

In the Matter of the Arbitration
between
State of Washington, Clark College
and
Washington Public Employees Association

Vicki Presley Leave Donation Grievance

AAA Case No. 75-390-00323-06

Arbitrator's Opinion and Award

Arbitrator William Greer
P.O. Box 80847
Portland, Oregon 97280

February 26, 2007

Grievant Vicki Presley asked Clark College (Employer) for approval to donate sick leave to another State employee. The Employer denied the request. Washington Public Employees Association (Union) grieved. I grant the grievance.

The parties presented their cases in a hearing on November 30, 2006, on the Employer campus in Vancouver, Washington. The Employer was represented by Cathleen Carpenter, Assistant Attorney General, Labor & Personnel Division, PO Box 40145, Olympia WA 98504-0145. The Union was represented by Leslie Liddle, Executive Director, WPEA, 140 Percival Street NW, Olympia WA 98502. Certified Court Reporter Tanya McCreary, Archer Associates, Inc., PO Box 1118, Vancouver WA 98666-1118, recorded and transcribed the hearing.

The advocates fully and fairly represented their respective parties. The hearing was orderly; the parties had a full opportunity to present evidence and examine and cross-examine witnesses. The hearing closed on January 22, 2007, upon receipt of the parties' post-hearing briefs.

The parties authorized me to retain jurisdiction over the grievance for 30 days following issuance of my opinion and award, for the purpose of hearing evidence and resolving any dispute

regarding any remedy ordered.

Statement of the issues. The parties granted me the authority to state the issues. The issues are: (1) Is the grievance arbitrable? (2) Did the College deny Grievant's request to donate leave, in violation of Articles 32 and 41 of the parties' collective bargaining agreement? (3) If the College violated the contract, as alleged, what is the appropriate remedy?

The Union asserts that the Employer violated the parties' contract and therefore has the burden of presenting evidence and argument to prove that claim. The Employer has the burden of proving any affirmative defenses that it asserted.

Witnesses and exhibits. All witnesses testified under oath. The parties offered 14 joint exhibits. The Union offered testimony from one witness (Presley). The Employer offered two exhibits and testimony from three witnesses (Pallamounter, Golder, Macneil). All of the exhibits were received.

I have thoroughly reviewed all of the evidence that was received, relevant, and material, and I have thoroughly considered the parties' arguments and post-hearing briefs.

Facts

The parties. The Employer is a higher education institution in Vancouver. The State of Washington (State) entered into the parties' collective bargaining agreement on behalf of the Employer. The Union is the exclusive representative of a bargaining unit of Employer employees. Presley is a member of the Union's bargaining unit.

Collective bargaining agreement. The parties' 2005-07 contract, in effect at all material times, includes the following (emphasis added):

Preamble. This agreement is entered into by the State of Washington, referred to as the "State," on behalf of each separate Community College District, referred to as the "Employer," and the [Union].

11 Shared Leave

11.3 Shared Leave Use

A. The Employer shall determine the amount of leave, if any, which an employee may receive. However, an employee shall not receive more than 261 days of shared leave.

E. Vacation, sick leave, or all or part of a personal holiday transferred from a donating employee shall be used solely for the purpose stated in this Article.

F. The receiving employee shall be paid his/her regular rate of pay

11.4 An employee may *donate* vacation, sick leave, or personal holiday to another employee for purposes of the leave sharing program under the following conditions:

B. [1] The Employer *approves* the employee's request to donate a specified amount of sick leave to an employee authorized to receive shared leave. [2] The employee's request to donate will not cause his or her sick leave balance to fall below *176 hours* after the transfer.

11.6 This Article is grievable only through *Step 3* of the grievance procedure in Article 25.

25 Grievance Procedure

25.2.B. Filing and Processing [Grievances]

Step 1. If the issue is not resolved informally, the Union may present a written grievance to the supervisor or designee

Step 2. If the grievance is not resolved at Step 1, the Union may move it to the next step by filing it with the Human Resources Office

Step 3. If the grievance is not resolved at Step 2, the Union may move to the next step by filing it with the President/Chancellor

Step 4. If the grievance is not resolved at Step 3, the Union may file a demand for arbitration . . . with the Director of the OFM Labor Relations Office (OFM/LRO) . . . and the College President/designee Within 10 days of the receipt of the arbitration demand, the OFM/LRO will discuss with the Union whether a pre-arbitration review meeting will be scheduled If the matter is not resolved in this pre-arbitration review the Union may file a demand to arbitrate the dispute with the American Arbitration Association.

