

IN THE MATTER OF THE ARBITRATION)	ARBITRATOR'S
)	
BETWEEN)	OPINION AND AWARD
)	
TEAMSTERS LOCAL NO. 117)	
)	
"LOCAL 117" OR "THE UNION)	
)	
AND)	
)	
THE STATE OF WASHINGTON)	
)	
"THE STATE" or "THE EMPLOYER")	Fallen Luciano
)	Grievant

HEARING: October 10, 2013
Tukwila, Washington

HEARING CLOSED: October 10, 2013

ARBITRATOR: Timothy D.W. Williams
2700 Fourth Ave., Suite 305
Seattle, WA 98121

REPRESENTING THE EMPLOYER:
Angela Roberts, DOC Labor Relations Manager
Julie Moultime, DOC Labor Relations Consultant

REPRESENTING THE UNION:
Spencer Thal, Counsel for Teamsters 117

APPEARING AS WITNESSES FOR THE EMPLOYER:
Jane Parnell, Superintendent WCCW

APPEARING AS WITNESSES FOR THE UNION:
Fallen Luciano, Grievant

EXHIBITS

JOINT

1. Collective Bargaining Agreement, 7/1/2011 - 6/30/2013.
2. E-mail Life Giving Procedure, 11/15/2011.
3. Grievance letter, 11/30/2011.

EMPLOYER

1. E-mail from Moultime to Mitchell, 5/23/12.

Union

1. Executive Order, 02/01.
2. Blood Donation FAQ's.
3. Blood Unit Identification Card.

BACKGROUND

State of Washington, Department of Corrections (hereafter "State" or "the Employer") and Teamsters Local 117 (hereafter "Local 117" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Tukwila, Washington on October 10, 2013. At the hearing, both Parties had full opportunity to make opening statements, examine and cross-examine sworn witnesses, present documentary evidence, and make arguments in support of their positions.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide

arguments in the form of post-hearing briefs. Both parties chose to give closing oral arguments. Thus the award, in this case, is based on the evidence and oral arguments.

STATEMENT OF THE FACTS

The State of Washington, Department of Corrections and Teamsters Local 117 are parties to a collective bargaining agreement (CBA) effective from July 1, 2011 through June 30, 2013. The instant grievance arose under the terms of that agreement.

The facts of this case are simple and straightforward. The CBA contains a provision (Article 22.8) granting up to five working days of paid leave for the purpose of participating in a medical life giving procedure to include a blood donation. The Grievants, Fallen Luciano and Rich Hunsicker, are correction officers that donated blood during the daytime and requested their night shift as a day of paid leave. The request was denied on the basis that their participation in the life giving procedure (blood donation) did not occur during their work shift.

On November 30, 2011 the Union filed a grievance claiming that Article 22.8 was violated when the leave request was denied (J 3). The grievance indicates that the violation occurred "on November 15, 2011 and is ongoing." As a remedy the grievance

seeks the approval of future requests for paid leave and the restoration of any "personal leave utilized by bargaining unit members that participated in a life giving procedure." The State denied the grievance.

The Parties processed this grievance through the steps of the CBA's grievance procedure but were unable to resolve the matter. As a result it was submitted to Arbitrator Timothy Williams for resolution on October 10, 2013.

At hearing the parties stipulated to the following two facts:

1. The language found in Article 22.8 first on its way into the CBA in the 2009-11 agreement.
2. There is little if any bargaining history associated with the provision known as Article 22.8.

STATEMENT OF THE ISSUE

The Parties were able to agree on a statement of the issue which is as follows:

1. Did the Employer violate Article 22.8 when it denied leave to Fallen Luciano and/or Rich Hunsicker for blood donation?
2. If so, what does Article 22.8 require?

APPLICABLE CONTRACT LANGUAGE

COLLECTIVE BARGAINING AGREEMENT, 2010 - 2013

3.1 Management Rights

If it is understood and agreed that the Employer possesses the sole right and authority to operate the institutions/offices and to direct all employees, subject to the provisions of this Agreement and federal and state law.

9.5 Authority of the Arbitrator

The Arbitrator will have the authority to interpret the provisions of this Agreement to the extent necessary to render a decision on the case being heard. The Arbitrator will have no authority to add to, subtract from, or modify any of the provisions of this Agreement, nor will the Arbitrator make any decision that would result in a violation of this Agreement.

9.6 Arbitration Costs

The expenses and fees of the arbitrator will be shared equally by the parties.

