria of the FMLA. The use of any paid or unpaid leave (excluding leave for a work-related illness or injury covered by workers' compensation or assault benefits and compensatory time) for an FMLA-qualifying event will run concurrently with, not in addition to, the use of the FMLA for that event.

15.5 Serious health condition leave consistent with the requirements of the FMLA will be granted to an employee in order to care for a spouse, son, daughter, parent or domestic partner as defined by WAC 182-12-260 (2) who suffers from a serious medical condition that requires on-site care or supervision by the employee. . . .

* * *

15.9 Parental Leave

A. Parental leave will be granted to the employee for the purpose of bonding with his or her natural newborn, adoptive or foster child. Parental leave may extend up to six (6) months, including time covered by the FMLA, during the first year after the child's birth or placement. Leave beyond the period covered by the FMLA may only be denied by the Employer due to operational necessity. Such denial may be grieved beginning at the agency director step of the grievance procedure in Article 29.

B. Parental leave may be combination of the employee's accrued vacation leave, sick leave for pregnancy disability or other qualifying events, personal holiday, compensatory time, or leave without pay.

15.10 Pregnancy Disability Leave

A. Pregnancy disability leave will be in addition to the twelve (12) weeks of FMLA leave.

B. Pregnancy disability leave will be granted for the period of time that a permanent employee is sick or temporarily disabled because of pregnancy and/or childbirth. . . .

* * *

**ARTICLE 29
GRIEVANCE PROCEDURE**

29.3 Filing and Processing (Except Department of Corrections and Social and Health Services Employees)

* * *

D. Authority of the Arbitrator

1. The Arbitrator will:

- a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;

* * *

29.5 Filing and Processing for Departments of Corrections and Social and Health Services Employees (Panel Process)

* * *

Step 4 – Arbitration

. . .The arbitration will be processed in accordance with Subsection 29.3 C through E.

* * *

NATURE OF THE DISPUTE

The Grievant, Steve Mack, is a Support Enforcement Officer at the Fife field office for the Division of Child Support, which is part of the Washington State Department of Social and Health Services (DSHS). The Grievant's son was born on May 24, 2007. On October 19, 2007, the Grievant requested leave pursuant to the Family and Medical Leave Act (FMLA) in order to care for and bond with his healthy infant son. The Grievant explained in that written request that he was requesting four hours off each afternoon from January 2, 2008 until May 23, 2008, a period when the infant's mother would be attending school. On October 31, 2007, the Employer responded that the request was approved inasmuch as he met the requirements of the FMLA and

that “[s]uch paid and unpaid leave will be counted towards the 12-week FMLA entitlement in accordance with . . . WFSE Article 15.4. . . .”

On January 2 and 3, 2008, the Grievant submitted leave request forms in which he requested paid leave for those days to be designated as “sick-FMLA.” The Grievant’s supervisor initially approved those requests. However, within a few days the Grievant was advised by Management that he could not use sick leave to care for his healthy infant son, and that he should resubmit his leave request as either for annual leave or leave without pay. The Grievant complied. On January 30, 2008, a grievance was filed protesting the Employer’s decision to not allow the Grievant to use sick leave for an absence covered by the FMLA. During January and February 2008, the Grievant took a total of 100 hours of “Vacation Leave-FMLA.” A step 2 grievance meeting was held on April 14, 2008. On May 9, the Employer denied the grievance and the dispute was advanced to arbitration.

BARGAINING HISTORY

During 2004 and 2005, the State of Washington negotiated a Collective Bargaining Agreement with the Union which covered numerous state agencies, including DSHS. The Union’s initial proposal for a “Family and Medical Leave” article, dated February 25, 2004, included the following section:

XX.11 – Parental Leave – Paid parental leave will be granted for the purpose of bonding with the employee’s natural newborn, adoptive, or foster child. Parental leave may extend up to six (6) months, including time covered by family/medical leave, during the first year after the child’s birth or placement. The Employer may approve extensions beyond the six (6) months.

