IN ARBITRATION BEFORE
MICHAEL E. CAVANAUGH, J.D.

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| WASHINGTON FEDERATION OF STATE EMPLOYEES, | ) | |
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| Union, | ) | ARBITRATOR'S DECISION |
| | ) | AND AWARD |
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| | ) | AAA No. 75-390-00269-11 |
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| STATE OF WASHINGTON, DEPT. OF TRANSPORTATION, | ) | |
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| | ) | |
| Employer. | ) | |
| | ) | |
| (Richard Cox Grievance) | ) | |

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## I. INTRODUCTION

Grievant Richard Cox suffers from chronic and severe migraine headaches. In 2009, and again in 2011, he asked to be declared eligible to participate in the State's "shared leave" program in which employees may choose to donate accrued leave to fellow employees who have exhausted their own leave because of a "serious," "extreme," and/or "life-threatening" health

condition. Although Mr. Cox's condition has frequently resulted in time off work for which he has no leave available in his leave banks, the Department denied each of Grievant's requests, stating that his medical condition was not "extraordinary or severe." In addition, the Department took the position that shared leave is not available for a "chronic" condition "unless there is a severe or extreme manifestation of the condition for a specific period of time." Exh. E-7. The Department's witnesses used the term "exacerbation" to describe the prerequisite "extreme manifestation of the condition for a specific period of time." Without such an exacerbation, argues the Department, an application must be denied because shared leave "is not for open-ended chronic conditions." *Id*. In addition, the Department contends that the dispute before me is not truly "arbitrable" because shared leave, as provided by the statute and as incorporated into the parties' CBA, is "purely discretionary" with the Agency heads, both as to whether leave should be granted in the first instance, as well as with respect to the amount of leave to be approved, *if any*. See, RCW 41.04.665(2).

The Department's witnesses initially repeated these "chronic condition" and "exacerbation" contentions in their testimony at the hearing, but on cross examination (and in response to questions from the Arbitrator), the State clarified its position somewhat. For example, the Department's Director of Human Resources, Kathryn Taylor, confirmed that a chronic condition that "routinely" causes a period of incapacity does in fact fall within the definition of a "serious health condition" for shared leave purposes—at least for the periods of recurring incapacity.[1] Thus, such conditions would be eligible for shared leave, although medical

[1] With this testimony, it seems to me the Department has abandoned the argument that "exacerbation" of a chronic condition is required in all cases in order for an employee to be eligible to participate in the shared leave program.

certification would be required (but not necessarily medical care)[2] to verify that any specific period of incapacity was caused by the qualifying health condition. Tr. at 90-91. Moreover, as the Department's witnesses made clear, "after-the-fact" applications are allowed, i.e. an employee may file a request for shared leave approval upon returning to work from an absence caused by a serious medical condition. The problem with Mr. Cox's applications, the Department's witnesses contended, was that he asked *in advance* for blanket and open-ended leave approval rather than applying to use shared leave upon his return to work from specific absences caused by his condition.[3]

The Union argues that the Department's claim of unfettered discretion in applying the shared leave provisions of the contract reads far too much into the supposedly discretionary language of the Agreement, i.e. the provision of Article 14.2 that an employee "may" be eligible to receive shared leave under certain specified conditions. Why would the parties bother to set forth a detailed set of conditions, the Union asks rhetorically, if the Agency in all cases retains the power to grant or deny shared leave for any reason satisfactory to the Department? In addition, the Union points out that the Department, in the application of Article 14, appears to treat employees with chronic health conditions differently from those with temporary disabilities, which the Union contends is "discrimination" on the basis of disability status in violation of

[2] Mr. Cox explained that he has been living with severe periodic migraines for a number of years and does not seek medical help for every episode. Nevertheless, he is unable to work when he has a severe migraine.

