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IN THE MATTER OF ARBITRATION)

BETWEEN)

RENTON POLICE GUILD,)

Guild,)

and)

CITY OF RENTON, WASHINGTON,)

City.)

ARBITRATOR'S OPINION

AND AWARD

GRIEVANCE OF CLAY DEERING

HEARING SITE:

City Hall
Renton, Washington

HEARING DATE:

March 15, 2016

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REPRESENTING THE GUILD:

Erica Shelley Nelson
Cline & Casillas
520 Pike Street, Suite 1125
Seattle, WA 98101

REPRESENTING THE CITY:

Michael C. Bolasina
Summit Law Group
315 Fifth Avenue S, Suite 1000
Seattle, WA 98104

ARBITRATOR:

Gary L. Axon
P.O. Box 190
Ashland, OR 97520
(541) 488-1573

I. INTRODUCTION

This arbitration arises out of a dispute between the parties regarding the interpretation of an application of Article 7.3, LEOFF II On-the-Job Injury (OJI) Benefit. Clay Deering (Grievant) is a police officer employed by the City of Renton, Washington (City). On October 8, 2014, Deering injured his right shoulder when making an arrest. Deering saw a doctor and took four days off from work. While off duty, he received workers' compensation time loss and OJI benefits under Article 7.3. Deering utilized four days of the Article 7.3 benefits and returned to full duty. Unfortunately, his shoulder problems grew worse and required surgery. Grievant asked the City to convert his 44 hours of OJI taken in October 2014 to sick leave so that he could have his first time loss related to his shoulder injury at the time of his March 2015 surgery. The City denied his request. Grievant had the surgery and was able to collect the OJI benefit for days off between March 31, 2015 and April 8, 2015. April 8, 2015 was the six-month anniversary of the first use of time loss.

The Renton Police Guild (Guild) filed a grievance asserting the denial of the OJI benefit after April 8, 2015 violated Article 7.3 of the Collective Bargaining Agreement (CBA). When the parties were unable to resolve the dispute in the lower levels of the grievance procedure, the Guild advanced the case to arbitration.

II. STATEMENT OF THE ISSUES

The parties stipulated to a statement of the issues, which read as follows:

1. Did the City violate Article 7.3 of the 2013-2015 Collective Bargaining Agreement with regard to Clay Deering's work-related injury?

2. If the City violated Article 7.3, what is the appropriate remedy?

III.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 7 – SICK LEAVE

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7.3. LEOFF II On-the-Job Injury (OJI) Benefit. Effective January 1, 2011, all LEOFF II personnel will receive up to six (6) consecutive calendar months of full pay and benefits for L & I qualified duty-related disabilities. The maximum period of this benefit will not exceed six (6) consecutive calendar months.

7.3.1. The coverage begins the first day or shift of time loss.

7.3.2. The individual with the disability will not be required to use any personal sick leave if the duration of the illness or injury is six (6) consecutive calendar months or less.

7.3.3. No Personal Leave can be used during the six (6) consecutive calendar month period.

7.3.4. Employees that are released by their physician to work light duty shall inform their supervisor of the release within 24 hours. Any light duty performed during the period of disability will not extend the period of the six (6) consecutive calendar months.

7.3.5. This benefit will conclude when any of the following conditions occur:

- a. The individual is cleared for return to full duty;
- b. The individual remains on disability and completes their six (6) consecutive calendar months; or
- c. During the six (6) consecutive months, the Department of L & I declares the individual to be "fixed and stable" with a disability that permanently prevents a return to full duty.

The intent of this agreement is to make an injured employee financially 'whole' for the duration of the recovery. The total

compensation received by an injured employee will not exceed their regular duty compensation.

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IV. STATEMENT OF FACTS

All private and most government employees in the State of Washington receive time loss payments through Washington Labor & Industries when they are injured on the job and unable to work. Employees may supplement their benefit by utilizing accrued leave to continue earning 100% of base salary. If the employee has no accrued leave to use, his compensation is limited to time loss payments from Labor & Industries, which is generally 60% to 70% of the base salary. RCW 41.04.535 allows employers to offer police officers and firefighters the ability to negotiate a more generous benefit than what is provided under RCW 41.04.515.