The Union’s initial proposal for a “Sick Leave,” article also dated February 25, 2004, included the following section:

XX.2 – Sick Leave Use

An employee will be granted paid sick leave to the extent of the employee's accumulation for absences necessitated by illness, injury, pregnancy, childbirth, and preventative care of the employee or family member, as defined in this Agreement.

In addition to the above, employees will be granted sick leave in the case of exposure of the employee to a contagious disease while on duty.

* * *

The Employer proposals, dated March 19, 2004, included the following:

Family and Medical Leave

- X.1 A. Consistent with the federal Family and Medical Leave Act of 1993 (FMLA), an employee who has worked for the state for at least twelve (12) months and for at least one thousand two hundred fifty (1,250) hours during the twelve (12) months prior to the requested leave is entitled to up to twelve (12) workweeks of FMLA leave in a twelve (12) month period for any combination of the following:
1. Parental leave for the birth and to care for a newborn child or placement for adoption or foster care of a child and to care for that child; or
 2. Personal medical leave due to the employee's own serious health condition that requires the employee's absence from work; or
 3. Family medical leave to care for a spouse, son, daughter, or parent who suffers from a serious health condition that requires on-site care or supervision by the employee.
- B. Entitlement to FMLA leave for the care of a newborn child or newly adopted or foster child ends twelve (12) months from the date of birth or the placement of the foster or adopted child.

* * *

- X.5 A. Parental leave shall be granted to the employee for the purpose of bonding with his or her natural newborn, adoptive or foster child. Parental leave may extend up to six months, including time covered by the FMLA, during the first year after the child's

birth or placement. Leave beyond the period covered by the FMLA may only be denied by the Employer due to operational necessity. Such denial may be grieved beginning at Step X of the grievance procedure in Article X.

- B. Parental leave may be a combination of the employee's accrued vacation leave, sick leave for pregnancy disability or other qualifying events, personal holiday, compensatory time, or leave without pay.

* * *

Sick Leave

* * *

X.2 Sick Leave Use

Sick leave may be used for:

- A. A personal illness, injury or medical disability that prevents the employee from performing his or her job, or personal medical or dental appointments.

- B. Care of family members as required by the Family Care Act, Chapter 296-130 WAC.

- C. A death of any relative that requires the employee's absence from work. Sick leave use for bereavement is limited to three (3) days or as extended by the agency for travel. Relatives are defined for this purpose as spouse, significant other, son, daughter, grandchild, foster child, son-in-law, daughter-in-law, grandparent, parent, brother, sister, aunt, uncle, niece, nephew, first cousin, brother-in-law, sister-in-law and corresponding relatives of employee's spouse or significant other.

* * *

In the Union's counter proposal dated August 9, 2004, it essentially agreed to the Employer's proposal regarding parental leave. The Union's Family and Medical Leave proposal no longer included its previous proposal for a new type of paid leave, i.e., "[p]aid parental leave." The following day, the parties reached a tentative agreement on the Family and Medical Leave article, which in relevant part, contains the same language as in the successor agreement which is applicable here.

On June 9, 2004, the Employer's counter proposal on "Sick Leave" included the reasons for sick leave use which it had previously proposed, and added the following additional reason:

- C. Exposure of the employee to contagious disease when attendance at work would jeopardize the health of others.

The Union's counter proposal on "Sick Leave" which is dated August 9, 2004, adopted the language which the Employer had proposed on sick leave use, except that it omitted the Employer's reference to using sick leave for bereavement.

