IN ARBITRATION PROCEEDINGS

PURSUANT TO THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

In the Matter of an Arbitration Between ACADEMIC PROFESSIONALS OF CALIFORNIA And CALIFORNIA STATE UNIVERSITY. Re: APC on Behalf of REBECCA ARAUJO v. CSU LONG BEACH (R04-2016-147); EDIE BROWN on Behalf of ROSANNA KELLEY and APC v. SONAOMA STATE UNIVERSITY (R04-2016-343); AMERICO YACOPI v. SAN DIEGO STATE UNIVERSITY (R04-2016-343); APC v. CSU (R04-2016-333).	Paul Crost, Arbitrator

This arbitration was conducted following grievances by the Academic Professionals of California [APC or Union] asserting that the California State University (University or CSU) violated provisions of the parties' Collective Bargaining Agreement (CBA). The parties have stipulated that the grievances at issue are properly in arbitration. A hearing was held on March 16, 2017, and written closing arguments were submitted on June 16, 2017. I have reviewed the testimony and evidence presented during the arbitration hearing, as well as the post-hearing briefs submitted by counsel. While I have not addressed all of the arguments and issues raised by these professional advocates, this should not be interpreted to mean that I have not reviewed and carefully considered the evidentiary record and all arguments of counsel. Rather, I have addressed those elements that have a significant impact on my decision-making process.

STATEMENT OF THE ISSUES

Because the parties could not agree upon a statement of the issues at the hearing, they requested that the Arbitrator formulate the issue statement. APC proposed the following statement of the issues:

[Whether] the CSU violated the applicable Collective Bargaining Agreement when it required exempt Unit 4 employees to use sick leave or vacation or dock[ed] their pay for partial day absences. If so, what shall be the remedy?

CSU proposed the following issue statement:

Does the University's practice of charging exempt Unit 4 employees sick or vacation time for partial day absences while on Family Medical Leave violate the Collective Bargaining Agreement? If so, what is the remedy?

Based on my review of the evidence and argument, I have determined that an appropriate statement of the issues is:

Did the CSU violate the Collective Bargaining Agreement by charging exempt Unit 4 employees sick or vacation time for partial day absences while on Family Medical Leave?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

22.7 The family and medical leave provisions in this Article incorporate both the Federal Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA) and will be denoted by FML. An employee who has at least one (1) academic year or twelve (12) months of service is entitled to FML.

22.14 FML is unpaid leave; however, employees shall utilize appropriate leave credits prior to being placed on any unpaid portion of FML.

28.27 Exempt Employees

c. Employees who have absences of less than a full day shall receive a full day's salary and shall neither have their salary docked nor be required to use sick leave or vacation for such absences of less than a full day.

d. CSU employees in exempt classifications are exempt from FLSA which means they are exempt from overtime payment requirements. If exempt employees need to work hours in excess of the normal business week or business day, they do not receive overtime or CTO. Exempt employees are expected to accomplish assigned work without regard for numbers of hours worked. When it is necessary for employees to work extended hours, managers may authorize informal adjustments in work hours. Normally, it is not necessary to keep complex records of hours worked. If a manager feels an employee is not working an appropriate number of hours, the employee should be counseled. If corrective actions are being

considered, performance records should be maintained. Any non- disciplinary, corrective action by supervisors should be addressed to failures by the employee to meet job performance standards and requirements. . . .

The provisions of this section 28.27 are subject to the grievance procedure and pursuant to Article 10, grievances may be filed by individual employees, groups of employees or the Union on behalf of a unit employee or group of unit employees.

At the option of APC, in the event that a grievance alleging a violation of this provision is not settled at Level 1, APC may submit solely the issue of whether a violation of this provision occurred directly to arbitration no later than thirty (30) days after the Level I response. In considering whether this provision has been violated, the Arbitrator shall not be precluded from reviewing the contract as a whole. . . .

Each individual's case will be decided on its own merits and grievance/arbitration decisions concerning this provision shall not operate as a precedent for other cases. The Arbitrator shall issue a written award but no opinion. . . .