[3] Mr. Cox testified, on the other hand, that the Department had never communicated to him that he needed to file requests for shared leave approval after each incident of incapacity, and I think it is fair to say that the general tenor of the Department's written denials of his shared leave requests is that he was simply ineligible for shared leave because his condition was "chronic." Even the possibility of shared leave in the limited situation of a "severe or extreme manifestation of the condition for a specific period of time," as set forth in Exh. E-7, was initially described by the Department as requiring an "exacerbation" of the condition, i.e. it would not be enough that there was an additional instance of the kind of incapacity *routinely* resulting from the serious health condition. As noted above, while Ms. Taylor clarified the Department's approach to such situations in response to a question from the Arbitrator, Tr. at 90-91, there is no evidence the Department had ever previously informed Mr. Cox that he might be eligible for shared leave without an "exacerbation" of his condition.

Article 2 of the CBA.[4] Thus, the Union requests a declaration that Mr. Cox meets the eligibility requirements for shared leave.

At a hearing held April 2, 2012 in the offices of the Attorney General in Tumwater, Washington, the parties had full opportunity to present evidence and argument, including the opportunity to cross examine witnesses. The proceedings were transcribed by a certified court reporter, and I have carefully reviewed the transcript in the course of my analysis of the evidence. Counsel filed simultaneous electronic post-hearing briefs May 25, 2012, and with my receipt of the briefs, the record closed. Having considered the evidence and argument in its entirety, I am now prepared to render the following Decision and Award.

## II. STATEMENT OF THE ISSUE

The parties were unable to agree upon a statement of the issue to be decided, agreeing that the Arbitrator should formulate the final issue statement after hearing the evidence and argument. Tr. at 4-5. The Union proposed that the stated issue be simply whether the Department violated Articles 14 and/or 2 of the CBA when it denied Grievant's request to utilize shared leave, and if so, what the remedy should be. The Department suggested that the issue to be decided is whether the CBA provides criteria under which the Agency must provide an opportunity for shared leave, or whether shared leave is permissive at the discretion of the Agency.[5]

After considering these proposals in light of the entire record, I would frame the issues before me as follows:

[4] For reasons that appear in this Decision and Award, I do not find it necessary to determine the merits of the Union's disability discrimination argument.

[5] To the extent, if any, the Department's issue statement reflects a question of "arbitrability," the State stipulated that the Arbitrator has authority to decide whether the present grievance is substantively arbitrable. Tr. at 5.

1. May shared leave under Article 14.2 of the Agreement be granted or withheld to bargaining unit employees entirely at the discretion of the Department?

2. If not, did the Department violate Article 14 of the Agreement by denying Grievant's March 2011 application for shared leave?

3. In the alternative, did the Department violate Article 2 of the Agreement in denying shared leave to Mr. Cox?

4. If the answer to question 1 is in the negative, and/or the answer to either question 2 or 3 is in the affirmative, what should the remedy be?

## III. FACTS

A Washington statute, which preexisted the full-scope bargaining under which the parties have entered into a series of CBA's, provides that "an agency head may permit an employee to receive [shared leave]" if certain conditions are met, including the existence of an "extraordinary" or "severe" "illness, injury, impairment, or physical or mental condition." RCW 41.04.665(1)(a)(1). The statute also provides that the "agency head shall determine the amount of leave, *if any*, which an employee may receive under this section." RCW 41.04.665(2) (emphasis supplied). These provisions were essentially incorporated into the Agreement by the parties. *See*, Articles 14.1 through 14.4. Although some of the CBA's the State has entered into with other bargaining units expressly provide that shared leave questions are not subject to arbitration, the Union here demanded (and the State acceded to its demand) that the grievance procedure apply to shared leave disputes. Tr. at 28-29. Although the State now concedes that Grievant's chronic and severe migraines constitute a qualifying medical condition, his 2009 application for intermittent use of shared leave was denied on the basis that his condition "appears to be chronic, but not extraordinary or severe in nature." Exh. E-5-4.

Similarly, the Department denied Grievant's application in March 2011 with virtually identical language, i.e. that his condition did "not demonstrate a need that we believe qualifies as

'extraordinary' or 'severe' as defined in the WFSE CBA Section 14.1(F)." Exh. E-6-4. In follow-up email correspondence regarding the issue, the Agency also took the position that "our goal is to ensure that shared leave is approved as needed to *resolve* a condition or injury—not to approve it for an open ended time frame." Exh. E-7 at 1 (emphasis in original). The parties were unable to reach an informal resolution of the resulting dispute, *Id*., and the Union filed a grievance dated April 19, 2011. Exh. E-8. These proceedings followed.