22.8 Leave for Life-Giving Procedures

Employees will receive paid leave, not to exceed five (5) working days in a two (2) year period, for participating in life-giving procedures, upon approval. "Life-Giving Procedure" is defined as a medically supervised procedure involving the testing, sampling, or donation of blood, platelets, organs, fluid, tissues, and other human body components for the purposes of donation, without compensation, to a person or organization for medically necessary treatments. Employees will provide reasonable advance notice and written proof from an accredited medical institution, physician or other medical professional that the employee participated in a life-giving procedure.

POSITION OF THE UNION

The Union advances three primary arguments in support of the grievance:

1. Article 22.8 provides paid leave when participating in a life giving procedure and there is nothing in the Article that requires the participation to have been during the employee's scheduled work shift. The Employer cannot on its own simply insert this additional restriction.
2. The "upon approval" language protects the right of the State to ensure adequate coverage on work shifts but does not grant the State the right to deny paid leave because the procedure occurred outside the employee's work shift. The Grievants gave sufficient notice, as required by Article 22.8, for the State to provide necessary coverage.
3. The intent of the language was to encourage employees to participate in life giving medical procedures. This is important in the instant case because only 10% of those capable of giving blood actually do so. The State's interpretation of the language removes the incentive from a substantial number of employees. There is adequate protection against any abuse of this benefit since it is limited to five paid days during a two year period.

For all of the above reasons, the Union urges the Arbitrator to sustain the grievance and provide an appropriate remedy.

POSITION OF THE STATE

The State disagrees with the Union and urges the Arbitrator to deny the grievance. The State's position is based primarily on two central arguments that include:

1. The State has both the right and obligation to effectively and efficiently manage its operations to include providing adequate staff coverage. Article 22.8 clearly and unequivocally provides for paid leave "upon approval." The State, for operational reasons, does not approve paid time off for life-giving medical procedures when those procedures are performed outside of an employee's work shift. Thus the State's denial of the Grievants' requests for paid leave was consistent with the requirements of Article 22.8.
2. Since the grievance involves a matter of contract language interpretation, the Union carries the burden of proof. The Union has provided no persuasive evidence that the Parties intended the language of Article 22.8 to grant a paid day off work whenever an employee donated blood outside of his or her schedule shift. While the State actively encourages employees to participate in blood donation, the paid time off provided in Article 22.8 applies only when the donation occurs during scheduled work time. The State points to Article 9.5 that bars the Arbitrator from adding to the terms of the agreement and emphasizes that the Union should not achieve by arbitration what it did not receive at the bargaining table.

Based on the above two arguments, the State urges the Arbitrator to find the grievance to be without merit and deny it.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the Parties' collective bargaining agreement (CBA) and the issue(s) that is to be decided. In the instant case, the arguments of the Parties focused on the language from Article 22.8 dealing with paid time off to participate in a life-giving medical procedure. There are two basic issues before the Arbitrator with the first focusing on the question of whether the Employer violate Article 22.8 when it denied leave to Fallen Luciano and/or Rich Hunsicker for blood donation. The second issue is broader and seeks to determine exactly what Article 22.8 requires. The Arbitrator will discuss both of these questions as part of this analysis.

The Arbitrator begins by noting that in a labor grievance arbitration the employer carries the burden of proof in a matter of discipline or discharge. Where the issue in dispute involves a claim by the Union that a provision(s) of the collective bargaining agreement has been violated, the union carries the burden of proof. In this case, the matter in dispute is not discipline or discharge but rather it is a claim by the Union that the State misapplied the provisions found in Article 22.8 resulting in the Grievants being denied paid leave. In advancing this claim, the Union carries the burden of proving it

and, to prevail, must provide a preponderance of evidence to support the claim.

The Arbitrator carefully reviewed the audio recording of the hearing, studied the submitted documents and gave full consideration to the oral arguments provided at the hearing. Ultimately the Arbitrator determines that the Union has provided sufficient evidence to prove its claims and thus the grievance is sustained.

The Arbitrator emphasizes that, while he carefully reviewed all of the points raised by the Parties in their opening and closing statements, he has chosen to focus the analysis on the arguments and evidence that he found weighed most heavily on the final decision. The fact that a contention or point is not discussed does not mean that it was not considered. It does mean that it was not determined to be a major factor in arriving at the conclusion that the grievance should be sustained. The reasoning and the primary factors that led to this conclusion are laid out in the following multipoint analysis.

First, this is a contract language interpretation case and the best place to begin the analysis is with the language itself. Article 22.8 begins with the sentence that reads:

Employees will receive paid leave, not to exceed five (5) working days in a two (2) year period, for participating in life-giving procedures, upon approval.

There are four basic elements to this sentence with the first being the basic fact that employees "will" [a mandatory expression] receive paid leave. The second part of the sentence limits the amount of paid leave to five days in a two year period. The third part of the sentence notes that the paid leave is granted for participating in life-giving procedures. The final part of the sentence indicates that leave must be approved before it can be taken.