RELEVANT UNIVERSITY POLICY

Technical Letter, HR 99-05:

12. Are exempt employees able to use intermittent or reduced work schedule FML?

FLSA allows for partial day docks or use of leave credits for absences under the FMLA. In order to standardize our attendance-reporting procedures under CSU policy, partial day absences while on FML are to be charged against an exempt employee's accrued leave credits. However, if an exempt employee exhausts his/her accrued leave and still has FML time, the employee is to receive regular pay.

Please note: There is no change in CSU attendance policy for exempt employees not on FML. Exempt employees continue to report regular absences in full work day increments.

DISCUSSION

The events that led to this arbitration are not in dispute. Three Unit 4 exempt employee grievants had taken time off for one or more FML partial days. Relying on University Technical Letter HR-99-05, their sick leave and/or vacation credits for their partial times off were charged. If their sick leave or vacation credits had been used at the time of the partial time day off, the University would not dock their pay for their partial days off.

APC contends that HR 99 – 05 is contrary to and a violation of Article 28.27c. which states:

"[Exempt] employees who have absences of less than a full day shall receive a full day's salary and shall neither have their salary docked nor be required to use sick leave or vacation for such absences of less than a full day."

In support of its position the University contends that Article 22.7 and 22.14 apply to exempt employees. It contends that FML partial day absences are governed by the federal and state FLSA, FLMA and CFR regulations and case law, and that the University has established a past practice that is consistent with the CBA.

APC focuses on the language of Article 28.27, which states that exempt employees' partial day absences cannot be debited from their sick and/or vacation leave credits. It also contests the claim that the University has established a past practice regarding this issue in that, because the language of Article 28.27c. is clear and unambiguous, it would be improper to modify that language. APC points out that there is no evidence that APC was aware of the University's past practice until the instant grievances were filed, and that some of the campuses interpreted the CBA in a manner that is consistent with APC's position.

While the parties submitted detailed briefs addressing state and federal laws and regulations, I have concluded that the language of the CBA is determinative without deciding which version of the laws are not dispositive of the issue before me. My role is to interpret the contract language. My conclusion may well be contrary to case law or regulations, but even if that were the case (I make no opinion on those issues), the contract governs.

If the only provision of the CBA were Article 28.27c., it would unequivocally require a conclusion that the University cannot dock leave credits for exempt employees' partial absence days. Unless there are contractual provisions, or established past practice that modifies or limits the clear language of Article 28.27c., it must be concluded that the grievances should be sustained

The University argues that Article 28.27d. requires that "in considering whether this provision has been violated the Arbitrator shall not be precluded from reviewing the contract as a whole." It asserts that there is an "interplay between Article 22, which governs FML, and 28.27c., which governs the use of sick leave or vacation for absence of less than a full day for an exempt employee, without any reference to FML. Under the terms of the CBA the Arbitrator shall not be precluded from reviewing the contract as a whole and must decide each case on its own merit."

My reading of the "whole" language of 28.27d. is not relevant to the instant issue in that it is a section that deals with exempt employees' claims for overtime. The lengthy paragraphs, of which the "whole" language is within that language, describe a special arbitration procedure: no court reporters and briefs, rulings don't operate as a precedent for other cases, there will be no opinion by an arbitrator, and

"With regard to provisions a., b. and d. above, the sole and exclusive remedy for that CSU's violation of the terms of this provision shall be limited to a prospective cease and desist order." Subdivision 28.27c. is not subject to these procedures and limits. The language stating that "the arbitrator shall not be precluded from reviewing the contract as a whole," is applicable to 28.27a., b., and d., but 28.27c. is explicitly omitted from 28.27d. Article 10 arbitration provisions do not include the "whole" language and procedures set forth in 28.27d. In light of my review of 28.27, the "whole" language does not support the University's position.[1]

Article 28.27c. is clear and unambiguous, as is the clear language of 22.14 that states, "FML is unpaid leave; however, employees shall utilize appropriate leave credits prior to being placed on any unpaid portion of FML." The clear language of this provision declares that FML is "unpaid leave." The status of exempt employees does not fit that language. When exempt employees are absent for a partial day, and have no leave credits, the University does not treat their status as being on "unpaid leave." Thus, if 22.14 were applied to exempt employees, there would be a conflict with 28.27c., in that exempt employees are not on "unpaid leave" when they exhaust their leave credits. In order to avoid that conflict, one must acknowledge that exempt employees are not subject to the language of 22.14.