## IV. DECISION

### A. Whether Shared Leave Eligibility is Entirely Discretionary With the Agency

I begin with the Department's argument that approval for shared leave may be withheld at its discretion even if an employee meets the established criteria. The primary argument advanced in support of that proposition is that the operative language is clearly "permissive," e.g. a Department head *may* grant leave and may determine the amount of leave, *if any*, which an employee *may* receive. This language, which appears in both the statute *and* Article 14 of the CBA clearly establishes, according to the Department, that no employee is *entitled* to the shared leave benefit. In support of its arguments for Agency discretion in the granting of shared leave, the Department has also pointed to issues such as budget limitations, particularly with respect to grant funds designated for a specific purpose, as well as to potential fiscal hardships (and potential policy issues) if financial resources of one Agency were required to be shifted to another Agency to fund inter-departmental shared leave. For example, one Agency might need to effect debilitating cuts in its *own* staff and/or its *own* services in order to cover the cost to *another* Agency of providing shared leave to one of that Agency's employees.[6]

[6] As I understand it, this dilemma arises because compensation for leaves is paid out of current Departmental resources, i.e. funds to pay leave benefits are not accrued in advance.

I do not disagree with the proposition that Agency heads must possess broad discretion to implement the shared leave program in a way that makes "business" sense, and as Arbitrator, it is my duty to afford great deference to management decisions in that arena even if they are not the choices I might have made if it were solely up to me. In other words, if an Agency head articulates a rational business justification for denying or limiting leave donation in a specific instance, it is not my place as Arbitrator to second-guess that management judgment. But, to say here that Agency heads and/or their designees possess significant discretion in the application of the donated leave policy is not necessarily to say that their discretion is limitless or unreviewable. That is so for at least three reasons.

First, the parties have agreed that issues arising in the application of shared leave may be presented to an Arbitrator under their grievance and arbitration procedure. That agreement implies that there are at least some shared leave issues, limited though they may be, that are reviewable. That is, it is inconsistent with the parties' agreement to arbitrate shared leave issues for the State to take the position that an Arbitrator lacks authority to engage in any meaningful review of the process. Second, the leave sharing program grew out of a *policy* choice by the Legislature. *See*, RCW 41.04.650-060. That policy choice—a legislative judgment that Agencies should support State employees "who historically have joined together to help their fellow employees who suffer from" (or who have relatives or household members suffering from) "extraordinary" or "severe" conditions—requires that the shared leave program be implemented in a manner that fosters the achievement of the stated goal, i.e. the policy goal provides a yardstick against which the propriety of discretionary decisions by Agency heads in this arena must be measured. Thus, I cannot accept the Department's argument that "rationality is not the issue in this arbitration." Employer Brief at 12. To be sure, if the Department articulates a

legitimate business rationale for its decisions with respect to shared leave, that rationale will carry the day. But it goes too far, in my view, to suggest that an Agency head's decision must prevail even if it cannot be supported by some articulable "rational" justification, nor could I accept the notion (which seems to be to be inherent in the Department's argument if taken to its logical extension) that an Agency head's decision must prevail even if it reflects considerations *at odds* with the policy of the shared leave statute. In other words, I find unpersuasive the Department's claim that the "permissive" language of the shared leave policies, as set forth in the statute and CBA, confers unlimited and unreviewable discretion. That argument simply proves too much.

Third, while I do not quarrel with the examples given of circumstances under which the Department might legitimately need to limit an employee's use of shared leave—either by denying eligibility outright or by restricting the amount of leave allowed—none of those circumstances seem to be applicable here. For example, there is no evidence that the Department's budget would be significantly adversely affected if Mr. Cox were made eligible for shared leave, nor that any "grant-limited" funds—whether the Department's or some other Agency's—would be involved. Moreover, it appears to me that these and similar legitimate considerations will often more appropriately be weighed on the *leave donation* side of the equation, rather than in the process of determining whether an employee meets the basic *eligibility* requirements for the benefit. *See*, e.g. RCW 41.04.665(3)(a) (an employee may "request" that the head of the Agency approve a leave transfer to another employee); *see also*, Article 14.3(E) (a condition of leave sharing is that the Agency head of the "donating" employee "permits the leave to be shared with an eligible employee"). It appears that if allowing a particular employee to donate shared leave to a specific co-worker is inconsistent with the

business needs of the donating *or* the receiving employee's Agency, either Agency head may withhold approval. But in many instances, if not most, that will present an entirely separate question from whether an employee should be considered *eligible* to receive shared leave — *assuming* that co-workers may be willing to donate and that a calculation as to the impact on the State by the Agency heads involved does not preclude it.

