

**SUSAN GRODY RUBEN, Esq.
Labor Arbitrator and Mediator
30799 Pinetree Road, No. 226
Cleveland, OH 44124**

**IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES**

In the Matter of

**FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC., Unit 2**

and

**STATE OF OHIO
DEPARTMENT OF NATURAL
RESOURCES**

**OCB CASE NO. 25-12-20100824-0007-05-02
Grievant: Officer Thomas Lorenz**

**ARBITRATOR'S
OPINION AND AWARD**

This Arbitration arises pursuant to the collective bargaining agreements (“the Agreement”) between the Parties, the FRATERNAL ORDER OF POLICE, OHIO LABOR COUNCIL, INC. (“the Union”) and the STATE OF OHIO (“the State”), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. The Parties agreed the grievance is properly before the Arbitrator for a final and binding pursuant to the Agreement.

Hearing took place March 3, 2011 in Columbus, Ohio. The Parties were given full opportunity for the presentation of witnesses, evidence, and argument.

APPEARANCES:

On behalf of the Union:

KAY E. CREMEANS, ESQ., General Counsel, FOP.

On behalf of the State:

CARRIE SPRADLIN, ODNR Labor Relations Officer 3.

ISSUE

Did the State violate Article 37.01 of the Agreement when it denied the Grievant's request to receive service credit for time spent in the Civilian Conservation Corps? If so, what is the appropriate remedy?

**RELEVANT PORTION OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT
2009-2012**

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ARTICLE 37 – VACATION ALLOWANCE

37.01 Rate of Accrual

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Effective July 1, 2010 employees who provide valid documentation to their agency's Human Resources department shall receive credit for prior service with the State, the Ohio National Guard, or any political subdivision of the State for purposes of computing vacation leave in accordance with ORC 9.44. This new rate shall take effect starting the pay period immediately following the pay period that includes the date that the Department of Administrative Services processes and approves their request. Time spent concurrently with the Ohio National Guard and a state agency or political subdivision shall not count double. An employee who has retired in accordance with the provisions of any retirement plan offered by the State and who is hired by the State on or after March 1, 1994, shall not have his/her prior service with the State or any political subdivision of the State counted for the purpose of computing vacation leave.

...

. . .

THE GRIEVANCE

The grievance states in pertinent part:

In compliance to and in agreement with the current Bargaining Unit 2 contract, Article 37.01 Vacation Allowance Rate of Accrual, I applied for prior service credit with the State and a political subdivision of the [S]tate for the purpose of computing vacation leave. I was granted my prior service with a political subdivision of the [S]tate, The Toledo Metropolitan Park District. I was however denied credit for my prior service with the State for my time employed with the Ohio Department of Natural Resources, Division of Civilian Conservation Corps. I was employed with them from 7/27/2000 to 9/22/2001. During my employment with the ODNR CCC I was issued ODNR uniforms, instructed and obligated to comply with all ODNR and State policies and work rules, operated State owned and labeled equipment and vehicles, and was paid on ODNR pay stubs and checks issued by the Auditor of the State.

I request that all prior service time be credited to my total service time for the purpose of computing vacation and that it be back dated and credited to include the pay period that included July 1st 2010.

PARTIES' POSITIONS

Union's Position

The State violated Article 37.01 when it denied the Grievant's request for service credit for time spent in the Civilian Conservation Corps "CCC." The Grievant's 14 months spent in CCC count as employment for the reasons stated in the grievance – i.e., the Grievant was issued Ohio Department of National Resources ("ODNR") uniforms, instructed and obligated to comply with all ODNR and State policies and work rules, operated State owned and labeled equipment and vehicles, and was paid on ODNR pay stubs and checks issued by the Auditor of the State.

State's Position

CCC was a federal training and education program developed to give employment to young men and women nationwide. The Grievant's request for

vacation accrual credit for his time spent in CCC was denied pursuant to ORC § 1553.05(D) which states:

Participants shall not be considered as state employees under Chapter 124 of the Revised Code and shall not be permitted to participate in any public employee retirement program while they are participants in the civilian conservation program. They shall be considered employees of the state for the purposes of section 9.83 and Chapters 4112 and 4123 of the Revised Code.

The three listed exceptions are liability insurance, civil rights, and workers' compensation. Vacation accrual is not a listed exception and therefore, not eligible for service credit.

