

86-33

ARBITRATION

STATE OF OHIO

and

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

DECTIONS AND AWARD

This case is brought by fourteen State Troopers who contend that the State, of Ohio has deprived them of their seniority rights in. violation of the Collective Bargaining Agreement' (hereafter "Agreement") enacted on April 28, 1986 between the State and the Fraternal Order of Police, Ohio Labor Council, Inc. (hereafter "Labor Council").

The facts are undisputed. Grievants worked for the State Highway Patrol for varying numbers of years, left their employment for a year or more, and then returned, all before the enactment of the Agreement. Prior to their return, they were assured that their periods of previous employment with the Highway Patrol would be credited for purposes of determining seniority; and upon their return, that was in fact done. But after April 28, 1986 the State

took the position that the newly enacted Agreement precluded the giving of credit for employment prior to a break in service of more than one year, and reduced Grievants' seniority status accordingly. For example, Grievant Thomas Keast was initially hired in 1965, left in 1969 for other employment, and returned in 1974. During the twelve years since his return, he has been credited with the four years' service prior to 1969 for purposes of determining seniority, and thus was the second trooper listed on the vacation list issued for his post on March 31, 1986, which was in order of seniority. However, on the seniority list issued shortly after enactment of the Agreement, he was the sixth trooper listed.

1. Arbitrability

At the hearing herein, the State took the position that the grievance was not arbitrable because Grievants were represented not by Labor Council, but by W. Sean Kelleher, an outside attorney. The facts underlying this situation are as follows.

Grievants filed this grievance as a class grievance directly into the third step of the grievance procedure,

pursuant to Section 20.04 of the Agreement.¹ When the grievance was denied, Labor Council appealed to the fourth step of the grievance procedure on behalf of Grievants.² When the appeal was denied, Labor Council notified the State in writing that it would be taking

¹Article 20.04 of the Agreement provides, in pertinent part, as follows:

20.04 Grievant

A grievance under this procedure may be brought by any bargaining unit member who believes himself/herself to be aggrieved by a specific violation of this Agreement.

Where a group of bargaining unit members desire to file a grievance involving an alleged violation which affects more than one member in the same way the grievance may be filed by the F.O.P. Ohio Labor Council. . . . Grievances so initiated shall be called class grievances. . . . Class grievances shall be initiated directly at the third step of the grievance procedure.

²Article 20.06 of the Agreement provides, in pertinent part, as follows:

If the grievant or the F.O.P. Ohio Labor Council is not satisfied with the written answer received at Step 3, within ten (10) days after receipt thereof, the F.O.P. Ohio Labor Council may appeal to the Director of the Office of Collective Bargaining. . . .

the case to arbitration.³ Prior to the hearing, when lists of prospective witnesses were exchanged,⁴ Attorney Kelleher advised the State that he had been retained by the Labor Council to represent Grievants at the hearing.

The Agreement clearly contemplates that after Step 3 of the grievance procedure, Labor Council rather than individual grievants will prosecute the case. Here, Labor Council fully prosecuted the case after Step 3 up to and including the arbitration hearing. As shown,

3 Article 20.06 of the Agreement provides, in pertinent part, as follows:

If- the F.O.P. Ohio Labor Council is not satisfied with the answer at Step Four . . . it may submit the grievance to arbitration under the provisions of Section 20.07 of this article, by written notice of its desire to do so. . .

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Article 20.06 of the Agreement provides, in pertinent part, as follows:

8. Discovery

Five (5) days prior to the start of an arbitration hearing under this article, the parties shall deliver the names of all witnesses to each other.

Apparently, there was a mutual waiver of the five day requirement, since neither party delivered the names of all its witnesses five days prior to the hearing.

it followed all of the procedural steps required by the Agreement to bring the case to arbitration. Then it retained counsel to present the case at the arbitration hearing.⁵ As far as the record shows, it has never in any way indicated that it was not a party to or bound by the arbitration proceedings. Under these circumstances, both the letter and the spirit of the Agreement have been completely fulfilled, and there is no bar to arbitrating the case.

2. Revocation of Seniority

The State takes the position that Article 36 of the Agreement precludes the giving of credit for employment prior to a break in service of more than a year when determining seniority. Article 36 provides, in pertinent part, as follows:

⁵Article 20.07 of the Agreement provides, in pertinent part, as follows:

20.07 Arbitration

4. The parties may be represented by their representatives or, legal counsel. . . .

ARTICLE 36 - SENIORITY

36.01 Definition

Seniority shall be defined as the total length of continuous service in a permanent full-time position or succession of positions with the Employer. 'A termination of employment for any reason lasting less than thirty-one (31) days shall not constitute a break in continuous service. Continuous service also will not be interrupted if the employee was on approved leave of absence or if the employee is reemployed within two (2) years from the date of a layoff.