Pursuant to RCW 41.04.535, the City entered into a contract with the Renton firefighters that provided a more generous benefit than what is required by statute. The firefighters and the City agreed to a contract benefit that begins with the first use of time loss after an injury and then continues for six (6) consecutive months. During this period, the City is required to supplement the time loss payments to 100% of the employee's base salary. The injured employee is not required to use any accrued leave to supplement the time loss payments.

In negotiations for the 2010-2012 police contract, the Guild wanted to secure the same OJI benefit that the fire union had negotiated in the 2008 firefighters' collective bargaining agreement. The Guild proposed the same language that existed in the fire contract. Article 7.3 was agreed to with little or no discussion regarding the OJI

benefit. The dispute in this case is over the meaning of the phrase "six (6) consecutive months."

Subsequent to the adoption of Article 7.3, the parties could not agree on how the language should be interpreted. There was a round table discussion, involving the City and the fire and police unions, regarding the meaning and scope of the OJI benefit. Nancy Carlson, an administrator in the Human Resources Department, gave her interpretation of the OJI benefit. Carlson also was a negotiator for the City on the police contract. Prior to the round table discussion, Carlson shared the City's interpretation of the meaning of the OJI benefit language. City Ex. 4, p. 1. Carlson prepared a summary of the discussions and sent it to the union presidents. City Ex. 8. The police and fire unions did not sign any agreement with Carlson's interpretation of the contract language.

In early 2012, Officer Anthony Vanera sustained an on-the-job injury to his shoulder. He was off work for several weeks before returning to full duty in July 2012. While he was out on leave, he received OJI benefits under Article 7.3. By December 2012, it became apparent to Vanera and his doctors that his shoulder would not heal on its own, so surgery was necessary. Vanera communicated with the police department as well as Human Resources and was assured by the City that he could use the remainder of his six-month OJI benefit. Based on those assurances, he scheduled shoulder surgery for January 2013. While he was out on leave for shoulder surgery, Vanera was simultaneously attempting to secure a mortgage for his home. During the employment verification process, he discovered the City was not paying him the six-month OJI benefit. This caused a problem because the bank threatened to cancel the

loan when it learned that Vanera's compensation was limited to time loss through L & I. Vanera was a newer employee who had not accrued any leave to supplement the time loss payments. Vanera told Carlson that he would have postponed the surgery until after the loan closed if he knew he would be limited to time loss payments. Vanera needed immediate relief if his home purchase was to go through.

Carlson interpreted the language of the OJI benefit to have concluded in July 2012 when Vanera returned to full duty after his work-related injury. City Ex. 3, p. 2. Carlson decided to create a "compassionate exception" to the limitation on the OJI benefit for Officer Vanera. She wrote a letter to the Guild President explaining her decision:

I believe that Officer Vanera's situation has some unusual aspects. First, he is a new employee and has not been here long enough to accrue enough sick leave so that he could be made whole (as regards salary) during his period of recovery. Second, he did have options with respect to when the surgery would take place. He explained that if he had known that he would not receive the benefit from Article 7, Section C, he would have postponed the surgery until after he had qualified for the mortgage. But most persuasive is the fact that he did not receive the correct interpretation of Article 7.

Therefore, the City has decided to make a one-time exception and allow Officer Vanera to run out the remainder of the six (6) month benefit provided for in Article 7, beginning in January 3, 2013.

City Brief, p. 4.

On October 8, 2014, Grievant Deering injured his right shoulder while lifting a prisoner off the floor of a patrol car. As he was picking her up, Grievant experienced significant pain in his right shoulder. That same day Grievant sought treatment with Dr. Dennis Stumpp at Valley Medical Center Occupational Health. Dr.

