In re the Arbitration between:

State of Washington, Department of Corrections,

Employer,

and

Teamsters Local Union No. 117,

Union.

FMCS File No. 12- 01072-6

GRIEVANCE ARBITRATION OPINION AND AWARD

Pursuant to **Article 9** of the collective bargaining agreement the parties have brought the above captioned matter to arbitration.

James A. Lundberg was selected as the neutral arbitrator from a list of arbitrators provided by the Federal Mediation and Conciliation Service.

The parties agreed that the matter is properly before the arbitrator for a final and binding determination.

The grievance was submitted on March 18, 2011.

A hearing was conducted on June 1, 2012 at Tumwater, Washington.

Briefs were submitted on July 20, 2012 and the record was closed.

APPEARANCES:

FOR THE EMPLOYER:

David J. Slown, Asst. Attorney General
Labor and Personnel Division
7141 Cleanwater Drive SW
P.O. Box 40145
Olympia, WA 98504-0145

FOR THE UNION:

Daniel Swedlow and
Spencer Nathan Thal
14675 Interurban Avenue South
Suite 307
Tukwila, WA 98168

ISSUE:

Issue as Stated by the Union:

Did the Employer violate the Collective Bargaining Agreement by denying personal holidays to employees without meeting the mandate in Section 20.4?

Issue as Stated by the Employer:

May the Employer deny requests for holiday leave when relief is not available, in accordance with the language of Rule 21.7, or must the Employer make the showing demanded by the Humphreys decision under its reading of Rule 20.4.

CONTRACT PROVISIONS IN DISPUTE:

SECTION 20.4 PERSONAL HOLIDAYS:

A. Eligibility

An employee may choose one (1) workday as a personal holiday to take off with pay during the calendar year if the employee has been or is scheduled to be continuously employed by the State for more than four (4) months.

B. Release for Personal Holiday

An employee who is scheduled to work less than six (6) continuous months over a period covering two (2) calendar years will receive only one (1) personal holiday during this period. The Employer will release the employee from work on the day selected as the personal holiday if:

1. The employee has given at least fourteen (14) calendar days' written notice to the supervisor; provided however, the employee and the supervisor may agree upon an earlier date; and
2. The number of employees selecting a particular day off does not prevent the agency from providing continued public service.

C. Carryover

Personal holidays must be taken during the calendar year or the entitlement to the day will lapse, except that the entitlement will carry over to the following year when an otherwise qualified employee has requested a personal holiday and the request has been denied. The employee will attempt to reschedule his/her personal holiday during the balance of the calendar year. If he/she is unable to reschedule the day, it will be carried over to the next calendar year.

ARTICLE 21 VACATION LEAVE

SECTION 21.7 SUPPLEMENTAL REQUESTS

Nothing in the above paragraphs will preclude the right of an employee to request vacation leave or his/her personal holiday at any time. The Employer will consider said request in relation to authorized relief, program needs and the existing published vacation schedule, all of which will take precedence. These requests will be resolved on a first-come, first serve basis. Employees will complete a Leave Request Form for any such vacation leave taken immediately upon his/her return to work.

FACTUAL BACKGROUND:

Arbitrator Richard M. Humphreys in an Arbitration award dated August 14, 2009 interpreted the current language of **Section 20.4** of the collective bargaining agreement. He also interpreted **Section 21.12** of the contract, which set forth the basis upon which a CBA day could be denied. The decision relied upon the "plain meaning of the language of the Articles" as he found both Articles to be clear and unambiguous. The Arbitrator said, "Article 21.12 and 20.4 create strong but rebuttable presumptions that the leave entitlement reflected in both articles should be granted simply upon request. If the DOC can establish good faith job related reasons for denial with particularized showings under the language of each article as outlined above, it will have rebutted the strong presumption contained in each article that such leaves be granted upon request."

After Arbitrator Humphreys issued the Arbitration Award, the Union filed a number of grievances involving **Section 21.12** and **20.4** of the collective bargaining agreement. The Union also brought an action in the Superior Court of the State of Washington, Thurston County Case No. 10-2-00603-3, dated March 23, 2010 to enforce the August 14, 2009 Arbitration Award.

