

# Arbitration Award

**In re  
City of Warrensville Heights  
and  
Ohio Patrolmen's Benevolent Association**

126 LA (BNA) 1313  
FMCS Case No. 09/54968  
August 6, 2009

Colman R. Lalka, Arbitrator, selected by parties through procedures of the Federal Mediation and Conciliation Service.

## **Statement of the Case**

The Grievant requested FMLA leave for the birth of his second child. While on FMLA leave, the City prohibited the Grievant from working secondary employment. The Union grieved the prohibition as being in violation of the Parties' Collective Bargaining Agreement and the FMLA. The grievance was processed, without resolution, through the steps of the Parties' contractual grievance procedure, and the matter is now before this Arbitrator for final and binding determination.

## **Issue**

Did the City's prohibiting of the Grievant working secondary employment while on FMLA leave violate the Parties' Labor Agreement? If so, what is the remedy?

## **Collective Bargaining Agreement**

The following provisions of the Parties' Labor Agreement are applicable to these proceedings:

### Article 2

#### Purpose and Intent

\* \* \*

#### Section 2. Legal References.

(a) This Contract shall be subject to all applicable law(s).

\* \* \*

### Article 10

#### Grievance Procedure

\* \* \*

Section 2. For the purpose of this procedure, the below listed terms are defined as follows:

(a) Grievance - A “grievance” shall be defined as a dispute or controversy arising from the misapplication or misinterpretation of the specific and express written provisions of this Agreement.

\* \* \*

Section 3. The following procedure shall apply to the administration of all grievances filed under this procedure:

\* \* \*

(h) This procedure shall not be used for the purpose of adding to, subtracting from, or altering in any way, any of the provisions of this Agreement.

Section 4. All grievances shall be administered in accordance with the following steps of the grievance procedure:

\* \* \*

Step 4: ... The Arbitrator’s decision shall be limited to interpretation of the contract, and the Arbitrator shall not add to or modify any provision of the contract. The Arbitrator’s decision shall be final and binding. ...

#### Article 13

##### Conformity To Law

Section 1. Where, pursuant to Section 4117.10, the parties have intended to draft a provision which is different than law, then the language of the contract will prevail. Otherwise, this Agreement shall be subject to applicable federal, state and local laws.

\* \* \*

#### Article 17

##### Vacations

\* \* \*

Section 3. ... Except as where otherwise provided in this Agreement, the City shall be prohibited from forcing any employee to take off or otherwise expend any of his or her accrued paid leave, including vacation leave. ...

\* \* \*

#### Article 26

##### Miscellaneous

\* \* \*

Section 3. Subject to approval of the Safety Director, an employee may retain private, part-time employment as long as it in no way interferes with his or her employment with the City. An employee shall not commence part-time employment until approval of the Safety Director has been granted. The decision of the Safety Director shall be final, and approval may be withdrawn at any time. An employee who has retained private, part-time work shall keep the Chief informed of the name and address of the private employer. The decisions of the Safety Director shall not be arbitrary and capricious.

\* \* \*

The following provision of the C.F.R., specifically 29 C.F.R. 825.312(h), is discussed below:

If the employer has a uniformly-applied policy governing outside or supplemental employment, such a policy may continue to apply to an employee while on FMLA leave. An employer which does not have such a policy may not deny benefits to which an

employee is entitled under FMLA ...

## **Discussion**

### **Arbitrability**

At the commencement of the Arbitration Hearing, the City raised an issue of substantive arbitrability. The City, relying on Article 2, §2(a) and Article 13, contends the Parties' Labor Agreement does not incorporate federal law, but is subject thereto, and the Article 10, §2(a), definition of a grievance limits the Arbitrator solely to an application of the Labor Agreement, not the FMLA.

For reasons that will be discussed below, the City's argument is rejected. In addition to Article 2, §2(a), Article 10 §2(a), and Article 13, expressly subjecting the Collective Bargaining Agreement to all applicable law and defining a grievance as a misapplication or misinterpretation of the Labor Agreement, at least two other provisions of the Parties' Labor Agreement are intertwined with the FMLA in the City's handling of this matter, Article 17 peripherally, and Article 26 directly. While a review of FMLA is necessary for an understanding of this matter, in the Arbitrator's view it is the Parties' Labor Agreement upon which the ultimate resolution lies, and, it follows, this matter is arbitrable.

### **Merits**

The Grievant has been a police officer with the City since 2000. The Grievant's wife gave birth to their second child in December 2008, and the City concedes that under FMLA it is a FMLA covered Employer, the Grievant is a covered employee, and the birth of the Grievant's second child is a covered event. On December 31, 2008, the Grievant contacted Carolyn Patrick, Personnel Director, to have his second child included on his health coverage. Ms. Patrick, knowing the birth of a child is a covered FMLA event, inquired of the Grievant if he would be taking time off. The Grievant responded he would, and FMLA forms were provided to the Grievant.

Ms. Patrick also inquired of the Grievant if he wanted to use paid leave while on FMLA leave, and the Grievant indicated he would use his vacation. Ms. Patrick indicated she cannot, pursuant to Article 17, mandate an employee use vacation time, the decision is always left to the employee. Additionally, the City did not compel the Grievant to use FMLA leave, and stressed the Grievant could have discontinued the use of FMLA by simply returning to work.