On August 22, 2004, the Employer amended its "Sick Leave" article proposal to include the following section:

X.2 Sick Leave Use

Sick leave will be charged in 1/10th of an hour increments and may be used for the following reasons:

- A. A personal illness, injury or medical disability that prevents the employee from performing his or her job, or personal medical or dental appointments.
- B. Care of family members as required by the Family Care Act, Chapter 296-130 WAC.
- C. Exposure of the employee to contagious disease when attendance at work would jeopardize the health of others.
- D. Preventative health care of relatives or household members, up to one (1) day for each occurrence.
- E. Illness of a child.
- F. Illness of relatives or household members, up to five (5) days for each occurrence or as extended by the Employer.
- G. A death of any relative that requires the employee's absence from work. Sick leave use for bereavement is limited to three (3) days or as extended by the agency for travel. Relatives are defined for this purpose as spouse, significant other, son, daughter, grandchild, foster child, son-in-law, daughter-in-law, grandparent, parent, brother, sister, aunt, uncle, niece, nephew,

first cousin, brother-in-law, sister-in-law and corresponding relatives of employee's spouse or significant other.

The Union's counter proposal on "Sick Leave" dated August 22, 2004 contained a "Sick Leave Use" section which was essentially identical to the Employer's proposal on that subject.

On September 7, 2004, the Employer made another counter proposal on "Sick Leave" which included a "Sick Leave Use," section identical to the one which the parties had both previously proposed, except that it added the following:

C. Qualifying absences for Family and Medical Leave (Article X).

On the same day, a tentative agreement was reached on the "Sick Leave" article which was identical to the Employer's counter proposal. In the parties' 2007-09 Agreement, executed on May 29, 2007, there was no change in the contract language applicable to this dispute.

Steve McLain was the Employer's primary spokesperson during the 2004 contract negotiations with the Union. He was the Deputy Director of the Labor Relations office in OFM, beginning in July 2004 for about a two year period, and then advanced to Director of Labor Relations for an additional two years. Mr. McLain testified that the Family and Medical Leave article was agreed to by the parties about a month prior to the agreement on the Sick Leave article. He testified that at the bargaining table, there was discussion that the Employer would not create a new paid type of parental leave, and, in fact, the Union's proposal in this regard was not included in the parties' tentative agreement on the Family and Medical Leave article. He testified that the Employer's prior practice was to allow sick leave to care for a sick child, but not merely to bond with a child, and that practice was consistent with the Employer's proposal on family medical leave which was adopted in the Agreement. Mr. McLain testified that when the Employer proposed adding "Qualifying Absences for Family and Medical Leave (Article X)" to the list of sick leave uses, which occurred near the end of the negotiations, it was to make sure

that it had covered what was legally required. He testified that he does not recall any bargaining table discussion about this proposal. Mr. McLain further testified that the Family and Medical Leave Act provides a right to employee leave in designated circumstances, but does not specify whether the leave is to be paid or unpaid. He testified that it is the sick leave article in the Agreement which explains when employees are eligible to use sick leave.

Greg Devereaux, the Union's Executive Director, was one of the Union's spokespersons during the 2004 negotiations. Mr. Devereaux testified that when the Employer proposed adding to the "Sick Leave Use" provision, "Qualifying Absences for Family and Medical Leave (Article X)," there was no discussion about it. Mr. Devereaux testified that in the Union's internal discussions in their caucus, they decided to accept the Employer's overall sick leave proposal because they viewed it as expanding the use of sick leave to include any absences under the Family and Medical Leave article.

Teamsters Local Union 117 is the exclusive bargaining representative for most employees of the Employer's Department of Corrections employed in the correctional institutions and in certain related activities. In the Employer's collective bargaining agreement with Teamsters Local Union No. 117, which was signed on May 29, 2007, the same day as the Agreement applicable to the instant dispute, the Sick Leave Use" section reads as follows:

23.2 Sick Leave Use

Sick leave will be charged in one-tenth (1/10th) of an hour increments and may be used for the following reasons:

- A. Illness, injury or disability of the employee or for preventative health care, including medical or dental appointments.
- B. Exposure of the employee to contagious disease when attendance at work would jeopardize the health of others.
- C. Disability of the employee due to pregnancy or childbirth.