25.2.D. Authority of the Arbitrator.

1. The arbitrator will:

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

b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it

32 Management Rights

32.1. The employer retains all rights of management, which, in addition to all powers, duties and rights established by constitutional provisions or statute, will include but not be limited to, the right to:

F. Develop, enforce, modify or terminate any policy, procedure, manual or work method associated with the operations of the Employer;

32.2 The Employer agrees that the exercise of the above rights shall be *consistent with the provisions of this Agreement*.

41 Entire Agreement

41.1 This Agreement constitutes the entire agreement and any *past practice* or agreement between the parties, whether written or oral, *is null and void*, unless specifically preserved in this Agreement.

41.3 This Agreement supersedes specific provisions of institution policies with which it *conflicts*.

Background and events

In March 2002, Presley donated 40 hours of leave to another State employee, her sister.

In December 2005, Presley asked the Employer for approval to donate additional sick leave to her sister under the terms of contract Article 11—Shared Leave. The Employer denied the request, observing that Presley had donated 40 hours to her sister in 2002 and quoting an internal Clark College policy dated September 2003 (quoted below).

In January 2006, the Employer told Presley that the contract requires Employer approval for a donation and that it was using the internal policy to determine the guidelines for approval.

On February 2, 2006, the Union filed a grievance alleging that the Employer’s refusal to approve Presley’s request violated Articles 11.1, 11.4, 11.5, 32.2, and 41.3 of the parties’ contract. At step 1, the Employer denied the grievance but stated a willingness “to interpret donations to an employee in another state agency on a per instance basis and, therefore, will allow Ms Presley to donate 40 hours of leave to her sister,” subject to several contingencies.

At step 2, the Employer used the terms of Article 11.3.A. (regarding amounts that an employee may *receive*) to interpret the amount of leave allowed to be *donated* under the terms of Article 11.4 and denied the grievance.

At step 3, the Employer referred to Clark College Administrative Procedure 635.018 (dated September 2002) and denied the grievance. That policy states that the Employer “offers a shared leave program . . . implemented under the authority of RCW 41.04.650-670 and applicable rules.” It also states: “Each request for shared leave donations is considered and approved by the executive director of human resources or designee in accordance with the stated criteria. . . . Detailed procedures, guidelines and forms are available from Human Resources.”

The Union demanded to arbitrate the grievance. While the parties participated in a pre-arbitration meeting, that fact is not material to my decision of the issues. In arbitration, the Union alleges that the Employer violated Articles 32 and 41 of the parties’ contract.

The Employer funds shared leave program donations through budgeted funds. When the Employer approves the donation of sick leave by an employee to another State employee, the Employer provides to the other State employer a check in the amount of the approved donation. If every employee

requested approval for the donation of 100 hours to an employee at another institution and the Employer granted all of those requests, the Employer would not have sufficient funds to make those donations. (Golder Tr 41.)

Positions of the Parties

Union

1. The grievance is arbitrable. It does not allege an Employer violation of Article 11 (which states “This Article is grievable only through Step 3 of the grievance procedure in Article 25”). It alleges Employer violations of Articles 32 and 41.

2. The policy that the Employer relied on in denying Presley’s request is not in any way “associated with the operations of the Employer,” in the words of Article 32—Management Rights. Even if the policy is associated with the Employer’s operations, Article 32.2 states that management must exercise its rights “consistent with the provisions of this Agreement,” which includes Article 11—Shared Leave.

The Employer has the right to approve or disapprove an employee’s requested donation of leave to another employee through the shared leave program. The Union objects to the Employer using some *prior* existing policy—apparently established sometime in 2003—to determine the parameters for donating leave to the shared leave program. Article 11.4 provides clear guidance to the Employer as to the number of hours of leave an employee may donate if the Employer approves. By relying on a *policy* as guidance as to the number of hours of leave an employee may donate is clearly an overreach of management rights and a violation of the provision in Article 41 that the *agreement* is complete within its four corners.

3. Article 41 states “This Agreement constitutes the entire agreement and any past practice or agreement between the parties, whether written or oral, is null and void, unless specifically preserved in this Agreement” and “This Agreement supersedes specific provisions of institution policies with which it conflicts.” The Employer’s policy patently conflicts with the terms of the collective bargaining agreement. The Employer is attempting to contradict the terms of Article 11 by setting limits to the donation of leave by Presley that are different from those established in the contract.