36.03 Termination of Seniority

Seniority shall terminate when the employee:

- (1) Quits or resigns, and is separated from the Patrol for more than one (1) year;

As shown, Grievants were assured prior to their return to employment with the Highway Patrol, which in Trooper Keast's case was twelve years ago, that their previous service would be counted when determining seniority status. And that practice was followed as to Grievants until the Agreement went into effect. The State argues that this practice must now be reversed, and that Grievants must be stripped of the seniority, and the benefits which flow therefrom, which they have enjoyed since their return to employment.

The Supreme Court has made clear in numerous instances the importance of seniority to an employee's working life, and has recognized that it is a benefit, if not a right, which cannot lightly be taken away. As it noted in California Brewers Association v. Bryant, 444 U.S.598, 605-06 (1980);

In the area of labor relations, "seniority" is a term that connotes length of employment. A "seniority system" is a scheme that, alone or in tandem with non-"seniority" criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase. Unlike other methods of allocating employment benefits and opportunities, such as subjective evaluations or educational requirements, -the principal feature of any and every "seniority system" is that preferential treatment is dispensed on the basis of some measure of time served in employment.

In Wygant v. Jackson Board of Education, 106 S. Ct. 1842, 1851 (1986), the Court held that the Jackson Board of Education could not use layoffs as the means to accomplish its legitimate purpose of remedying prior discrimination against minorities in hiring teachers, noting that

Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority. "At that point, the rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker owns,' worth even more than the current equity in his home."

And **see**, Teamsters v. U.S., 431 U.S. 324 (1977). Thus, a determination that Grievants' seniority may be reduced or eliminated should not be reached absent compelling evidence that the parties so intended. ⁶

There is no such evidence here. Indeed, what evidence there **is**, namely some notes from the bargaining sessions leading to the enactment of the Agreement, indicate that the matter was not discussed at all; the provision was enacted essentially as proposed, with minor changes not relevant here.

The contract language itself is prospective - i.e., "Seniority 'shall be defined. . . and "Seniority shall terminate . . . " The "normal expectation" is that contract benefits and liabilities will be prospective in their application." Timken-Detroit Axle Co., 21 LA 197, 198' (R. Smith, 1953). In other areas of the

⁶ Seniority is relevant under this Agreement in determining order of layoffs, shift assignments, and transfer rights, inter alia. In addition, Grievants testified that seniority is relevant in determining vacation schedules, officer-in-charge assignments, and car assignments, and that it affects the respect received from one's colleagues.

Agreement, the parties indicated their intent that benefits and rights previously in existence should not be disturbed by the Agreement. For instance, Article 2, while stating that the Agreement is a "final and complete agreement of all negotiated items. . .", contains the following caveat:

Fringe benefits and other rights granted._
the Ohio Revised Code which were in effect
on the effective date of this Agreement and
which are not specifically provided for or
abridged by this Agreement will continue
in effect under conditions upon which they
had previously been granted throughout the
life of this-Agreement unless altered by
mutual consent of the Employer and the Labor
Council.

And Articles 31 (Residency) and 43 (Vacation Allowance) make clear that they are prospective in application only. Thus, to find that the State may reduce or take away Grievants' seniority under these circumstances would be to contravene the parties' intent as evidenced elsewhere in the Agreement.

Moreover, such an interpretation would be contrary to State policy as evidenced in other areas.⁷

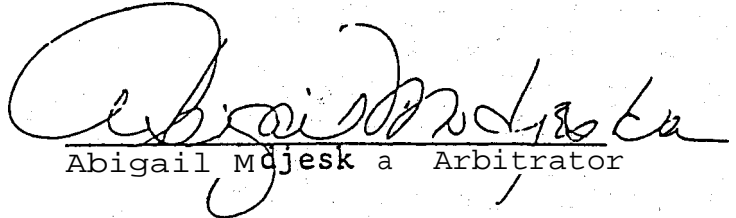
For instance, the Ohio Public Employee Retirement System, contained in Chapter 145, Sections 1-21 of the Ohio Administrative Code, clearly contemplates that credit will be given for all periods of past service.

And finally, to find that the State may retrospectively deprive employees of previously enjoyed benefits would raise serious questions of constitutionality.⁸

3. Award

For all of the foregoing reasons, the grievance is upheld. The State is ordered to restore to Grievants forthwith the seniority status and benefits which they enjoyed prior to the enactment of the Agreement, and to make them whole for any losses suffered as a result of the deprivation of such seniority status and benefits.

Dec 2, 1986
Dated


Abigail McJesik a Arbitrator

COUNTY. OF FRANKLIN

STATE OF OHIO

Compare, 'Babcock-Wilcox Co.,' 26 LA 502 (Donahue, 1956), where the Arbitrator held that a seniority provision similar to that. involved here **would** have to be applied retrospectively in order to avoid elimination of. "rights which . . . employees may have gained through long and meritorious service" prior to enactment of the parties' collective bargaining agreement.