- D. The serious health condition of an eligible employee under the Family and Medical Leave Act.
- E. To provide care to a child with a health condition requiring treatment or supervision as required by the Family Care Act, WAC 296-130.
- F. Preventative health care of relatives or household members up to one (1) day for each occurrence, or as extended by the Agency.
- G. Illness of a child.
- H. Illness of relatives or household members, up to five (5) days for each occurrence as extended by the Employer.

For purposes of A through H above, relatives are defined for this purpose as spouse, significant other, child or grandchild (including foster and adopted children and grandchildren), parent, parent-in-law, child-in-law, grandparent, sibling, aunt, uncle, niece, nephew, first cousin, sibling-in-law, and corresponding relatives of the employee's spouse or significant other.

Past Practice

Sherri-Ann Burke, a labor advocate for the Union since 2000, testified that the Employer has been inconsistent in its practice of approving or denying sick leave for parental bonding with an infant. The Collective Bargaining Agreement relevant to this dispute also covers certain employees of the Employee's Department of Corrections who are not employed in institutions. Section 29.5 of the Agreement provides for a Grievance Resolution Panel to rule at step 2 for grievances filed on behalf of employees in the Departments of Corrections and also in DSHS. Section 29.5.B.2.a provides for the Panel to "consist of three (3) agency representatives appointed by the Employer, and three (3) union panel members appointed by the Union." If the Panel deadlocks, then the dispute advances to a "Pre-Arbitration Review Meeting." A Grievance Resolution Panel was convened on May 12, 2008 to decide a grievance filed on behalf of a

Department of Corrections employee regarding: “Denial of sick leave usage for purposes of parental bonding/FMLA” involving alleged violations of “Article 12.2.C, 15.1.A.1, 15.1.B, [and] 15.9. A & B.” Ms. Burke was one of the three Union Panel members. Ms. Burke identified the three agency Panel members as the Deputy Administrator for the Department of Corrections, a labor relations person, and an administrator. The Panel resolved the Grievance with the following explanation:

The parties agreed not to rule on the violations. To resolve the grievance, the panel agreed to the following stipulations: that Rick Hagen be allowed the option to choose to use sick leave for FMLA/parental bonding leave usage exhausted to this day. Rick Hagen will need to inform Kevin Bovenkamp of which days he would wish to reflect sick leave by May 30, 2008. Rick Hagen will be allowed to choose to utilize sick leave for the remaining time he has been approved for FMLA.

Ms. Burke testified that the Panel chose not to rule on the violations because the Department of Corrections had been inconsistent in its treatment of sick leave for parental bonding and it did not want to revisit decisions made regarding other employees.

Pattie Dalrymple was the administrator at the Fife field office of the Division of Child Support for three years prior to March 2009, when she was assigned to the Division’s Everett Field Office. Ms. Dalrymple testified that DSHS is a huge entity, but that her experience has been that DSHS employees have not been permitted to use their sick leave to care for a healthy infant. Brenda Moen was the Human Resource Manager in Region 5 for DSHS from January 2005 through January 2009. Ms. Moen testified that the issue of leave for women going on maternity leave comes up frequently, and DSHS has always taken the position that the care of a healthy child does not qualify for sick leave. Mr. McLain testified that the Employer’s practice, as far as he could tell, was that sick leave could not be utilized to bond with a child, though employees could be off work for six months to do that.

POSITION OF THE UNION

The Union contends that the Employer violated Section 12.2.C of the Agreement by denying the Grievant the use of his sick leave for his qualifying FMLA absence. The Union points out that Section 12.2.C allow sick leave to be used for “Qualifying absences for Family and Medical Leave (Article 15).” The Union maintains that Section 15.1.A.1 through 3 lists the “qualifying absences” that allow an employee to use sick leave under Section 12.2.C, and those include, “Parental leave for the birth and to care for a newborn child.” According to the Union, Section 15.9 contains an additional parental leave benefit, in addition to the twelve weeks of FMLA leave provided for in Section 15.1.A.1, by providing that parental leave may extend up to six months including time covered by the FMLA. The Union argues that this clear and unambiguous language must be applied as written. The Union contends that if the language is deemed to be ambiguous, it should still prevail because the Employer proposed the disputed language in Article 12.2.C without explaining it, and therefore the rule should be followed that ambiguous language is construed against the party that proposed it. The Union further maintains that its position is supported by a prior grievance settlement decision from the Department of Corrections Grievance Resolution Panel. Finally, the Union argues that the Employer’s interpretation would render the disputed contract language meaningless and unnecessary. In this regard, the Union points out that prior to the Employer’s proposal of the disputed language, the parties had already agreed that sick leave use would include “Care of family members as required by the Family Care Act.”