While the grievances and the lawsuit were pending, the parties engaged in negotiations over a new collective bargaining agreement. The negotiations included discussions over how to resolve the disputes over **Section 21.12** and **Section 20.4** that had arisen following the August 14, 2009 Arbitration Award.

On December 13, 2010 the parties entered into a Memorandum of Understanding wherein the existing grievances and the lawsuit were withdrawn

and the parties adopted new contract language at **Section 12.12** relating to CBA days. As part of the Memorandum of Understanding the "Union also agrees[d] to permanently relinquish the right to pursue any claims related to the Enforcement of the CBA Day arbitration award lawsuit." What the parties accomplished in the Memorandum of Understanding and in the language of the new collective bargaining agreement was to create criteria for approval of CBA days. The parties also resolved all of the pending issues that related to the August 14, 2009 Arbitration Award, including the lawsuit to enforce the August 14, 2009. The Memorandum of Understanding did not invalidate the August 14, 2009 Award, as it relates to **Section 20.4** of the collective bargaining agreement nor did it prohibit the Union from future grievances claiming violations of **Section 20.4**, which governs Personal Holidays, not CBA days.

The language of Section **20.4** that was interpreted in the August 14, 2009 Arbitration Award has continued to be part of the collective bargaining agreement and is unchanged.

By letter dated March 18, 2011 the Union brought a "Statewide Grievance" over management's practice of denying Personal Holiday's using available relief as the determinative factor. The grievance was denied. The parties were unable to resolve the issue, which is now before the Arbitrator for a final and binding determination.

SUMMARY OF THE UNION'S POSITION:

The Union argues that **Section 20.4** of the collective bargaining agreement is clear and unambiguous. If an employee makes a request for Personal Holiday with

at least 14 calendar days notice, the request can only be denied if the number of requests on the particular day would "prevent the agency from providing continued public service." There are no other conditions to be met with regard to approval of Personal Holidays. Unless the agency is prevented from providing continued public service, a timely request for Personal Holiday time off will be granted. Where contract language is clear and unambiguous arbitrators will apply that language to give it the meaning expressed by the parties. **Elkouri and Elkouri, *How Arbitration Works* 435-436 (6th Edition, 2003).** By denying Personal Holidays based upon the absence of available relief the Employer violates the plain language of **Section 20.04** of the collective bargaining agreement.

An important principle in contract interpretation is that specific contract provisions control general contract provisions. In this case, the specific provisions applicable to Personal Holidays are found at **Section 20.4. Section 20.4, B, 1 and 2** specifically set forth the requirements that must be met for an employee to be released for Personal Holiday. **Section 21.7** cited by the Employer is more general in that it applies to supplemental requests for vacation. When determining whether a request for Personal Holiday will be granted, management must apply the specific language of the contract designed to control a Personal Holiday release request.

Section 20.04 was recently incorporated into the collective bargaining agreement, while **Section 21.7** has been a part of the agreement for a very long time. Recent changes to contract language are controlling because the newer language has been added to modify the existing provision.

To find that **Section 21.7** controls release for Personal Holidays would render **Section 20.4** meaningless. Parties to a contract do not write provisions that are intended to have no effect. An interpretation of a contract that renders any provision meaningless should be avoided.

Harsh and unreasonable results should be avoided when interpreting a contract. In this case, allowing management to deny Personal Holidays for any reason short of the contractually agreed upon standard would defeat employee expectations as to their rights and leave correctional workers with one less day that they may take off with "near certainty".

The August 14, 2009 decision by Arbitrator Humphreys already determined the following:

> The language of **Section 20.4** is clear and unambiguous and establishes a strong presumption that Personal Holiday request must be granted.
>
> The high standard for denying a timely request for Personal Holiday requires reasonable good faith job related justifications that are specifically applicable to the individual request.

The decision of Arbitrator Humphreys should be followed in this case.

The principle of collateral estoppel applies to this case. Collateral estoppel requires: (1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied. *City of Aberdeen v. Regan*, 170 Wn.2d 103, 108, 239 P.3d 1102 (2010) See also, *Bobby v. Bies,* 556 U.S.

