

ARBITRATION BETWEEN

**THE WASHINGTON FEDERATION OF STATE EMPLOYEES,
GABRIELLE WHITE, GRIEVANT**

AND

**STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES**

**Arbitrators Opinion and Award
AAA Case No. 75-390-00065-09
Richard W. Croll, Arbitrator
August 26, 2009**

PROCEDURE

This grievance is between the State of Washington, Department of Health and Human Services (DSHS) and the Washington Federation of State Employees (WFSE), Gabrielle White, Grievant. The Grievant filed the grievance when her Supervisor denied her leave to attend a Union Conference. The grievance was filed under the terms of the Parties' Collective Bargaining Agreement (CBA), effective dates July 1, 2007 through June 30, 2009 (Joint #1). The Parties were unable to settle the grievance and it was processed through the procedures outlined in the Grievance Procedure, Article 29 to Arbitration under the rules of the American Arbitration Association (AAA) and the CBA. The Arbitrator was selected under the above stated terms and is authorized to hear and decide this grievance.

A hearing was held before the Arbitrator in the Seattle offices of the Washington Attorney General on June 16, 2009. The parties were allowed full opportunity to offer evidence, examine and cross-examine witnesses and provide argument to the Arbitrator. The parties elected to provide written argument to the Arbitrator and these arguments were received by the AAA on July 23, 2009 at which time the hearing was declared closed. The Arbitrator has thirty-five days to render an award, August 27, 2009.

ISSUE

Whether the Employer violated Articles 11.8 or 39.9 when it denied Gabrielle White her request for leave to attend a Union - sponsored conference on August 4th through August 8th, 2008. If so, what is the appropriate remedy?

EXHIBITS

- Ex #1 Collective Bargaining Agreement 2007 – 2009
- Ex #2 Organizational Chart
- Ex #3 Leave requests from G. White, four requests
- Ex #4 Requests for Release for Union Activities, three requests
- Ex #5 Performance Meeting Record from E. Caver, 7/7/08
- Ex #6 Performance Record from E. Caver, 7/21/08
- Ex #7 Fax from Phedra Quincey to Helen Campbell, 7/24/08
- Ex #8 Email from H Campbell to, 7/24/08
- Ex #9 Official Grievance Form w/contract and bill. 8/1/08
- Ex #10 Response to Grievance, 9/10/08
- Ex #11 Letter re. panel process step #2, 10/16/08
- Ex #12 Mgt. Presentation at Grievance Panel
- Ex #13 Union Materials presented at Grievance Resolution Panel
- Ex #14 Demand for ARB/PARM, 11/19/08
- Ex #15 LRO acknowledgement, 11/21/08
- Ex #16 Pre-Arbitration Review Meeting, 1/15/09
- Ex #17 G. White leave record, #497162
- Ex #18 Leave request Ong Lan, 7/22/08, approved 8/4/08

APPEARANCES

For the Union:

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Nanci Hammond, DSHS
Kendrick Stewart, DSHS Administrator
Evelyn Caver, DSHS Supervisor

BACKGROUND

The grievant was at all times pertinent to this grievance employed by the DSHS in the Rainier Community Service Office as a Customer Service Specialist. Her duties were as a receptionist and to provide first line services to the customers. The DSHS offices in King County are represented by Washington FSE Local #843 and the Grievant has served as a Union shop steward for the past two years.

The events which initiated this grievance occurred in June, July and August of 2008. It was during this time the Grievant requested she be permitted to use her vacation time. The Grievant's Supervisor, Ellen Caver, in some instances approved the vacation requests and sometimes she disapproved them. Ultimately all of the Grievant's vacation requests put into evidence were either approved by Ms. Caver or her supervisor, Ms. Campbell. (Ex. #3) It was during this same period of time, specifically, July, 2008, that the Grievant was nominated and elected to attend three separate Union Conferences. (Tr. p.14) On a form entitled, "Request for

Release for Union Activities” she requested that she be released on the dates of all three Union Conferences. (Ex. #4) She was approved for leave for two of the conferences but was not approved for leave for the third conference. She consulted her Union representative and they filed the instant grievance on August 1, 2008. (Ex #9)

DISCUSSION AND OPINION

The Union opened its presentation by focusing on the Grievant’s leave requests. While it does not appear to be intentional, there was some confusion about which type of leave was being requested (vacation or union activities) and for what reason. The first of the Grievant’s leave requests introduced at the hearing were requests for vacation (Ex. #3), and the subsequent leave requests were for union activities (Ex #4). The Union’s rationale for taking this approach was because at the time the vacation requests were filed, the Grievant had not yet been elected a union conference delegate.

