

#168

IN THE MATTER OF THE
ARBITRATION BETWEEN

Ohio Department of
Natural Resources

Grievance No. 87-2013

and

Hearing Date:
January 29, 1988

Fraternal Order of Police
of Ohio, Inc.
Ohio Labor Council Inc. Unit 2

Brief Date:
February 22, 1988

For DNR: Jon E. Weiser, Labor Relations Administrator

For FOP: Paul L. Cox, Chief Counsel

Present: Jon E. Weiser (Advocate DNR), Bill Demidovich (Assistant Advocate DNR), Marlaina Eblin (OCB Labor Relations Specialist), Linda Trent (ODNR Budget Analyst: witness), Anton Naess (Assistant Chief, Negotiations Services, OCB: witness), Paul Breese (Chief of Negotiations Services, OCB: witness), Paul E. Cox (Advocate FOP), Cathy B. Perry (Legal Assistant, FOP), James E. Schneider (Grievant), David Frank (Grievant).

Preliminary Matters:

Both parties agreed that the Arbitrator could tape the proceedings to refresh her recollection, solely on the condition that the tapes were destroyed when the award is made. Both parties agreed that the Arbitrator could submit the Award for publication. The parties stipulated that the matter was properly

before the Arbitrator. No witnesses were sequestered. All witnesses were sworn.

Issue:

Did the Employer violate Sections 55.06, 55.07, and 55.11 on July 1, 1987 with respect to the classifications specified in § 55.06 because when these persons were assigned to new pay ranges not all of those new pay ranges gave the employee an increase of four (4%) percent?

Relevant Contract Sections

ARTICLE 55 - WAGES

§ 55.01

Employees in the bargaining unit shall be paid in accordance with the following pay schedule, effective with the pay period which includes June 1, 1986.
(emphasis added)

55.01 Pay Schedule (5.00% Increase)
(Table Omitted)

§ 55.02

Employees in the bargaining unit shall be paid in accordance with the following pay schedule, effective with the pay period which includes January 1, 1987.
(emphasis added)

(Table Omitted)

§ 55.03

Employees in the bargaining unit shall be paid in accordance with the following pay schedule, effective with the pay period which includes July 1, 1987.
(emphasis added)

(Table Omitted)

§ 55.04

Employees in the bargaining unit shall be paid in accordance with the following pay schedule, effective with the pay period which includes July 1, 1988. (emphasis added)

(Table Omitted)

§ 55.05 - Initial Step Assignment for Pay Increase

Employees at Step 1 of a pay range in Schedule B shall be assigned to Step 1 of their pay range in Section 55.01. Employees at Step 2 and Step 3 of pay ranges in Schedule B shall be assigned to Step 2 of the new pay range. Employees at Steps 4, 5, 6, 7 and 8 of pay ranges in Schedule B shall be assigned to Steps 3, 4, 5, 6 and 7 respectively of the new pay ranges. Employees in Schedule A shall be assigned to the same step in the new pay range.

Employees who are at Step 2 of pay range in Schedule B and who are assigned to Step 2 in Section 55.01 shall have their step date changed to the effective date of this Article and shall not advance to Step 3 until twelve (12) months from that date. Movement from one step to another after probation shall occur after one (1) year of service following the completion of probation in the classification if performance has been satisfactory. (emphasis added)

Class #	Pay Range Assignments	
	Pay Range	Classification Title
22251	10	Wildlife Education Officer
22291	8	Game Protector 1
22292	9	Game Protector 2
22294	10	Wildlife Investigator
22521	7	Park Ranger
22522	8	Park Ranger Specialist
22821	5	Ranger 1
22822	6	Ranger 2
23511	9	Liquor Control Investigator 1
23512	10	Liquor Control Investigator 2
26611	7	Police Officer 1
26612	8	Police Officer 2
26911	7	Watercraft Officer
26912	8	Watercraft Officer Specialist
26913	10	Watercraft Asst. District Supervisor

§ 55.06 ODNR Pay Range Reassignment

Effective the 1st pay period occurring after July 1, 1987 the following ODNR bargaining unit classifications shall be assigned to new pay ranges:

22521	Park Ranger	08
22522	Park Ranger Specialist	09
26911	Watercraft Officer	08
26912	Watercraft Officer Specialist	09
22821	Ranger 1	07
22822	Ranger 2	08

All employees affected by this pay range reassignment shall be placed in the appropriate step within the new pay range guaranteeing a pay increase. (emphasis added)

§ 55.07 Promotions

Employees who are promoted within the unit shall be placed at a step to guarantee them at least an increase of four (4%) percent.