Stumpp ordered an x-ray that revealed nothing of obvious concern. On examination, the doctor diagnosed a shoulder strain and AC sprain and eventually recommended cortisone shots. Grievant was unable to work and utilized four days of OJI benefits following the shoulder injury. He returned to unrestricted full duty on October 17, 2014.

Deering continued to experience right shoulder pain. Grievant testified he never stopped experiencing pain and discomfort in his right shoulder from the work-related injury on October 8, 2014. Grievant worked from October 17, 2014 through March 29, 2015.

In early March 2015, Grievant Deering saw a shoulder specialist, Dr. Richard Martin, M.D. Dr. Martin performed a physical examination and opined that he may have a tear so Dr. Martin referred Deering for a MRI. The MRI revealed a shoulder tear necessitating surgery.

Deering spoke with Melissa Day, Administrative Assistant to the Chief of Police, to request the balance of his OJI benefit. Day told Deering that he had only a week remaining on his six-month OJI benefit. Deering believed that the clock should have stopped when he returned to work on October 17, 2014, and that he should receive the full six-month benefit. Deering asked Day if he could buy back the four days of OJI time that he used in October 2014, with his own sick leave. Day advised Grievant that it was not possible to buy back the OJI time. As a result of the City's refusal to let Deering use the balance of his OJI benefit or buy back the October 2014 OJI time with sick leave, Deering had to use sick leave and his own personal leave to make up the difference between the time loss benefits paid by workers' compensation

and his own regular wages. Deering had the surgery to his right shoulder on March 31, 2015.

The Guild filed a grievance alleging the City violated Article 7.3 because Deering should have received a new six-month OJI benefit when he had to undergo shoulder surgery on March 31, 2015 because of the October 8, 2014 work-related injury. The City denied the grievance. The Guild moved the grievance to arbitration. A hearing was held at which time both parties were accorded the full and complete opportunity to present evidence and argument in support of their respective positions. Post-hearing briefs were timely filed. The case is now properly before the Arbitrator for a final and binding decision.

V. POSITIONS OF THE PARTIES

A. The Guild

The Guild asserts that Article 7.3 is clear and unambiguous and requires the City to pay Deering the full six-month OJI benefit. According to the Guild, the City erred in denying Grievant six months of OJI benefits when he was forced to leave work to undergo shoulder surgery. The Guild submits the City's actions and rationale are not logical in light of the plain reading of Article 7.3.

The Guild asserts the phrase "all LEOFF II personnel will receive up to six (6) consecutive calendar months of full pay and benefits for L & I qualified duty-related disabilities" is clear and unambiguous. According to the Guild, this phrase clearly provides for a period of six consecutive months of full pay and benefits for "L & I qualified duty-related disabilities." Even though the word "consecutive" is used in the language, there is no express language or exclusion limiting how many times an officer

can utilize this six-month benefit, so long as it is consecutive. The Guild asserts the language means that an officer is not entitled to more than six months at any one successive time. While the language creates an outer limit, it certainly does not prevent interpretations such as those provided by the Guild, that Deering was entitled to multiple six-month periods after he returned to full time duty, or use the remaining balance of his earlier six-month benefit period.

The language also references “L & I qualified duty-related disabilities” in the plural form, which supports the Guild’s argument that the language contemplates more than one six-month period is available for multiple periods of disability.

The City argued that Grievant’s OJI benefits continued to run from October 8, 2014, the date of his injury, and ended on April 8, 2015, six months later. In the view of the Guild, the City’s argument directly conflicts with Article 7.3.3 and 7.3.5 that explicitly provides that no personal leave can be used during the six-month period. Deering testified that he used personal leave after he returned to full duty in October 2014, during the alleged “six (6) month” period. Article 7.3.5 provides the benefit “will conclude when any of the following conditions occur: The individual is cleared for return to full duty.” The Guild submits that under this clear and express language, Grievant’s OJI benefits should have ended when he returned to full duty on October 17, 2014. If the City’s interpretation were adopted, Article 7.3.3 and 7.3.5, and the express intent of Article 7.3, to make an injured officer financially whole, would be rendered meaningless. In sum, Deering used personal leave, therefore, his benefit could not have been “continuously running.” The chain of events that actually occurred does not support the City’s blatantly flawed narrative.