POSITION OF THE EMPLOYER

First, the Employer contends that the clear contract language of Section 12.2.C controls, and that the Union made a unilateral mistake, for which no relief is available. The Employer

argues that given all of the negotiating history concerning Section 12.2.C and Article 15, the Union should have known its interpretation was neither shared nor reasonable. The Employer maintains that having failed to seek clarification while at the negotiating table, the Union cannot now impose its meaning on the contract. The Employer suggests that the Employer's rejection of the Union's proposal to extend paid parental leave for six months gave the Union reason to know that the Employer attached a more limited meaning to provisions about use of sick leave for parental bonding. The Employer opines that the Union's interpretation of Section 12.2.C effectively removes the word "qualifying" since it goes without saying that an employee must "qualify" for FMLA to have an "absence for Family and Medical Leave." The Employer argues that the only reasonable reading of this provision is that "qualifying" limits the application of Family and Medical Leave to those particular types of absences for which the use of sick leave would be logical. The Employer asserts that Section 15.9.B limits use of sick leave for parental leave to "pregnancy disability or other qualifying events," and this language would be meaningless if sick leave were to be allowed for all parental leave. Regarding the Department of Corrections Grievance Resolution Panel decision, the Employer noted that it did not rule on whether the Collective Bargaining Agreement had been violated. The Employer maintains that to the extent that that grievance has any bearing here, it indicates only that one agency has apparently felt there was some ambiguity in the language of Section 12.2.C, leading to inconsistent application.

DISCUSSION

Both parties rely on Washington State Court precedent to argue that the arbitrator is bound to follow clear contract language. Hansen v. City of Seattle, 45 Wn. App. 214, 221 (1986);

Wagner v. Wagner, 95 Wash. 2d 94, 621 P2d. 1279, 1283 (1980). In Wagner v. Wagner, Id., the Court set forth this rule of contract construction as follows:

In construing a contract, a court must interpret it according to the intent of the parties as manifested in the words used. * * * Courts can neither disregard contract language which the parties have employed nor revise the contract under a theory of construing it.

This also is the view of many labor arbitrators. Ruben, ed., Elkouri & Elkouri – How Arbitration Works, 6th ed. (2003), p. 434. In the dispute at hand, the clear contract language supports the Union’s position.

The issue at hand involves sick leave use. The permissible uses of sick leave are listed in Section 12.2 of the Agreement. Section 12.2.C specifies one of the reasons for which an employee may use sick leave:

Qualifying absences for Family and Medical Leave (Article 15)

Article 15, Section 15.1.A sets forth three reasons for which an employee is entitled to take family and medical leave “[c]onsistent with [the] Family and Medical Leave Act of 1993 (FMLA). . .” One is for absence “due to the employee’s own serious health condition.” A second reason is to care for an immediate family member “who suffers from a serious health condition.” The third reason, one that is applicable to the dispute at hand, is “to care for a newborn child,” which is further clarified in Section 15.1.B as limited to the 12 month period following birth. Section 15.1.A also sets forth certain employment requirements which the employee must meet before being eligible for “FMLA” leave. The employee must have worked for the Employer for at least 12 months and for at least 1250 hours during the 12 months prior to the requested leave. Furthermore, according to Section 15.1.A, FMLA leave is limited to 12 workweeks in a 12 month period. The Employer recognizes that the Grievant is entitled to family and medical leave to care for his infant, inasmuch as it granted him his request for this