§ 55.08 Probationary Step Movement

An employee shall receive a step increase upon satisfactory completion of the probationary period.

§ 55.09 Job Audits and Appeal

The employee may request the Personnel Division of the Department of Administrative Services to conduct a job audit to determine if an employee is properly classified. After the audit is conducted, the employee will be notified of the results in writing. Should the employee or the department wish to appeal they must file a written notification to the Office of Collective Bargaining within fourteen (14) days after notification from the Department of Administrative Services. The Labor Council and the Employer shall select a hearing officer to conduct a hearing in the same manner as the expedited arbitration procedure outlined in Article 20. The hearing officer's decision shall be final.

§ 55.10 Classification Changes

The Employer through the Office of Collective Bargaining may create classifications, change the pay range of classifications, authorize advance step hiring if needed for recruitment problems or other legitimate reasons, and issue specifications for each classification as needed. If any pay range is decreased, then the Office of Collective Bargaining will negotiate the change with the Ohio Labor Council, Inc.

The Office of Collective Bargaining shall notify the Labor Council at least twenty (20) days in advance of any of the aforementioned actions.

§ 55.11 Pay Range Reassignments

Employees whose classifications receive a pay range reassignment shall have their salary adjusted in accordance with Section 55.07 of this Article.

§ 55.12 Professional Certification

Bargaining unit members in the Department of Mental Retardation and Developmental Disabilities and the Department of Mental Health who have successfully completed basic police training and maintain certification in accordance with the rules of the OPOTC shall receive a pay supplement of two and one-half (2.5%) percent based upon the employee's base rate of pay effective the 1st pay period occurring after July 1, 1987. An additional adjustment of one and one-half (1.5%) percent based upon the employee's base rate of pay shall be effective the 1st pay period occurring after July 1, 1988.

In order to receive the professional certification pay supplement a member of the bargaining unit must have successfully completed OPOTC Basic Police Training, be commissioned by the employing agency in accordance with the Agency's procedures and successfully complete his/her probationary period.

If during the course of this Agreement, Police Officers 1 and 2 in the above departments receive an upgrade pay range adjustment, the provisions of this Article will no longer be applicable. (emphasis added)

Facts:

The parties agree that effective July 1, 1987, ODNR reassigned persons in the job classifications enumerated in § 55.06 to the pay ranges specified in § 55.06. In all cases, the reassignment effectuated a pay increase of some amount. The Employer placed each employee within their new range in a step

which gave a pay increase. Some of these pay increases were less than four (4%) percent. For example, a Park Ranger going to Pay Range 08 from Pay Range 07 (Step 06) moved to Step 05 in Pay Range 08. If moved to Step 04 in Range 08, this employee would have received no raise. By being moved to step 05 (\$10.08/hr), this employee received a .37/hour raise, or 3.8%. To give a four (4%) percent raise, this employee would have to have been moved to Step 06 of Pay Range 08, i.e., \$10.50/hr; then this employee would have received a .79/hr raise which in effect would have been an 8.1% raise. To raise the employee to a flat 4% increase would have required a pay of \$10.10/hr, for which no step existed. The parties jointly agreed that raises must be within established steps.

The Union rested its case based on its opening argument which maintained the the contract language was clear and unambiguous on its face. According to the Union, Section 55.11 required that \$ 55.07 be read back into \$ 55.06 and mandated that any movement required by \$ 55.06 create a minimum raise of four (4%) percent.

Although the Union offered no formal witnesses, the Union advocate during his cross-examination of Employer witnesses did offer quasi-testimony on his actions and intentions during the negotiations. The Union advocate was also a member of the negotiating team. The Arbitrator cannot and will not give equal weight to such information as she would give to the sworn, formal testimony of Employer witnesses. However, she will regard the

Union advocate's remarks as those of an officer of the court and give them weight where relevant to achieve fairness, the ultimate goal in all arbitrations.