If the Arbitrator concludes the disputed language is ambiguous, he should use varying methods of interpretation in reaching a reasonable “just interpretation of the contract language.” The principal purpose of Article 7.3 should be given great weight. The parties agreed that the essential goal of Article 7.3 was to make an injured officer financially whole during recovery. The City’s interpretation is directly contradictory to the express purpose of Article 7.3. Officer Deering did not receive the full six-month OJI benefit to supplement his time loss benefits and he was only given two weeks, which forced him to burn nearly all of his sick leave recovering from the shoulder surgery. This result does not make Grievant “whole.”

The Guild’s interpretation should be adopted because it gives effect to all clauses and words within Article 7.3. The City’s interpretation would render the express intent of Article 7.3 meaningless because Grievant would effectively be receiving only a couple weeks of the negotiated six-month allowable benefit.

Moreover, the City’s interpretation of Article 7.3 produces harsh, absurd, or nonsensical results. The City’s argument that the OJI benefit continued to run from the date of Deering’s injury is nonsensical because he was not actually utilizing the benefit. He returned to work and had no need for the benefit. Under the City’s rationale, an officer who suffers an injury, returns to work, and then later suffers complications or needs surgery is penalized for continuing to work by being denied the OJI benefit. Forcing Deering to burn all of his sick leave when he only used about two weeks of a six-month benefit is overly harsh and punitive when Grievant was injured on duty while serving and protecting the community.

The Arbitrator should apply the standard of construction, which holds that reason, and equity considerations are paramount in interpreting contract language. The Guild's interpretation of Article 7.3 provides the most equitable and reasonable result. The City has adopted an interpretation that effectively provides only a couple weeks of a six-month benefit. The City's interpretation is neither equitable nor just, and is contrary to how the Guild intended this language to function.

The City's action with regard to Vanera established a sound past practice that should be followed by the Arbitrator. The City's action with regard to Vanera provides pertinent guidance and should be given great weight in the interpretation of Article 7.3.

The Guild concludes that the grievance should be sustained. The Guild requests that the City be ordered to pay Officer Deering the amount he would have received from the City had he received the full six-month OJI benefit or, alternatively, restore the sick leave that was deducted from his sick leave bank during the six months he was out on leave for shoulder surgery and subsequent recovery.

B. The City

The City takes the position that the plain language of the CBA mandates denial of the grievance. Under black letter Washington law, "clear and unambiguous contracts are enforced as written." Citations omitted. Where contract language is unambiguous, the subjective intentions of the parties are irrelevant to the determination of the parties' intentions.

The plain language of Article 7.3 expressly states the OJI benefit begins on the first use of time loss after a work-related injury. Article 7.3 expressly states,

repeatedly throughout the provision, the OJI benefit continues for six consecutive months after the first use of time loss. In the present case, Grievant's OJI benefit expired on April 8, 2015.

Regarding the compassionate exception for Officer Vanera that allowed him to receive the OJI benefit after the six consecutive month period expired; this was done because Vanera was given misinformation by the City about the OJI benefit. The City expressly wrote to the Guild that the Vanera situation was a one-time exception.

The City next argues that Grievant received the OJI benefit that he was contractually entitled to. His first time loss for his on-duty shoulder injury occurred on October 8, 2014. Officer Deering received the OJI benefit for time loss related to that on-duty shoulder injury for four days following the October 8, 2014 injury. The City recognizes that the circumstances in the present case meant that a good employee did not receive very much in terms of an OJI benefit. However, the plain language of the contract cannot be ignored or re-written simply because a good employee feels like he was treated unfairly. In sum, the City submits officers can return to full duty, use personal leave/take vacations as they wish, but then still use the OJI benefit if the time loss was related to an earlier injury and was within six consecutive months after the time loss.