leave, though it takes the position that he is not entitled to utilize his accrued sick leave for that time off. While Section 15.1.A requires that leave be granted, it does not state that family and medical leave is to be considered paid leave. The family and medical leave language is derived from federal and state laws which require unpaid family and medical leave in certain circumstances. 29 U.S.C. 2601, *et. seq*; RCW 49.78.010, *et. seq*. According to a publication of the Washington State Department of Labor and Industries, an exhibit which was jointly submitted by the parties, the law does not diminish the obligation of an employer to comply with a collective bargaining agreement which provides greater family leave benefits to employees than the rights provided under the law.

As I read Section 12.2.C's reference to "[q]ualifying absences for Family and Medical Leave (Article 15)," it is referring to an employee fulfilling the required conditions for such leave set forth in Section 15.1.A. Thus, in the Grievant's case, in order to have a qualifying absence under Section 12.2.C, he must have met the criteria for time and hours worked in the past year, for the time span for which the leave is requested, and for the reason that it was to care for a newborn child within the first year after birth. It is undisputed that the Grievant met these qualifications. Therefore, according to Section 12.2.C, he was entitled to use sick leave for his absences for family and medical leave which have met the qualifications and requirements for such leave as set forth in Article 15.

I am not persuaded by the Employer's argument that the word "qualifying" in Section 12.2.C serves to limit the application of that section "to those particular types of absences for which the use of sick leave would be logical." First, it is not necessarily illogical for the parties to agree that employees could use their accrued sick leave for days that they qualify for FMLA leave. The Employer correctly points out that the use of the word "qualifying" preceding the

word “absences” in Section 12.2.C means that only certain absences are covered by this section. The absence must be “qualifying,” but “qualifying” for what? Section 12.2.C provides the answer. It applies to “[q]ualifying absences for Family and Medical Leave.” Thus, a normal interpretation of “[q]ualifying absences for Family and Medical Leave” appears to be that if one’s absence meets the eligibility requirements for family and medical leave set forth in Article 15, then one is eligible to use sick leave. This is made even more apparent by Section 12.2.C’s specific reference to the “Family and Medical Leave” article, “Article 15”. The Employer’s view appears to be that Section 12.2.C allows sick leave to be used only for absences which qualify both for family and medical leave according to Article 15 and also for sick leave under one of the subsections of 12.2 other than 12.2.C. The negotiated language does not say this and would require the Arbitrator to, in effect, modify the written Agreement to coincide with the Employer’s position. Section 29.3.D of the Agreement precludes the Arbitrator from making such a revision. If the Employer wanted to make sick leave use for FMLA leave contingent on meeting the requirements of one of the other subsections of Section 12.2, it should have proposed language which said this. In this regard, it is significant that the Employer in its negotiated contract with the Teamsters Union, which was executed on the same date as the Agreement at issue here, did limit sick leave use for absences “under the Family and Medical Leave Act” to those which involved “[t]he serious health condition of an eligible employee.” In the applicable labor contract here, the Employer did not limit the use of sick leave for “Family and Medical Leave” other than it be for “[q]ualifying absences for Family and Medical Leave (Article 15.)”

The language of Section 15.9.B does not necessarily conflict with the plain language of Section 12.2.C. Section 15.9 deals specifically with parental leave for bonding with a newborn. It provides a benefit extending beyond the three months of FMLA leave referenced in