The Employer maintained that the contract is clear and unambiguous on its face when all sections of Article 55 are read as a whole and when generally accepted principles of contract interpretation are applied. (See Union's position below.) However in the alternative, if the Arbitrator did not find the language clear and unambiguous on its face, the Union offered the testimony of Paul Breese, the OCB Chief of Negotiations Services, who was directly involved in the negotiation of the contract sections at issue. Mr. Breese testified that the intention of the Employer was to obtain pay parity within certain job classifications through § 55.06 and that the intention was to guarantee a "pay increase" but not to guarantee a 4% pay increase. In support of this position, the Employer offered Employer Exhibit #1 which was the Employer's offer during negotiations on Article 57 (reclassified 55). Page 6 of that exhibit mirrors the exact language of § 55.06. Page 7 of that exhibit "explains" page 6. The explanation is consistent with the Employer's application of § 55.06. Breese stated that the "offer with explanation" was in the Union's hands approximately 4 days before it was accepted. Under cross-examination, Mr. Breese agreed with Mr. Cox that he had never explained orally that the "Example" on page 7 did not give four (4%) across the board for persons affected by § 55.06. Mr. Breese said that no one on the Union team had inquired about

the "example". Mr. Breese also relied on Management Exhibit #2, which were notes of the negotiation taken by the Employer. On page 1, Weiser offered Section "G" (current 55.06) "This would provide an entry level position and career latter (sic) to range 29". On page 2 under a section delineated "Cox" the union offer is stated (by the Employer's notes) as follows:

Wages

Unit 1 - different wage scale July 1987 and 1988

Unit 1 language

Job audits, appeals, promotions, probationary step movement, classification change, etc, are reasonably necessary in a total wage package so we would want to include this.

Mr. Breese said that the Union was asking that Unit #1 language (now \$\$ 55.07-55.11) be added to "in toto" to the wage provisions provided to Unit #2 which were different than the wage provisions of Unit #1. Mr. Breese testified that the purpose of \$ 55.06 was to achieve wage parity for those classifications.

The Arbitrator excluded testimony on the alleged fiscal impact of the Union's interpretation of \$ 55.06 as irrelevant and prejudicial. Mr. Breese stated that at the time of the negotiations he and DNR were aware of the cost of a flat increase of 4% applied to \$ 55.06 and never discussed that issue with the Union. The Union offered the testimony of Linda Trent, OBM Budget Analyst. On objection by the Union, the Arbitrator excluded as irrelevant and prejudicial her testimony as to the future fiscal impact on DNR of the Union's interpretation of \$ 55.06. The Arbitrator, therefore, excluded from evidentiary consideration

Employer Exhibit #4D, dated 8-17-86 (after the effect of the Contract). The Arbitrator allowed testimony by Ms. Trent on information she provided to the OCB negotiators on the ODNR offer during negotiations. Ms. Trent was not present during negotiations. Her testimony went solely to information provided. Management Exhibit 4B is undated and is, therefore, also excluded from evidence. Management Exhibit #4A dated 4-10-86 contains the handwritten comments of Ms. Trent on p. 2. In her handwritten explanation, she showed that the total cost of \$ 55.06 without a flat four (4%) percent guarantee was less than with a 4% guarantee. Management Exhibit #4C prepared by Ms. Trent for the negotiators, according to her testimony, reflects the same information.

Mr. Weiser advocate for the Employer and a negotiator, took the stand and essentially corroborated Mr. Breese' recollections.

Union Position

The language of the Contract is clear and unambiguous on its face. Section 55.11 requires that \$ 55.07 be read to control \$ 55.06, thus mandating that changes in pay ranges carry step increase to guarantee a four (4%) percent pay range. In its brief, the Union says at p. 2, referring to the connection of \$ 55.11 to \$ 55.06, that "\$ 55.11 requires that employees receiving such (emphasis added) pay range reassignments receive salary adjustments pursuant to \$ 55.07. All testimony of

the Employer on intent is irrelevant and should be excluded. If that testimony is not excluded, the Union points out as important that the Employer "never brought to the attention Union" that Employer Exhibit #1 reflected only a 3.8% raise for some employees under \$ 55.06. Moreover, the Union said that since Exhibit #2 indicated an "impasse" was reached after the time referred to on page 8 of this opinion that no agreement had been reached as to the wage sections until subsequent to the meeting described in the notes (P. 3 Union brief). However, the Union re-iterated that "The FOP position rests solely on the contract language."

Employer Position

The Employer also maintains that the language of the contract is clear and unambiguous on its face but that if the Arbitrator finds that the language is capable of two reasonable interpretations that the unrebutted testimony of Mr. Breese was credible and must be accepted as definitive on the issue.