By waiving the Article 7.3.5(a) limitation in the Vanera case, the City had no intention of creating a new six-month OJI benefit period every time an injured officer returned to work without restriction, is not supported by either the contract language or the factual circumstances.

The Arbitrator should reject the Guild's attempt to transform this limited waiver of Article 7.3.5(a) into a wholesale revision of the express time limits on the OJI benefit. The City requests that the Guild's grievance should be denied.

VI. DISCUSSION

The Arbitrator finds the Guild proved by a preponderance of the evidence the City violated Article 7.3 of the Collective Bargaining Agreement with regard to Clay Deering's work-related injury. Accordingly, the grievance will be sustained and a remedy ordered. The reasoning of the Arbitrator is set forth in the discussion that follows.

The starting point for review of this case is Article 7.3.5. The parties, in clear and unambiguous language, stated the agreed-on purpose of 7.3.5 is as follows:

This benefit will conclude when any of the following conditions occur:

- a. The individual is cleared for return to full duty;
- b. The individual remains on disability and completes their six (6) consecutive calendar months; or,
- c. During the six (6) consecutive months, the Department of L & I declares the individual to be 'fixed and stable' with a disability that permanently prevents a return to full duty.

The intent of this agreement is to make an injured employee financially 'whole' for the duration of the recovery. The total compensation received by an injured employee will not exceed their regular duty compensation.

...

Emphasis added.

The examination and interpretation of Article 7.3.5 must be made in the context of the above-quoted language that plainly states the purpose of Article 7.3 "is to

make an injured employee financially 'whole' for the duration of the recovery.”
Emphasis in original.

There is no disagreement that “whole” means providing an OJI benefit to an employee who is receiving time loss benefits from Labor & Industries to enable the disabled employee to be made financially whole because of a work-related injury. There is no dispute that the maximum period of the benefit payment is capped at six months.

The crux of this case is to determine the intent of the parties when they used the word “consecutive” in Article 7.3. I hold the phrase “all LEOFF II personnel will receive up to six (6) consecutive calendar months of full pay and benefits for L & I qualified duty-related disabilities” refers to the maximum allowable OJI payments for a given injury. Contrary to the City’s claim that the OJI benefit begins after the first time loss and expires six consecutive months later, I find the reference to consecutive refers to the maximum amount of the actual payment of the OJI benefit, not the period in which the payment is allowed. The City ignores the fact Grievant was not receiving OJI payments between October 17, 2014 and March 30, 2015. He received OJI payments after the surgery between March 31 and April 8, 2015. The six-month anniversary of his first use of the OJI benefit occurred on April 8, 2015. At no point did he come close to receiving the maximum compensation for an injured employee that exceeded his regular duty compensation.

The second sentence of Article 7.3 states: “The maximum period of this benefit will not exceed six (6) consecutive calendar months.” Once again, the reference is to the maximum period of the OJI benefit. Since Grievant was back working for the

period of October 17, 2014 until March 30, 2015, it follows that Grievant was not receiving OJI benefits. Grievant did not receive OJI payments that exceeded the six-month maximum for the disability benefits.

Article 7.3.2 and Article 7.3.3 follow a similar pattern that prohibits the use of personal sick leave and personal leave during a period of disability. Grievant was not disabled or paid OJI benefits between October 17, 2014 and March 30, 2015. As such, he could use personal sick leave and personal leave during this period because he was not receiving the OJI benefit.

Article 7.3.5(b) provides: "The individual remains on disability and completes their six (6) consecutive calendar months." Grievant was cleared to return to full duty on October 17, 2014. His OJI payments were properly stopped in accordance with Article 7.3.5. As of October 17, 2014, Grievant had not received full pay and benefits of six (6) months of OJI that would provide him with full pay from OJI benefits and the L & I duty-related disability. Grievant did not remain on disability after October 17, 2014, so his OJI benefit ceased. There is no dispute Grievant was not paid six consecutive months of benefits because he no longer qualified for payments.