Leave requests:

<u>Request Date</u>	<u>Leave Date and Hours</u>	<u>Approved/Disapproved/Person</u>
6/11/08	7/28/08 – 7/31/08 (32)	approved – 7/24/08, Campbell
6/11/08	8/1/08 – 8/1/08 (8)	approved – 7/24/08, Campbell
7/16/08	8/12/08 - 8/12/08 (8)	approved – 8/27/08, Caver
6/11/08	8/13/08 – 8/15/08 (24)	approved – 7/24/08, Campbell

(See Exhibit #3 – Vacation requests)

7/22/08 7/28/08 – 08/01/08 (40) approved – 7/22/08, Caver
 7/16/08 8/01/08 - 08/08/08 (48) no indication of approval ¹
 7/16/08 8/12/08 – 08/15/08 (32) approved – 7/21/08, Campbell
 (See Exhibit #4 – Union Leave requests)

The form used for Exhibit #3 covers a large number of leave types, sixty – seven (67) in all. None of the leaves in Exhibit #3 indicate they are for Union Conferences, but several of them are for vacation. Exhibit #4 is all about leave for union conferences and other union business – not vacations. The Union grievance alleged that management’s refusal to approve the Grievant’s request to attend a Union Conference scheduled 08/01/08 – 08/08/08 (Ex #4) violated Sections 11.8 and 39.9 of the Agreement.

Alleged Violations of Section 11.8:

DSHS (the Employer) has argued they did not violate Section 11.8 of the Agreement. (Ex. #10). This section of the Agreement is entitled “Vacation Cancellation” and it states in relevant part: “Should the Employer be required to *cancel scheduled vacation leave* because of an emergency or exceptional business needs, affected employees may select new vacation leave from available dates.” (Ex 1, Art. 11.8; emphasis added.)

But this section is inapplicable, because the Grievant had not requested vacation leave for the week of August 4- 8; nor did the Employer approve or deny vacation leave for the Grievant on these dates. The Union cannot show that the Employer improperly “canceled” any scheduled vacation leave because there was no scheduled vacation leave. Section 11.8 of the Agreement only pertains to scheduled vacation leave and as there was no

¹ Helen Campbell denied the Grievant’s request for a union conference leave for August 4, 2008 through August 8, 2008. (Ex #9)

requested or scheduled vacation leave on the contested dates -- August 1, 2008 through August 8, 2008 -- it does not apply in this case.

Alleged Violation of Section 39.9:

Leave for Union business and Union activity is specifically covered by Article 39.9 of the Agreement. The Union has also charged the Employer violated Article 39.9 when they denied the Grievant leave to attend the Union Conference on August 1, 2008 through August 8, 2008 (Ex #4). The Union offered several arguments why denying the Grievant the requested union leave would violate Section 39.9, which are discussed below.

First, the pertinent language of this section follows:

39.9 Time Off for Union Activities

A. Union designated employees may be allowed time off without pay to attend union-sponsored meetings, training sessions, conferences, and conventions. The employee's time off will not interfere with the operating needs of the agency as determined by management.

The Union argues that “The Employer failed to demonstrate that the *Grievant's* request for time off for a Union sponsored conference would interfere with the operating needs of the agency.”(Union Br., p.4) Here, however, the Employer did state that the Grievant's absence would interfere with the operating needs of the agency. Had the Employer simply made this statement without further explanation, the Union might have an argument; but the record demonstrates that the Employer did, in fact, provide additional information to support its decision. However, based on the plain language of the Agreement and the parties' testimony, it may not have been necessary for the Employer to substantiate its decision to deny leave. While section

39.9 allows the Union to request time off for union business; the mechanics of the section are totally in the Employer's control. First the word "*may*" is a permissive word as used in section 39.9.² Coupled with that is the negotiated language for denying leave: "*The employee's time off will not interfere with the operating needs of the agency as determined by management.*"³ The word "*may*" certainly means that the Employer may grant the requested leave -- *or deny it*. The reason for denial shall be "as determined by management," i.e., the Employer, according to the language of Section 39.9. The *only* limiting factor on the Employer's discretion is that the reason for refusal must be because time off would "interfere with the operating needs of the agency." This provision leaves the Employer with extremely broad discretion to deny time off for Union purposes.

Furthermore, while the language of Section 39.9 may not require the Employer to explain its reason for denial of the Grievant's leave, DSHS did offer rationale for its decision in this case. Grievant's Supervisor *and the Grievant herself* testified without equivocation that the first days of the month represent the busiest time of the month for the agency; and the requested days were the first days of the month. There was considerable uncontested testimony by the Grievant's Supervisor that it is extremely difficult to cover a vacant position during this busy time, particularly, with a small staff of only three employees, counting herself. (Tr. p. 73) The record is clear that the Employer justified its business reasons for denying the Grievant's request for union leave on August 1 – 8, 2008.