In sum, while I agree that the Department has broad discretionary powers in implementing shared leave to further the Legislature's goals—goals which the parties themselves endorsed when they incorporated those statutory provisions into their Agreement—that discretion is not so broad as to preclude the Union's appeal to arbitration when a dispute arises over whether the Department's actions in a specific case, or a specific *kind* of case, are consistent with the policies and principles behind the shared leave program. Contrary to the Department's argument, this conclusion does not read "may" out of the statutory language. That is so because the business interests of the State must be considered in determining whether leave sharing is appropriate, and at what level, in any specific employee's unique circumstances, and thus it would be inaccurate and misleading for the statute or the CBA to provide that an otherwise eligible employee "shall" receive shared leave. The shared leave policies, properly applied, "may" result in shared leave—or may not—in any specific case, and the so-called "permissive" language of the policy says no more than that.

B. Whether Mr. Cox Was Eligible for Shared Leave

Turning to this case, then, the crux of the dispute is whether the Department violated the Agreement by denying Mr. Cox's application for open-ended approval for his "chronic" migraine condition—a condition the Department now concedes is eligible for shared leave (at least under some circumstances). As previously noted, the Department indicated at the hearing

that it would *retroactively* approve Grievant's use of shared leave if he were to submit appropriate after-the-fact medical verification of absences resulting from his serious medical condition. Moreover, as I understand the Department's current position (articulated by Ms. Taylor in her testimony), retroactive grants of shared leave would potentially be available to Mr. Cox even if his periods of incapacity did not rise to the level of an "exacerbation" as the Department has defined the term. Moreover, the Department has agreed, at least implicitly, that in cases that *do* rise to the level of an "exacerbation," the otherwise "chronic" nature of Grievant's impairment would not by itself prevent *prospective* approval for his use of shared leave. For example, in the future, if Grievant's conditioned worsened so as to require periodic hospitalization, or if his treating professionals recommended a new treatment modality that required him to miss work, he could receive advance approval for shared leave in an appropriate amount and for an appropriate duration in light of all the circumstances.[7] But the Department draws the line at an *indefinite* advance approval for the use of shared leave which, it says, would constitute an unwarranted "blank check."[8] In fact, the Department's witnesses noted that it is precisely for this reason that for a number of years, grants of shared leave approval have been limited to periods of ninety days, at which point the employee must reapply and must update the necessary medical verification and other required paperwork.

After carefully considering the matter, I find that under these specific circumstances the Department did not violate the Agreement by refusing to grant indefinite advance approval for Mr. Cox to utilize shared leave. Choosing not to grant such blanket approvals is a business

[7] In all cases, however, I understand the Department to be reserving the right to make rational business judgments about whether a grant of shared leave is appropriate and in what precise amount, applying the policies reflected in the shared leave program. I agree that the Department possesses that authority.

[8] The Department was careful to note during the hearing that it does not believe that Mr. Cox would abuse shared leave, but the potential for other employees to do so once a precedent has been set would be extremely troublesome.

decision well within the Department's discretion, and one that has been supported here by the articulation of a rational reason for making that policy choice, i.e. the need to monitor the use of shared leave for chronic conditions to ensure that the benefit is being used properly and that the circumstances supporting its use continue to exist. But given that the Department has now abandoned its apparent prior reliance on the theory that a "chronic" condition, absent exacerbation, can *never* meet the definition of a "serious" health condition, as well as any suggestion that Mr. Cox's migraines are not the *kind* of health condition for which shared leave is otherwise appropriate,[9] the question still remains: what *process* must Mr. Cox utilize to claim the shared leave to which the State now appears to agree he is generally entitled? As I understand it, the Department suggests that, unless there is an "exacerbation" of his condition, Mr. Cox should file a retroactive shared leave approval application (with supporting medical documentation) *each time* he has a migraine episode that results in incapacity that causes him to miss work. It strikes me that approach may result in excessive paperwork for everyone involved, and perhaps some unnecessary trips to the doctor for Mr. Cox, but I cannot say that the Department lacks the discretion to make that choice.[10]