From this Arbitrator's perspective, a critical element in the Parties disagreement over the application of this language is the relationship between the two words "will receive" and the two words "upon approval." Is the leave granted at the sole discretion of the Employer - emphasis on "upon approval" or is the Employer's discretion limited to regulating when the leave can be taken - emphasis on "will receive?" Based on the mandatory word "will" and a reading of the rest of the language in the provision, the Arbitrator concludes that the Employer's discretion is over the scheduling of the event not over the granting of the paid leave. In other words, when an employee informs the State of the intention to participate in a life-giving procedure, the paid leave must be granted with the State retaining, for operational reasons, control over the scheduling of the event. The employee cannot simply go to management and say, "I decided to go give blood today." Scheduling the time

needed for a blood donation or any other life-giving procedure must be arranged with management retaining ultimate control of the timing.

Second, another critical element with the language of Article 22.8 is the definition of the phrase *life-giving procedures*. The Arbitrator finds the definition a problem area for two reasons. One is that the accompanying definition identifies a broad range of possible medical events ranging from the very complex (kidney donation for example) to the very simple (blood donation). The first requires invasive surgery and a lengthy recovery period while the second is quickly concluded. This fact clearly impacts the process of scheduling the event as scheduling a blood donation is far simpler than arrangements that would have to be made to cover for an employee donating a kidney.

The second problematic dimension of this provision is that, regardless of the complexity of the life giving procedure, operationally all procedures are treated exactly the same. The language of Article 22.8 makes it clear that an employee will receive up to five paid days off in a two year period whether the event is blood donation or a kidney donation, partial liver donation, blood marrow donation, etc. The language provides for no distinction between any of these events.

Moreover, in evidence as Joint #2 is an e-mail message from Jane Parnell to all staff at WCCW in which she provides that:

If you participate in a "Life-Giving Procedure" as defined in the above contract article [Article 22.8] during your normal scheduled work-shift, you will not be required to utilize your own paid leave. You will be required to provide the documentation required above following the conclusion of your procedure.

However, if you participate in the procedure outside of your normal work shift-hours, you will not be entitled to paid leave by the Department.

The Arbitrator notes that Ms. Parnell also testified at hearing consistent with the above statement and that neither her written statement nor her testimony drew a distinction between simpler life-giving medical procedures and more complex procedures. In other words, as the Employer interprets the language of Article 22.8, if an employee donates blood during his or her shift, then he or she gets the benefit of the paid time off provided by Article 22.8. Likewise, if the surgical procedure for extracting a kidney is scheduled during an employee's work-shift then he or she gets the benefit of the paid time off provided by Article 22.8. Otherwise life-giving medical procedures performed outside of scheduled work time do not entitle an employee to paid time.

Third, after thoughtful consideration, the Arbitrator concludes that the Employer is misapplying Article 22.8. To fully understand this conclusion it is necessary to consider

what necessitates taking time off from work as a result of participating in the life-giving procedure. After all, the whole reason for having paid time off is not to give an employee an extra holiday but rather to ensure no loss of wages or loss of personal leave time for any absence from work resulting from the life giving procedure. While the Parties provided limited evidence and argument with regard to what constitutes necessary time away from work resulting from life-giving procedures, much of this is simply common sense. Time away from work would involve any travel time to and from a medical facility, the time for the medical procedure itself and any time for recovery from the life-giving procedure. The Arbitrator emphasizes the significance of the conclusion that any inability to perform regularly scheduled work caused by the participation in the life-giving event ought to be covered by paid time off under the requirements of Article 22.8 up to 5 days in a two year period.

As discussed above, life-giving medical procedures range from the simple to the complex and any recovery time ranges from very little to substantial. The Arbitrator consulted with medical authority and was informed that it would probably be six weeks or longer before a correctional officer could return to work following the donation of a kidney. That being the case, the Arbitrator emphasizes that the first five days of the surgery/recovery period would be paid time off per the

requirements of Article 22.8. Similarly, if donating blood makes an employee dizzy and thus not able to undertake his or her regular assigned duties (see page 1 of Union exhibit 2), then the employee should be receiving paid time off and not be working while recovery occurs.

Thus, the Employer misapplies Article 22.8 when it requires that the medical procedure itself occurs during scheduled work time in order for the employee to receive the benefit provided by Article 22.8. The Arbitrator concludes that if time needed to recover sufficiently from the medical procedure to undertake the employee's regular assigned duties extends into his or her work shift, then the employee is entitled to paid time off.