The Employer violated both Article 32—Management Rights and Article 41—Entire Agreement by using an internal policy, not the terms of the contract, to deny Presley’s request. The Union does not object to the right of the Employer to approve or deny her request to donate. The Union and Presley object to the Employer reliance on a policy, superseded by the terms of the Agreement, to do so.

4. Presley submitted a request—although not on the official form—and the Employer denied it. Presley thereby complied with the contract’s procedural requirements.

5. The terms of the Agreement include the rules negotiated and agreed upon by the parties which establish appropriate parameters for the shared leave program which are consistent with and not contrary to the relevant statute and provide for equal treatment of employees of the Employer. For the Employer to establish *additional* or *alternative* rules or policies violates Article 41 of the contract and seems to violate the statute.

6. *Elkouri and Elkouri* states: “Management is permitted to change policies and rules that are not restricted by the agreement . . . in order to meet changing circumstances. But, once such a policy has been subject to negotiations, it becomes a term of the parties’ contract, and subsequent unilateral changes may violate the contract.”

7. The appropriate remedy is an order that the Employer cease and desist from enforcing policies that are inconsistent with the terms of the Agreement.

Employer

1. The grievance is not arbitrable. This grievance is about the Employer’s exercise of discretion under Article 11 and, under the terms of Article 11.6, is not subject to arbitration.

2. Even if the grievance is arbitrable, the Union failed to show that the Employer’s use of the policy as a guideline violated Articles 32 and 41 of the contract. The Union fails to acknowledge the Employer has the authority to exercise discretion. The contract provides *no restriction* on how the Employer must exercise its discretion. The Union is attempting to modify the Employer’s discretion through arbitration, which is not allowed under Article 25.2 (D).

3. The Employer’s denial of Presley’s request, based on the Employer’s policy, did not violate Article 32. Article 32.2 requires that the exercise of management rights listed in the article must be “consistent with the provisions of this agreement.” WPEA argues use of the policy by the Employer is inconsistent with the contract. Article 11.4, however, grants the Employer the discretion to approve shared leave. There is *no restriction* within the contract as to how the Employer must exercise its discretion. Since the contract does not set parameters on the discretion, the Employer’s use of a policy as a guideline is consistent with the provisions of the contract.

4. Article 11.4 (B) states an employee *may* donate sick leave under the following condition: “[a] The Employer approves the employee’s request to donate a specified amount of sick leave to an

employee authorized to receive shared leave. [b] The employee’s request to donate leave will not cause his or her sick leave balance to fall below one hundred seventy-six (176) hours after the transfer.” The Union appears to be relying on the second sentence in an argument that as long as an employee would retain 176 hours after the transfer, the approval must be granted. That interpretation ignores the plain language of the first sentence. “An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.” *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621 P.2d 1279 (1980). The plain language of Article 11.4 (B) requires that: (a) the employer must *approve* the donation, *and* (b) the amount donated must not leave a donor with less than 176 hours after the transfer.

5. The Union’s argument that the language in Article 11.4 (B) defines the amount of shared leave that can be donated ignores the parties’ negotiation history. Lucy Parke Macneil, a negotiator for the Employer, testified that the negotiations started with an initial Union proposal that gave no discretion to the Employer but rather depended only upon the donor limits after the transfer. The parties did not agree upon that language. The final agreement provided that the Employer must approve the transfer. Since the Employer has discretion, the Employer does not violate Article 32 by exercising that discretion.

6. The Union argues the past policy is superseded by the language of Article 41.3. The language, however, states an institution policy is only superseded if it *conflicts* with the contract, and the Union provided no evidence of a conflict. There are no parameters set by the parties within the contract as to how the discretion by the Employer should be exercised. The fact that the contract does not provide parameters means that the Employer is free to make its determination on any basis not in conflict with the other provisions of the Agreement. Use of the policy is not in conflict, since there are no amounts of leave that *must* be approved pursuant to the contract.

7. The Employer exercised its discretion in an appropriate and lawful manner. Even if it is determined the Employer can no longer use a policy as a guideline when exercising its discretion, the Employer would still retain the discretion. If the Employer did not use the policy as a guideline, it would still have the authority to restrict the number of hours donated. RCW 41.04.670 provides that personnel authorities must establish “procedures to ensure that the program does not significantly increase the cost of providing leave. . . .” The legislature was aware there was an increased cost to agencies participating in the shared leave program and allowed them to establish procedures to minimize the impact. The Employer manages the impact of the program by putting limits on the number of hours that can be donated. The Employer must manage the funds in order to be able to write a check to the receiving agency. The Employer meets its responsibility to manage the program in a fair and equitable manner by applying the policy as a guideline when exercising discretion.