While on FMLA leave, Chief Frank Bova discovered, the Grievant was working secondary employment. Chief Bova thereupon contacted the Grievant, informing him it was not permissible to work secondary employment while on FMLA leave. Chief Bova stated this is the first time the situation arose, that he was not aware the Grievant had worked secondary employment while on FMLA leave after the birth of his first child, and indicated he considered FMLA tantamount to an employee being on Sick Leave.

Chief Bova pointed to General Order No. 230 regarding secondary employment, and noted secondary employment is prohibited when an employee is off sick or injured. Chief Bova admitted upon questioning that the Grievant was not off because of sickness or injury, but added he was on FMLA leave as the result of the birth of a child. That being the case, Chief Bova concluded, the Grievant should have stayed home to care for his wife and newborn. Chief Bova informed the Grievant he could return to work his job with the City, but could not work his second job.

The Grievant indicated he worked secondary employment while on FMLA leave after the birth of his first child in July 2007, and assumed the same procedure would apply upon the birth of his second child. However, upon being notified by the Chief it was impermissible to work secondary employment while on FMLA leave, the Grievant ceased working his second job, and grieved.

The grievance was eventually reviewed by Mayor Clinton Hall, who rendered the ultimate decision in denying the grievance. It was Mayor Hall's testimony if the Grievant wants to work secondary employment, the Grievant should return to work his job at the Police Department. The Mayor also testified he determined to disallow secondary employment while on FMLA leave after this situation arose, and that the City has no written policy regarding secondary employment while on FMLA leave. However, Mayor Hall concluded, a written policy has since been prepared and is awaiting approval by City Council.

The City argues 29 C.F.R. §825.312(h) does not require the policy regarding secondary employment be in writing, or, furthermore, that the policy be in place any length of time before its first application. In this situation, the City contends, it had the right to invoke a new policy in response to a new situation, and immediately apply that policy. The Arbitrator must respectfully disagree. A reading of 29 C.F.R. §825.312(h) makes it clear the Employer may continue a uniformly applied policy governing secondary employment, not institute a policy for the first time upon an employee working secondary employment while on FMLA leave.

In further support of its position, the City cites *Pharakhone v. Nissan North America, Inc.*, 324 F.3d 405 (6th Cir. 2003). In *Pharakhone*, the employee worked secondary employment while on FMLA leave for the birth of a child, and was terminated. The *Pharakhone* court upheld the termination. The Employer in *Pharakhone*, however, in contrast to the matter before this Arbitrator, and as permitted by 29 C.F.R. §825.312(h), had in place an articulated policy against secondary employment while on FMLA leave. Importantly, the *Pharakhone* court stated:

The FMLA makes it unlawful for an employer to "interfere with, restrain, or deny the exercise of" certain rights created by the statute. 29 U.S.C. §2615(a)(1). Among these statutory rights is that of an eligible employee to take up to 12 weeks of leave "[b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter."

Article 26, §3 of the Parties' Labor Agreement provides employees may work secondary employment subject to approval by the Safety Director. The decision of the Safety Director, Article 26, §3 further states, shall not be arbitrary or capricious.

The Grievant's secondary employment had been previously approved, indeed, he had worked the secondary job approximately five years prior to this situation. Against the backdrop of 29 C.F.R. §825.312(h) and *Pharakhone*, the City's denial of the Grievant's continued secondary employment unless the Grievant relinquished FMLA rights and return to work with the City, in the view of the Arbitrator, must be considered arbitrary and capricious. As such, Article 26, §3 was violated.

Finally, the City contends the Arbitrator is without authority to grant, as remedy for the violation of the Collective Bargaining Agreement, an award for lost wages that would have been earned from an Employer not a party to the within Collective Bargaining Agreement. In support of its position the City quotes Elkouri and Elkouri, *How Arbitration Works*, Sixth ed. 2003, at p. 1195:

Many agreements limit the authority of the arbitrator to interpreting and applying the collective bargaining agreement and deny the arbitrator the power to add to or modify the agreement. In such an instance, the award must be based on what is, or is not, required by the agreement, and there is only limited room, if at all, for application of "equity."

This Arbitrator must again respectfully disagree with the City's contention. An award of monetary damages for the City's violation of the Parties' Labor Agreement is not an application of "equity," as in the amending of the Labor Agreement based on the Arbitrator's view of "fairness." An award of monetary damages for the violation of the Labor Agreement is in keeping with generally accepted arbitral principles.

A continued reading of *Elkouri*, at p. 1204, discloses the following passage:

... In *Copley Newspapers*, the arbitrator ordered the employer to pay a reporter \$600 as a "make-whole" remedy for wrongful refusal of permission to write an article for a "non-competitive" magazine. In a less serious vein, the arbitrator in *Oakland University* ordered the school to reissue a parking permit to the union president and to reimburse him for costs of parking violations incurred while the permit was withheld. In *North Greene School District*, the arbitrator ordered the employer to stop interfering with the issuance of passes by an athletic conference to teachers and to reimburse each teacher the price of admission to each event attended for which the teacher paid admission during a designated school year. In *City of Cortland, Ohio*, the employer was required to reimburse travel expenses incurred by a firefighter to take paramedic training...

As in *Copley Newspapers, et. al.*, and pursuant to generally accepted arbitral tenets, under the facts of the grievance before this Arbitrator, a monetary make-whole remedy is appropriate.

## **Conclusion**

Based upon the foregoing, this Arbitrator finds a violation of the Parties' Collective Bargaining Agreement, and the grievance is sustained. The Grievant is to be compensated for all wages he would have received from secondary employment but for the City's violation of the Parties'

Labor Agreement.