825, 129 S.Ct. 2145, 2152 (2009); *Restatement (Second) of Judgments* Section 27 (1982). The August 14, 2009 Arbitration Award is on all fours with the current grievance. The principle of collateral estoppel should be applied because labor arbitration awards are intended to be final and binding upon the parties.

Not only is there no evidentiary basis for arguing that the State's financial woes justify the position that Personal Holiday requests must be subject to the availability of relief but the Employer's argument would render **Section 20.4** of the contract meaningless. Financial hardship has never been recognized as a factor that trumps contractual obligations.

While there are costs associated with meeting the mandate of **Section 20.4,** the Employer has at least two weeks and in some cases several months to arrange relief to cover for Personal Holiday requests and the Employer has at least four (4) options to meet staffing requirements. The Department budgets for Regular Days off (RDO), Authorized Leave (A/L), and Sick Leave (S/L). The pool of positions available for RDO, A/L and S/L could be expanded slightly to meet requests for Personal Holidays. The positions are staffed at straight time. The Department also has a pool of on-call, "intermittent" employees who are paid at straight time to fill in for absent employees. The Employer can also offer voluntary overtime and also has the ability to mandate overtime. Not only does the Employer have at least four options for staffing Personal Holiday requests but two of the options involve no overtime. There is no evidence of the amount of overtime that would be needed if all Personal Holiday requests were granted in a manner consistent with the August 14, 2009 arbitration award. Following the August 14, 2009 award would not prevent the

Employer from exercising discretion in emergency situations, since **Section 22.10** of the agreement grants management discretion to "cancel or otherwise adjust vacation periods in emergency."

The Union asks the Arbitrator to rule that "absence of available relief" is not a sufficient basis for denying a Personal Holiday request. Furthermore, the parties have agreed that the Arbitrator should retain jurisdiction in the event that the parties continue to have difficulty with the remedy.

SUMMARY OF EMPLOYER'S POSITION:

Management argues that during the negotiations that resulted in the Memorandum of Understanding and the new CBA language in the current collective bargaining agreement, they repeatedly told the Union negotiating team that they believed that a return to contract language meant, the "within relief resources" standard that had previously been used by the Department. When asked whether there was any doubt in his mind that DOC intended to administer Personal Holidays on a relief available basis, Mr. Pacholke gave the following answer:

A. There was no doubt in my mind that it was clear that we were making a significant financial investment in collective bargaining in CBA days and that there was – that we would maintain our past practice on Personal Holidays the way that it had been administered in the past. The discussion was primarily around CBA days.

At the June 1, 2012 hearing, the following question was asked by Attorney Slown and the following answer was given by Mr. Pacholke:

Q. Did the Union ever suggest – did they ever say anything that suggested to you that they thought the right to take a Personal Holiday should be even greater than the right to take a CBA day?

A. No.

Hearing Transcript page 174.

The Employer's witnesses testified that they believed going "back to book" on the standard for approving Personal Holidays was going back to the practice of allowing Personal Holidays within available relief. Absent from the testimony of Union witnesses is any expression that going back to book meant following the Humphreys' arbitration award.

The Memorandum of Understanding was put into effect to relieve the Employer of the onerous standard established in the August 14, 2009 arbitration award and to get prompt responses to Personal Holiday requests, which had become a huge problem. Putting the MOU into effect was contingent upon the Union withdrawing "All grievances pertaining to the approval/denial of CBA Days/Personal Holidays." If it was the intent of the parties that the August 14, 2009 arbitration award was to remain viable, the grievances pertaining to denial of Personal Holiday requests would have been pursued. By its conduct, the Union has agreed to reverse the Humphreys arbitration award.

The historical practice at the Department of Corrections is inconsistent with the result sought by the Union. CBA days have always been deemed to be a more important or higher priority benefit than the Personal Holiday benefit. The CBA days have been preferential days off that the parties focused their negotiating efforts

upon and arrived at a clear standard for denying CBA days. Unlike CBA days, Personal Holidays may be deferred to the next year, if denied. Furthermore, the Personal Holiday came into existence as a result of general state-wide legislation, which gave all state employees a Personal Holiday. Treating Personal Holidays as the ultimate right to leave is contrary to the bargaining history of the benefit.