In sum, because Mr. Cox requested a declaration of eligibility for shared leave on a prospective and indefinite basis, rather than asking for such leave retroactively for specific periods, and because the record does not support a finding of a change in or other "exacerbation"

[9] Had the Department held to these positions, I would have found them to be in violation of the Agreement because they are inconsistent with the policies of the shared leave program.

[10] One alternative that seems to make sense to me would be to grant Mr. Cox eligibility prospectively for rolling 90-day periods, limiting his shared leave for each period to an amount the Department finds would be reasonable under all the circumstances (and with updated medical verification required for each successive renewal). There may well be reasons of which I am unaware that would make that approach unworkable, however, and in any event, it is beyond my authority to prescribe any particular process.

of his condition that would have supported a prospective grant of shared leave, I cannot find that the Department violated the Agreement by denying the application as framed.[11]

C. Retention of Jurisdiction

In the ordinary case, once I have issued a decision setting forth my determination that the facts before me do not support a finding of a contractual violation, my jurisdiction ends. This is not an "ordinary case," however. That is so because I could not have accepted the Department's *initial* stated rationale for denying Grievant's applications for shared leave, i.e. that his "chronic" migraines could not constitute a "serious" health condition. For reasons already described, I believe the Department's reasoning was overbroad and inconsistent with the State's shared leave policy. I welcome the Department's clarification of its views at the hearing, however, and I am certain those "clarified" views will be applied by the Department in responding to further applications from Mr. Cox for shared leave eligibility. If disputes arise between the parties with respect to the *retroactive* application of those principles to the period covered by the grievance before me, however, the parties may need arbitral assistance in resolving those disputes expeditiously, i.e. it would make no sense to require the parties to start over at square one of the grievance process. Therefore, I will reserve jurisdiction to resolve any such disputes. Either party may invoke that reserved jurisdiction according to the process set forth in the following AWARD.

[11] Just to be clear, however, it is my understanding that the Department will entertain future shared leave requests from Mr. Cox on a retroactive basis and that he would be eligible for prospective grants of leave in cases of "exacerbation" of his condition. My decision is based squarely on these understandings. In addition, I do not understand the Department to contend that Mr. Cox may not now, even at this late date, go back and file properly verified shared leave requests for the period covered by this grievance. That approach is only fair given that the Department apparently failed to make clear to Mr. Cox that he might have been eligible for retroactive grants of shared leave on that basis.

## AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following AWARD:

1. The Department's decisions with respect to the application of shared leave under the Agreement may be subject to limited review by an Arbitrator to determine whether they are supported by the articulation of a rational business judgment consistent with the policies and purposes of the shared leave provisions; but

2. The Department did not violate the Agreement by denying Grievant's request for an indefinite prospective approval of his eligibility for shared leave; therefore, the grievance must be denied.

3. Because of the Department's clarification during the hearing of its views as to the proper procedure for Mr. Cox to apply for shared leave for his periodic periods of incapacity based on his chronic and severe migraines, however, as well as a clarification of the standards to be applied, and because the Department did not make these issues clear to Mr. Cox prior to the hearing, I will remand to the parties in the first instance the issue of retroactive application of those principles to incidents of incapacity occurring during the period covered by this grievance;

4. I will reserve jurisdiction for the sole purpose of resolving any disputes over the matters set forth in Paragraph 3 above that the parties are unable to resolve on their own; either party may invoke this reserved jurisdiction by fax or email sent, or letter postmarked, within ninety (90) days of the date of this AWARD (original to the Arbitrator, copy to the other party) or within such reasonable extensions as the parties may mutually agree (with prompt notice to the Arbitrator) or that the Arbitrator may order for good cause shown; and

5. Consistent with the terms of their Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 6th day of June, 2012

Michael E. Cavanaugh, J.D.
Arbitrator