8. If the Employer is held to have violated Article 32 or 41, the only remedy is to instruct the Employer not to use a policy as a guideline in the exercise of discretion to determine whether an employee may donate leave. Granting a remedy that allows Presley to donate shared leave would not be proper at this time; Presley failed to specify the amount of sick leave she wanted to donate. To allow Presley to donate shared leave based on the information provided at the hearing would violate RCW 41.04.665(6) and the contract, due to lack of agency approval.

Discussion

Arbitrability. In the grievance, the Union initially alleged violations of Articles 11, 32, and 41. In arbitration, however, the Union alleges violation of only Articles 32 and 41. Nothing in Article 32, Article 41, or any other element of the contract precludes the arbitration of the dispute over those articles, as the dispute was submitted to arbitration. The grievance is arbitrable.

The parties in essence agreed that the Employer's Article 11 *decisions* are not subject to arbitration. However, disputes about the *standards* to be applied to shared leave requests are subject to the terms of Articles 32 and 41 and are arbitrable.

Alleged violation. Did the College deny Grievant's request to donate leave, in violation of Articles 32 and 41 of the parties' collective bargaining agreement? To decide this issue, I refer to three documents.

The parties' July 1, 2005 through June 30, 2007 contract. Under the contract, the Employer has "all rights of management," including the right to "[d]evelop, enforce, modify or terminate any policy . . . associated with the operations of the Employer" (Article 32.1.F.), as long as that policy is "consistent with the provisions of this Agreement." (Article 32.2). In addition, Article 41.3 provides: "This Agreement supersedes specific provisions of institution policies with which it *conflicts*." While the parties agreed, in Article 11.4.B, that employee donation requests are subject to the Employer's approval, the contract document alone does not appear to specify all of the criteria or standards the Employer is to consider in that process.

September 2002 Administrative Procedure 635.018. In this document, the Employer states that it "offers a shared leave program . . . implemented under the authority of RCW 41.04.650-670 and applicable rules." (Emphasis added.) That section also states: "Each request for shared leave donations is considered and approved by the executive director of human resources or designee in accordance with the stated criteria. . . . Detailed procedures, guidelines and forms are available from Human Resources."

September 2003 "Shared Leave Implementation for Clark College." The Employer

implemented its shared leave program procedure in this document. It states that eligible employees may apply to receive “shared leave as provided by WAC 251-22-250 through 251-22-300.” I take notice that those administrative rules were *repealed* effective July 1, 2005, the first day of the parties’ 2005-07 collective bargaining agreement and before Presley submitted her request.¹ The Employer’s September 2003 policy, therefore, is based on repealed rules. The Union specifically argues that the Employer cannot apply that prior policy. Clearly, a policy based on repealed rules is inconsistent with, conflicts with, and is superseded by Articles 11, 32, and other terms of the 2005-07 contract. Because the Employer’s decision was based on those repealed rules, I set the decision aside as arbitrary and unreasonable.

The Employer, as an exercise of its authority under Article 32—Management Rights, may have adopted and incorporated the terms of RCW 41.04.650-670, and *current* rules adopted under that statute, into its administrative procedures. In support of that interpretation, I note that both Article 11.4.B. and RCW 41.04.665(3) provide that the donating employee must retain at least 176 hours of sick leave after the donation. Therefore, the Employer may have incorporated the balance of RCW 41.04.650-670 and the rules adopted under those statutes into the Employer’s operating rules and procedures, to the extent that they are consistent with and do not conflict with the contract.

In the negotiations for the 2005-07 collective bargaining agreement, the parties had a duty to bargain in good faith; the Employer recognized the Union as the exclusive representative of the bargaining unit; the parties agreed that the Employer would exercise the authority specified in Article 32—Management Rights; and certain state laws and rules applied to the parties. In that context, while the Employer has discretion in considering employees’ leave requests, it does not have *unfettered* discretion. The Employer’s policies and rules must be consistent with the contract and contain reasonable standards and criteria, and the Employer must exercise its discretion in a reasonable manner. Numerous authorities provide that employers are obligated to exercise their management rights in a manner that is not arbitrary, capricious, discriminatory, or unreasonable:

“The [employer’s] right to promulgate work rules is not unlimited. After plant rules are promulgated, they may be challenged through the grievance procedure on the ground that they violate particular provisions of the agreement or that they are unfair, unreasonable, arbitrary, or discriminatory. This right to challenge applies even when the agreement expressly gives management the right to establish plant rules.” Ruben, ed., *Elkouri & Elkouri—How Arbitration Works* (BNA 6th ed. 2003) at 767-68.