The "within available relief" standard should be adopted and the Humphreys rule for denial of Personal Holiday time off rejected because return to the Humphreys rule will cause the Employer to hold Personal Holiday requests until shortly before the requested leave date. In simple terms, the practice, which the Union found to be a huge problem, will be reinstated by the Employer. The Employer further contends that the newly created right to CBA day processing will be significantly eroded if the Humphreys rule is followed.

OPINION:

The collective bargaining agreement at **Section 20.4, B, 1 and 2** clearly and unambiguously requires the Employer to release an employee for a Personal Holiday if he or she makes a timely request and "The number of employees selecting a particular day off does not prevent the agency from providing continued public service."

The **Section 20.4** does not define what would prevent the agency from providing continued public service and this arbitrator has not been asked to create or adopt a definition. The question to be answered is whether the contractually agreed upon language must be followed or whether there is a contractual basis for adopting some lesser standard than articulated at **Section 20.4 , B, 2**.

The plain meaning of language in a contract is to be followed, unless it is unclear or ambiguous. **Section 20.4, B, 2** is not ambiguous. In the August 14, 2009 decision Arbitrator Humphreys arrived at the same conclusion. He ruled that the parties must follow the language they agreed upon in the collective bargaining agreement. The current language of **Section 20.4** is identical to the language reviewed by Arbitrator Humphreys. Nothing in the history of bargaining between the parties since Arbitrator Humphreys decision supports a finding that the August 14, 2009 decision as it relates to the administration of Personal Holiday leave has been overruled or vacated. In fact, the parties negotiated a change in contract language relating to CBA days and retained the language of **Section 20.4**. If the parties agreed to change the meaning of **Section 20.4** and intended to create a new **Section 20.4** standard, they presumably would have done so in a manner similar to the manner in which they changed the CBA standard.

All of the contract interpretation principles that are typically applied in reviewing contact language support the Union's position in this case. The plain meaning of **Section 20.4** is clear and unambiguous. **Section 20.4** was inserted into the contract after the language found at **Section 21.7** and is a more specific contract term than the general language of **Section 21.7**. An Arbitration Award has previously interpreted the language and that award with regard to **Section 20.4** is established shop law. The argument that the prior Arbitration award was reversed finds no factual support.

Finally, the parties have informed the Arbitrator that the contractual right to a Personal Holiday found in the collective bargaining agreement originated in a

state-wide legislative mandate. The high standard of protection for Personal Holidays established in **Section 20.4** is consistent with both the plain meaning of the contract and the public policy upon which it is based.

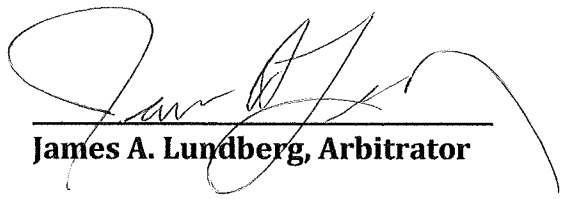
The Employer is in violation of the collective bargaining agreement when it denies a Personal Holiday to employees without meeting the mandate of **Section 20.4** of the collective bargaining agreement. Furthermore, the Employer may not deny requests for Personal Holiday leave when relief is not available, in accordance with the language of Rule 21.7, but must make the showing demanded by the Humphreys decision under its reading of Rule 20.4.

As requested by the parties, the Arbitrator shall retain jurisdiction over the remedy in the above matter.

AWARD:

1. ***The Employer is in violation of the collective bargaining agreement when it denies a Personal Holiday to employees without meeting the mandate of Section 20.4 of the collective bargaining agreement. Furthermore, the Employer may not deny requests for Personal Holiday leave when relief is not available, in accordance with the language of Section 21.7, but must make the showing demanded by the Humphreys decision under its' reading of Section 20.4.***
2. ***The arbitrator shall retain jurisdiction over the remedy in the above matter.***

Dated: August 1, 2012



James A. Lundberg, Arbitrator