Section 15.1. Section 15.9.B allows employees to use vacation leave, personal holiday, compensatory time or leave without pay for their parental leave. In addition, it also lists “sick leave for pregnancy disability or other qualifying events.” It must be remembered that a tentative agreement on Article 15 was reached a month before the agreement on the sick leave article. The reference to “other qualifying events” for using sick leave for parental leave must be read in conjunction with Section 12.2 where the parties specified the appropriate uses of sick leave. As previously discussed, by the time that a tentative agreement was reached on the overall sick leave article, the parties agreed that accrued sick leave could be used for qualifying absences for family and medical leave. Section 15.9.B neither overrides nor conflicts with the language of Section 12.2.C. I am mindful that early on in negotiations, the Employer rejected a Union proposal for paid parental leave. However, that was a Union proposal for a new class of leave, separate from sick leave, annual leave, compensatory time, personal holiday, or leave without pay. It has no bearing on whether employees may use these other types of negotiated leave for a particular absence to care for a new born. Whether or not an employee may use accrued sick leave for an absence is governed by Section 12.2.

The Employer has argued that the Union’s failure to understand the Employer’s proposal on Section 12.2.C was a unilateral mistake on the part of the Union for which no relief is available. Indeed, it appears one side or the other made a mistake in agreeing to Section 12.2.C inasmuch as I credit the conflicting testimony of the negotiators regarding what their respective intents were regarding Section 12.2.C. However, it is undisputed that the parties never discussed at the bargaining table their intent with regard to the meaning of Section 12.2.C. The failure of both parties to discuss at the bargaining table their intent as to the meaning of the language in Section 12.2.C provides emphasis to the fact that the intent must be gleaned from the language

itself. The Employer is correct that if there is a unilateral mistake by one side in negotiations regarding the significance of certain contract language, and it cannot be said that the mistake was caused by the actions of the other side, then no relief can be accorded the mistaken party. As stated by a leading authority in a much respected text, Hill, “Remedies in Arbitration,” in The Common Law of the Workplace, 2nd ed. (2005), § 10.33, “[p]oor judgment in making a deal or a mere misunderstanding are not grounds for reformation of the contract.” In the matter at hand, it has not been established that the Union negotiators used poor judgment or engaged in a unilateral mistake when it interpreted contract language proposed by the Employer in Section 12.2.C, without explanation, in accordance with its common and ordinary meaning.¹

In sum, Section 12.2.C provides that employees may use their accrued sick leave for “[q]ualifying absences for Family and Medical Leave (Article 15).” The Grievant had such qualifying absences for family and medical leave under Article 15, during such time as he qualified for and utilized FMLA leave to care for his son during the infant’s first year of life. The Employer violated Section 12.2.C when it denied the Grievant’s request to utilize his accrued sick leave to care for his son during the time period of his approved FMLA leave.

¹ I do not view the cited decision of the Department of Corrections Grievance Resolution Panel to be particularly significant with regard to the instant dispute. The Panel, while resolving that particular grievance, “agreed not to rule on the violations.” That grievance resolution was reached after the Employer rejected the Union’s grievance in the instant case at Step 2, but before this arbitration hearing. Thus, it is certainly not clear that the Employer has expressed general agreement with the Union’s interpretation of Section 12.2.C. Rather, it appears that the Employer agreed to resolve the individual Department of Corrections grievance on a non-precedential basis. However, that grievance resolution does confirm Ms. Burke’s testimony that the Employer’s practice regarding the use of sick leave to care for an infant while on FMLA leave has been inconsistent.

AWARD OF THE ARBITRATOR

It is the Award of your Arbitrator, for the reasons set forth in the attached Opinion, that:

- I. The Employer did violate the Collective Bargaining Agreement when it denied the Grievant's request to use his accrued sick leave to care for his healthy infant son during such time as he was on approved FMLA leave for that purpose.
- II. Therefore, during the period that the Grievant was on approved FMLA leave, he shall be permitted, at his option, to substitute his accrued paid sick leave for other types of paid or unpaid leave that he took for absences which would also qualify for FMLA leave under Article 15.
- III. Pursuant to a stipulation of the parties, the Arbitrator retains jurisdiction for the sole purpose of resolving any dispute which may arise between the parties regarding compliance with this Award.

Sammamish, Washington

Dated: October 5, 2009

/s/ Alan R. Krebs
Alan R. Krebs, Arbitrator