The Parties did not intend for their Agreement to supersede ORC §§ 9.44 nor 1553.05. Furthermore, the State is not compelled to consider an individual a "State employee" just because he receives a warrant from the "Auditor of the State." Rather, the Auditor of the State issues warrants to many different entities, some of which are not considered State employees.

Nor is the State compelled to consider an individual a "State employee" just because he is required to abide by ODNR rules and policies, wear ODNR identifying clothing, and/or operate ODNR equipment. Other entities, such as ODNR volunteers, are required to do the same and are not considered State employees.

Finally, the Grievant, while employed as a CCC member, was not considered a State employee pursuant to the ORC. Therefore, he is not entitled to prior service credit for the purpose of computing vacation accrual.

OPINION

Various factors must be weighed to determine whether the Grievant's CCC service qualifies as "prior service with the State" pursuant to Article 37.01 vacation accrual.

The Language of Article 37.01

The Article 37.01 language relevant to the grievance is:

[E]mployees...shall receive credit for prior service with the State...for purposes of computing vacation leave in accordance with ORC 9.44.

So the answer must lie in ORC § 9.44, yes?

ORC § 9.44

The ORC § 9.44 language relevant to the grievance is:

[A] person employed...by the state...earning vacation credits currently, is entitled to have the employee's prior service...counted as service with the state...for the purpose of computing the amount of the employee's vacation leave....

Not very helpful, is it?

The Parties' Intent

Nothing in the record is dispositive regarding whether the Parties intended to count CCC service for Article 37.01 vacation accrual purposes. Indeed, as best as can be discerned from the record, this specific issue was never discussed in bargaining negotiations between the Parties.

ORC § 1553.05(D)

The State primarily bases its denial of the grievance on § 1553.05(D) which provides:

Participants shall not be considered as state employees under Chapter 124 of the Revised Code and shall not be permitted to participate in any public employee retirement program while they are participants in the civilian conservation program. They shall be considered employees of the state for the purposes of section 9.83 and Chapters 4112 and 4123 of the Revised Code.¹

¹ Section 1553 – Civilian Conservation -- was repealed in 2003 when the CCC program in Ohio ended due to lack of continued federal funding. All of Section 1553 refers to CCC members as "participants," rather than employees.

(Emphasis added.) Chapter 124 is titled “Department of Administrative Services – Personnel.”² Section 9.83 addresses liability insurance, Chapter 4112 addresses equal employment opportunity, and Chapter 4123 addresses workers’ compensation.³

Employee Earnings History

The strongest piece of evidence in favor of the Grievant’s employee status while participating in CCC is a document titled “Employee Earnings History.” The first two entries are for the Grievant’s earnings in 2000 and 2001, when he was in the CCC. The later entries in the Grievant’s Employee Earnings History cover his years of service when he undisputedly has been a State employee. Other than a payroll number of “725-750” for the Grievant’s CCC service, and a payroll number of “725-730” for the later period of time when the Grievant undisputedly has been a state employee, the document makes no distinction between his CCC service and his later employment.

Conclusion

In weighing the Grievant’s Employee Earnings History – a bookkeeping document, against ORC § 1553.05(D) – a statute, the Arbitrator finds the statute, even repealed, controls. While neither the Agreement nor the rest of the record

² ORC § 124.01 provides definitions of “State service,” “Service of the State,” and “Employee”:

“State service” includes all offices and positions in the service of the state....

ORC § 124.01(B).

“Service of the state”...includes all offices and positions of trust or employment with the government of the state....

ORC § 124.01(K).

“Employee” means any person holding a position subject to appointment, removal, promotion, or reduction by an appointing officer....

ORC § 124.01(F).

³ The Arbitrator does find it curious, however, how the CCC members could be considered employees for liability, EEO, and workers’ compensation, but not State employees, merely by the

illuminate the Parties' intent regarding the Grievant's employment status while in the CCC, Section 1553.05(D) shows a clear intent on the part of the Legislature to consider CCC members something other than State employees.⁴ It is a well-settled proposition in Ohio arbitration that when the contract is silent and there is a relevant statute, the statute controls.

AWARD

For the reasons set out above, the grievance is denied.

Dated: May 7, 2011

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator

Legislature saying so.

⁴ The various indicia of employment while the Grievant was in the CCC -- ODNR uniforms, a requirement to comply with all ODNR and State policies and work rules, and operation of State owned and labeled equipment and vehicles -- while significant, cannot overcome the strength of a statute.