The University argued that there has been a past practice that supports its position. As I have found that 28.27c clearly supports the Union's position, it is improper to modify such language. Moreover, the University's evidence did not establish that APC knew and implicitly accepted the University's interpretation of 28.27c. The fact that individual employees did not question or grieve the HR 99-05 procedure does not support a finding that APC knew and failed to challenge that policy.

Elkourie & Elkourie, How Arbitration Works, 6th Ed. 2003, p. 627, described limits on a past practice argument:

> "Custom and past practice are used very frequently to establish the intent of contract provisions that are susceptible to differing interpretations. Arbitrators who follow the 'plain meaning' principle of contract interpretation will refuse to consider evidence of past practice that is inconsistent with a provision that is 'clear and unambiguous' on its face."
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> One arbitrator stated its as follows:
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> "Plain and unambiguous words are undisputed facts. The conduct of parties may be used to fix the meaning to words and phrases of uncertain meaning. Prior acts cannot be used to change the explicit terms of the contract. An arbitrator's function is not to rewrite the parties contract. His function is limited to finding out what the parties intended under a particular clause. The intent of the parties is to be found in the words which they, themselves, employed to express their intent. When the

[1] Even if the 28.27d. provision applied to the issue in this matter, applying the "whole language," the clear and unambiguous language of 28.27c. and the "unpaid leave "sentence in 22.14 would have the same result.

language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used."

Finally, the University's arguments regarding the HR 99–05 policy does not support its position. Initially, it is noteworthy that the policy poses the question "are exempt employees able to use intermittent or reduced work schedule FML?" Intermittent and reduced schedule are not the same as partial day absences. Moreover, it states that "there is no conflict with FLSA when the campus is required by law to grant FML. In such a case, there is a special exception to FLSA rules for family and medical leave." There is no language in the CBA that provides a "special exception" stated in the policy. It then states that "In order to *standardize our attendance-reporting procedures* under CSU policy, partial day absences while on FML are to be charged against an exempt employee's accrued leave credits. However, if an exempt employee exhausts his/her accrued leave and still has FML time, the employee is to receive regular pay." The University clearly acknowledged that the basis for its position is not the language of the contract. Rather than relying on the language of 28.27c., the purpose of the policy was to make it more efficient to treat partial day absences for exempt employees in the same manner as non-exempt employees.

The policy also states that "There is no change in CSU attendance policy for exempt employees not on FML. Exempt employees continue to report regular absences in full work day increments." In effect this policy imposes docking of leave credits for partial absences if the basis for the leave is FML, while partial days off for all other reasons do not have that adverse impact on them. Given that 28.27c makes no exception for differential reasons for partial day absences, the HR 99-05 policy singles out docking leave credits for partial day FML absences without any contractual authorization to do so, and arguably could be viewed as discrimination against FML absentees compared to those who are not on FML.

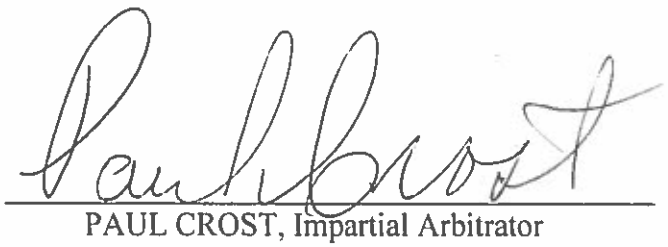
Having concluded that the University violated Article 28.27c., the appropriate remedy for the violation is to make all of the exempt employees whole for any losses of sick or vacation leave credits. subject to the contractual statute of limitations based upon the earliest grievance at issue. In the event that the parties are unable to resolve the remedy issue, I am retaining jurisdiction for 45 calendar days from the date of this award, solely for the purpose of resolving the remedy issue.

AWARD

CSU violated the Collective Bargaining Agreement by charging exempt Unit 4 employees sick or vacation leave for partial day absences while on Family Medical Leave.

The appropriate remedy for the violation is to make all affected employees whole for any losses of sick or vacation leave credits within the time limit based upon the earliest grievance at issue. In the event that the parties are unable to resolve the remedy issue, I am retaining jurisdiction for 45 calendar days from the date of this award, solely for the purpose of resolving the remedy issue.

Dated: July 20, 2017



PAUL CROST, Impartial Arbitrator