To adopt the City's interpretation, the clock continued to run even after Grievant had returned to work and no longer qualified to receive OJI benefits, converted the six consecutive months of OJI payments into a forfeiture provision. I must reject the City's interpretation that the agreed-on language justifies forfeiture of almost five and one-half months of the negotiated OJI benefit.

The Arbitrator gave no weight to the Vanera "compassionate exception." Carlson made clear in her letter to the Guild President the payment of OJI benefits to

Vanera was a “one-time exception.” City Ex. 3. Further, the City took responsibility for providing Vanera with misinformation about the OJI benefit under Article 7.3.

The record shows Grievant received four days of Labor & Industries time loss benefits and supplemental payments under Article 7.3 in October that made him “whole” while he was off work due to the shoulder injury. Grievant also received the OJI benefit from March 31, 2015 to April 8, 2015. Because of the City’s decision to keep the six-month clock running, despite the fact Deering no longer qualified to receive the OJI payments, after April 8, 2015, the City forced Grievant to use his accumulated sick leave benefits to make himself whole after March 8, 2015.

I find the City’s proposed interpretation would require this Arbitrator to engage in a legal fiction that Grievant actually received the full pay and benefits under Article 7.3 and from L & I that kept the six consecutive month clock running. The undisputed fact is Grievant was not receiving full pay and benefits from L & I for a qualified duty-related injury to his shoulder, because he had returned to work, and was no longer eligible for L & I time loss payments.

The City’s interpretation that the six consecutive months provision established a cap on the OJI benefits is misplaced. I am not persuaded by the City’s claim that the word “consecutive” should be allowed to override the fact Article 7.3 contemplated the employee would be made “whole” in the form of “full pay and benefits for L & I qualified duty-related disabilities.” Arbitral authority teaches that an interpretation that would render a provision meaningless should be avoided.

The City’s interpretation and application of Article 7.3 runs counter to the stated “intent of this agreement is to make an injured employee financially ‘whole’ for

the duration of the recovery.” Emphasis added. At no point did Deering receive OJI compensation that exceeded his regular duty compensation. The bottom line is Grievant used four days of OJI benefits in October 2014, and after his surgery he received OJI benefits for the period between March 31 2015 and April 8, 2015. The payment of the OJI benefit for this approximate two weeks of time fell far short of the compliance with the mandate of the CBA to provide OJI “benefits for L & I qualified duty-related disabilities” and “to make an injured employee financially ‘whole’ for the duration of the recovery.”

In sum, adoption of the City’s interpretation that would keep the clock running even though he was drawing no benefit regarding the shoulder injury, violated the stated intent of Article 7.3. Specifically, the City’s interpretation would deprive Grievant Deering of the opportunity to be made financially whole during the duration of his recovery from the shoulder injury.

Turning to the question of the appropriate remedy, I hold an order to make Grievant financially whole under Article 7.3 is justified. In my judgment, in order to fulfill the express “intent of this agreement is to make an injured employee financially ‘whole’ for the duration of the recovery” the City shall compensate Deering in the amount he would have received from the City while he remained eligible for the time loss payments from L & I.

AWARD

Having reviewed all of the evidence and argument in this case, I hold the Guild proved the City violated Article 7.3 of the Collective Bargaining Agreement by the manner management responded to Deering's claim for OJI benefits for a work-related injury. The City is ordered to make Grievant Deering whole for all OJI benefits he would have received from the City for the duration of his recovery from the shoulder surgery that qualified him for L & I time loss payments up to the maximum payments for a six-month period.

Your Arbitrator retains jurisdiction for a period of sixty (60) calendar days from the date of this Award to assist the parties in resolving any disputes arising out of the remedy so ordered. The fees and expenses of the Arbitrator shall be borne equally by the parties.

Respectfully submitted,



Gary L. Axon
Arbitrator
Dated: July 8, 2016