“Arbitrators recognize that contracts are interstitial documents that cannot possibly foresee and cover all possible future scenarios. Hence, arbitrators typically recognize the implicitly retained or contractually enumerated management right to

¹<http://apps.leg.wa.gov/wac/default.aspx?dispo=true&cite=251>—“Repealed by 05-12-067, filed 5/27/05, effective 7/1/05. Statutory Authority: Chapter 41.06 RCW.”

promulgate reasonable workplace rules. But, management's right to issue rules is limited to what is 'reasonable.'" *Elkouri & Elkouri—How Arbitration Works* at 771-72.

"Unless the arbitrator finds that management's actions were in violation of the contract or past practice, or otherwise arbitrary, capricious or unreasonable under standard arbitral criteria as applied to the facts, the employer's judgment will be sustained." Bornstein, Gosline, and Greenbaum, *Labor and Employment Arbitration* (Lexis Nexis October 2006) at Section 30.01, "Leaves of Absence."

"Contractual disputes concerning personal and business leave of absence clauses often center on the reasonableness of management's decision denying a requested leave. . . . Arbitrators look to the contract language and to standards by which management has reviewed previous requests. . . . Are the reasons for granting such leaves . . . delineated in the agreement or is the language broader? Where the evidence shows that management's criteria are objective and consistent with contract language and that they have been equitably applied, management's decision will not normally be overturned." *Labor and Employment Arbitration* at Section 30.04, "Personal and Business Leaves."

"Where no specific criteria are spelled out for granting personal leave, the question posed is whether the employer's denial of the leave was unreasonable or arbitrary." Ruben, ed., *Elkouri & Elkouri—How Arbitration Works* (BNA 6th ed. 2003) at 1107, citing *Loraine County, Ohio, Human Servs.*, 94 LA 661 (Dworkin 1990).

"When a grievance is filed and appealed to arbitration involving the correctness of management's decision, the arbitrator is necessarily empowered to determine from all of the evidence whether the company's judgment was reasonable and conformed to the criteria and principles contemplated by the contract." *The Magnavox Co.*, 45 LA 667, 670 (Dworkin 1965).

In this case, the Employer's denial of Presley's shared leave request was based on a September 2003 policy that in turn was based upon rules that have been repealed and no longer existed at the time of the Employer's decision. The Employer's application of the September 2003 policy amounted to an arbitrary and unreasonable exercise of the Employer's management rights.

Under the circumstances, the Employer violated Articles 32 and 41 by failing to apply the correct standard to Presley's Article 11 request.

Remedy. First, I shall set aside the Employer's denial of Presley's shared leave request and order the Employer to cease and desist from deciding shared leave requests based on the September 2003 policy.

Second, Presley's initial contact with the Employer sufficed for the purpose of bringing the above limited issue to this arbitration, but she did not provide all of the information required for the Employer to make a reasoned decision under its rules, as those rules are identified in this opinion. I return the dispute to the parties and retain jurisdiction over the dispute for 30 days, as agreed by the parties, or such later date as the parties agree. Specifically, I order the parties to do the following:

1. By March 12, 2007, the Employer is to provide Presley with a form or list of questions of information relevant to her shared leave donation request;
2. By March 19, 2007, Presley is to provide the requested information to the Employer;
3. By March 26, 2007, the Employer is to respond to Presley's request.

Respectfully submitted,

William Greer, Arbitrator
February 26, 2007
Portland, Oregon

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Vicki Presley Leave Donation Grievance

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Award

Arbitrator William Greer
P.O. Box 80847
Portland, Oregon 97280

I have carefully reviewed all of the parties' evidence and arguments. I grant the grievance. I set aside the Employer's denial of Presley's shared leave request. I order the Employer to cease and desist from deciding shared leave requests based on the September 2003 policy. I order the parties to do the following:

1. By March 12, 2007, the Employer is to provide Presley with a form or list of questions of information relevant to her shared leave donation request;
2. By March 19, 2007, Presley is to provide the requested information to the Employer;
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Respectfully submitted,

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