² "One arbitrator determined that when each of the parties has a different understanding of what is intended by certain contract language, the party whose understanding is in accord with the ordinary meaning of that language is entitled to prevail. For instance, the word "*may*" has been given its ordinary "permissive" meaning in absence of strong evidence that a mandatory meaning was intended." Elkouri and Elkouri, How Arbitration Works, 5th Ed. Pp.488-489

³ Emphasis added.

Areas of the Agreement supporting the Union's argument re. 39.9:

The Union contended that several sections of the Agreement supported their position that the meaning of "determined by management" meant the Employer must explain, to some standard, its decision to deny Union leave. When Employer Counsel asked Union Staff Representative Quincey to point out the areas of the Agreement supporting the Union's contention above Ms. Quincey listed the following: Article 10.3 (Tr. P.57), Article 11.6, B (Tr. p. 58) Article 11.8, (Tr. p. 59) and Article 39.9 (Tr. p. 59). A review of each of these articles suggested by the Union contains basically the same language as 39.9, the party who had the authority to grant or deny leave was the Employer. The Union was unable to show language in the Agreement stating that the Employer had to explain his business reasons in any fashion, other than what DSHS did in the instant grievance. Further testimony substantiated that the Employer has the sole right to determine the business issue.

Ms. Ozanich Q. And am I correct in assuming that similar to the vacation leave article, there's no procedure or specification in the contract about how management is to prove this to the union or the employee?

Ms. Quincey A. That's not been established in any kind of writing yet. (Tr. P.60)

It is apparent the Agreement allows the Employer to determine the business needs for rejection or granting of leave requests. There is no language in the Agreement limiting the Employer's decision making in the granting of leave requests.

Allegation that the Grievant's Supervisor treated the Grievant unfairly:

The Union charged that the Grievant's Supervisor "... *did not have a fair or equitable system for approving leave.*" (Un. Br. p. 5) and that she lacks "*credibility and capabilities as a supervisor ...*" among other charges (Un. Br. p. 6). There is no record that the Supervisor/Employer's decision to deny the Grievant leave during the first week of August was based on invidious motives. To the contrary, the Employer granted the Grievant's requests for Union leave for July 28, 2008, through August 1, 2008 (40 hours) and August 12, 2008, through August 15, 2008 (32 hours) (Ex #4). It is true that the Grievant's colleague was granted one day of leave while the Grievant was on a leave. However, the Supervisor's testified as to how she staffed the office when one or both of her employees were unavoidably gone. There is no evidence that the Grievant was singled out or treated differently or unfairly.

The Union charged that the Grievant's Supervisor used a "Performance Meeting Record" form inappropriately to document a conversation she had with the Grievant. The Union argued that this form was used to document discipline and was considered the first step in due process procedure. While it is apparent the form in some instances, serves as the Union stated, it also serves to document satisfactory performance and for rewarding positive performance.⁴ There is no indication on the form filled out by the

⁴ "INSTRUCTIONS: This is an optional use form designed as a tool to document communication between supervisors and employees. It is intended for use in a one-on-one meeting to identify and address performance concerns, or to document oral reprimands or instances of exceptional performance. Discuss the performance issue with the employee and allow the employee an opportunity to give an explanation. Discuss as appropriate. Review the performance expectation, related procedures, and communicate the standard for performance expectations or performance standards met or exceeded." (Emphasis added)

Supervisor that the Grievant was subject to any charge of discipline or poor performance. (Ex. #6)

Union's request of money for Grievant:

The Union explained that when a member is elected to attend a Union Conference the member and the Union sign a contract assuring that the member will be responsible for the outlay of money spent by the Union in the event the member does not attend the conference. The Union argued that the Employer has an obligation to pay the Grievant \$1,361.24, the amount the Union spent on behalf of the Grievant to send her to the conference. The basis of their claim is that the Grievant did not go to the conference due to the denial of the leave requested by the Employer.

The Employer argued against the Union's demand for money, saying the Grievant knew she was denied leave prior to the money being spent on her behalf. However, the question is moot as the Employer is not a party to the contract and has no obligation to pay the Grievant's expenses.

Summary:

The Union argued that as the language of the various leave articles all contain approximately the same wording: (1) "may" (referring to whether the management had to grant the requested leave) and (2) "as determined by management" (referring to who determines a business reason) that the Employer obviously was required to deliver a substantive reason to turn down a leave request.

Conversely, the plain language of the Agreement supports the Employer's position. If the contract language is ambiguous, then the

Arbitrator might listen to argument as to its meaning. But when the contract language in dispute is as clear and concise as it is in this Agreement, it is extremely difficult for a party to effectively suggest the language has another meaning. Thus, the Union's argument in this respect fails.

AWARD

Grievance denied.

Richard W. Croll

Richard W. Croll, Arbitrator

August 26, 2009

Date