The Employer notes that all of Article 55 must be read as a whole. Some sections are clearly specific sections directed at a limited number of employees at different contract times while other sections are general and apply to all employees at all times when covered by the contract. The Employer maintains that specific words take contractual precedence over general words. In particular, the Employer points out that the word "this" is applied to pay range assignments in \$ 55.06, thus indicating that

§ 55.06 was designed for a specific pay change for specific employees. Secondly, the Employer notes that the second paragraph of § 55.06 guarantees only "a pay increase" not a four (4%) percent pay increase. This paragraph is inconsistent with the language of § 55.07 and since the language of § 55.06 is designed to cover a specific issue that specific language takes precedence over the general language of § 55.07. Lastly, the Employer notes that if the Union's interpretation prevails, the second paragraph of § 55.06 becomes meaningless.

With regard to intent, the Employer maintains that the intent of ODNR was clear and that the Union with full knowledge through Employer Exhibit #1 accepted the Employer's offer on § 55.06, word for word.

Discussion

The task of an Arbitrator is to apply the words of the Contract. If the words are clear and unambiguous on their face, the interpretation consistent with that clarity and unambiguity is accepted. How is the Arbitrator to decide "clarity and unambiguity". One method is to exclude all testimony of "meaning" and to apply solely dictionary meanings, meanings derived from the Arbitrator's personal experience, meanings derived from definitional sections, or lastly meanings derived from evidence of past practice. In this case, the older method could lead this Arbitrator to find Article 55 unclear. For example, the

Employer's position that the second paragraph of § 55.06 is inconsistent with § 55.07 is persuasive. Principles of Contract interpretation do give weight to the specific over the general and do preclude failure to give meaning to words (i.e., the second paragraph of § 55.06). Moreover, under principles of Contract interpretation one must examine the contract as a whole to give consistent harmonious interpretation where possible. On their face §§ 55.01, 55.02, 55.03, 55.04, 55.05, 55.06, and 55.12 are all specific sections apparently designed to give specific wage increase and assignments. Moreover, §§ 55.06 (at dispute here) and 55.12 are even more specific applying only to employees in specific departments covered by the Contract. Sections 55.07-55.11 are generic in nature and apply to all employees and to all times during which the contract is in force. This view lends great weight to the interpretation that §§ 55.06 is not superseded by § 55.07 applied through § 55.11. Moreover, the use of the word "this" pay range assignment also tends to set § 55.06 aside as an exclusive provision. Lastly, paragraph two of § 55.06 guarantees only a pay raise not a four (4%) percent pay raise.

As indicated, the older method of excluding evidence and relying solely on the Arbitrator's ability to use English and apply contract interpretation principles has been superseded by a more modern practice of hearing evidence to determine if the words are susceptible of two possible reasonable meanings. If the Arbitrator concludes that two reasonable meanings are possible, then she may weigh evidence of uncommon meanings and of intent.

The Union offered little evidence to help the Arbitrator in this task. Certainly evidence offered by the Employer of future fiscal impact was prejudicial and irrelevant. The parties must abide by the contract they made not the contract they wish for financial reasons they had made. Looking at the strict words of § 55.11, it requires ("shall") that employees whose classifications receive a pay range reassignment shall have their salary adjusted in accordance with § 55.07. Section 55.07 requires ("shall") that employees who are "promoted within the unit shall be placed at a step to guarantee them at least an increase of four (4%) percent." These general terms could at their broadest interpretations cover § 55.06 but the inconsistencies already pointed out lend much more weight to the interpretation of the employer.

Without looking at evidence of intent, the mechanical calculations of applying § 55.06 in the fashion argued by the Union also creates anomalies. Some employees using the Union's interpretation would receive pay increases double the 4% urged. Such a result creates another reason for finding the Employer's interpretation reasonable.

Lastly, the Union offered no evidence on intent... While the evidence on intent offered by the Employer is not definitive in the Arbitrator's eyes that evidence is consistent with the Arbitrator's reading of the sections in question and lends some minor weight to this decision.

The Arbitrator concludes that given the specific words of

Article 55 coupled with well recognized and accepted principles of contract interpretation that § 55.06, taken in context, is susceptible of only one reasonable meaning, that is, the interpretation of the Employer.

Award

Grievance denied.

March 18, 1988

Date

Rhonda R. Rivera
Arbitrator