Fourth, the Arbitrator emphasizes that the above conclusion is specifically focused on the concept of an incapacity to perform regular assigned duties. The surgical procedures related to a bone marrow or kidney donation create an obvious presumption of substantial recovery time. Donating blood is an entirely different matter as there is no invasive surgery involved. Which leads logically to the question of how much time does an employee need after donating blood in order to resume his or her regular¹ duties.

¹ The Arbitrator emphasizes the word "regular" because of testimony at hearing about the Employer offering light duty assignments to any employee that has donated blood and is not in a condition to resume his or her scheduled work. Article 22.8 provides specifically for paid time off not for light duty work.

The Arbitrator notes the testimony of Ms. Parnell who views donating blood as involving a short time away from work and then the resumption of duties; a reality that often exists at places of employment in the form of a blood drive. The difficulty the Arbitrator has with this perspective is that it does not address specific medical instructions related to blood donation, most importantly as those instructions apply to the activity level of a job. The only medical evidence on the record of this proceeding indicates that as a result of blood donation one can "experience dizziness or loss of strength" (U 2) and that the donor is encouraged to "refrain from strenuous lifting or exercise for 24 hours" (U 3).

To put it bluntly, one does not donate blood and then go out and run a marathon. Some employees have desk jobs where the most strenuous activity is picking up the handset of the telephone. Heavy construction work would be something entirely different. In the first instance most employees would probably be able to resume their duties in a short period of time following the blood donation. In the second case one might seriously conclude that the full 24 hours of recovery ought be the norm.

As to Fallen Luciano and Rich Hunsicker, the Grievants, they are correction officers that work in a state prison. Their work, based on the testimony of Ms. Luciano, can be very quiet

or involve a strenuous confrontation. The problem, of course, is that the employee does not get to pick and choose what kind of events may occur during their work shift. Since blood donation, as noted above, can involve the loss of strength, resuming one's assigned duties immediately after giving blood may create a significant safety issue.

Ultimately the Arbitrator concludes that for both Fallen Luciano and Rich Hunsicker there is sufficient medical reason to conclude that, given the nature of their regular job duties, taking a work shift off for recovery purposes within 24 hours of donating blood was both prudent and advisable. Thus the denial of the request for paid time off work violated Article 22.8.

After thoughtful consideration related to the remedy for this violation, the Arbitrator has decided that the remedy should be proscriptive only and require that the Employer change its practice and allow paid leave when the life-giving medical procedure occurs outside of the work shift so long as there is a medical basis upon which to claim the need for recovery. Granting the Grievants some paid time off does not address an issue of recovery but rather turns the time off into vacation or holiday. The Arbitrator sees no reason to add to the Grievants vacation or holiday benefit.

CONCLUSION

The Arbitrator was asked to address two issues: one dealing with whether or not the Employer had improperly denied paid leave to the two Grievants and a second issue seeking to determine the specific requirements of Article 22.8. The Arbitrator finds that the denial of paid leave to the Grievants did violate Article 22.8 because the denial failed to properly consider medical information about recovery time. The fact that the life-giving medical procedure (blood donation) occurred prior to the work shift did not necessarily mean that the Grievants were fully capable of resuming their duties when the shift started.

As to the requirements found in Article 22.8 that must be met in order for an employee to receive paid time off, the Arbitrator has concluded that it is mandatory for the Employer to grant the time off so long as the employee provides sufficient notice of the intention to participate in a life-giving medical procedure and that the combination of travel time plus time for the procedure itself plus any recovery time necessitate that the employee take time off of work. Any incapacity to perform the employee's regular assigned duties resulting from the medical procedure should be covered by paid time off as provided by Article 22.8.

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DEPARTMENT OF CORRECTIONS)	
)	FALLEN LUCIANO
"THE STATE" or "THE EMPLOYER")	GRIEVANT

After careful consideration of all arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The Employer did violate Article 22.8 when it denied leave to Fallen Luciano and Rich Hunsicker for blood donation.
2. To remedy the above violation, the Arbitrator directs the State to grant paid leave per Article 22.8 in all future cases consistent with the following provision.
3. Article 22.8 should be read as providing paid time off for participating in a life-giving medical procedure, even when the procedure occurred outside the scheduled work-shift. To receive the paid time off the employee must have a medical basis to claim an incapacity to work resulting from the procedure, must not claim more than five days paid leave in a two year period, must have provided sufficient advance notice to allow the Employer to properly staff his or her shift and must provide the documentation required by Article 22.8.
4. Article 9.6 of the collective bargaining agreement states that "the expenses and fees of the arbitrator will be shared equally by the parties." The Arbitrator has assigned his expenses and fees accordingly.

Respectfully submitted on this, the 6th day of November, 2013 by,

Timothy D.W. Williams
Arbitrator