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IN THE MATTER OF ARBITRATION

BETWEEN

OHIO STATE HIGHWAY PATROL

AND

THE FRATERNAL ORDER OF POLICE

OHIO LABOR COUNCIL, INC.

UNIT 1

LINDA K. WYMAN, GRIEVANT

THOMAS P. MICHAEL, ARBITRATOR
COLUMBUS, OHIO

This is a proceeding pursuant to Article 20, Sections 20.06 and 20.07, Grievance Procedure and Arbitration, of the Contract between the State of Ohio, Ohio State Highway Patrol (hereinafter "Employer") and The Fraternal Order of Police of Ohio, Ohio Labor Council, Inc., Unit 1, (hereinafter "Labor Council").

Pursuant to the Contract, the parties selected Thomas P. Michael as the Arbitrator. A formal hearing was held at the Office of Collective Bargaining on August 2, 1989. This matter has been submitted to the Arbitrator on the testimony and exhibits offered at the hearing. The parties agreed to the tape recording of the arbitration hearing as well as to publication of this Opinion and Award. The parties have also waived the thirty day time limit for rendering of this award.

APPEARANCES:

For the Employer:

DARRYL L. ANDERSON
Labor Relations
Ohio State Highway Patrol

For the Labor Council:

PAUL L. COX, ESQUIRE
Chief Labor Council
Fraternal Order of Police,
Ohio Labor Council Inc.

ISSUE

The parties have agreed to the following statement of the issues before the Arbitrator:

Is the grievance properly arbitrable?

If so, did the Employer properly credit the grievant for prior governmental service time for purposes of vacation accrual and longevity computation? If not, what shall the remedy be?

PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS

§4117.08 Subjects appropriate for collective bargaining.

(A) All matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified in this section.

(C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

CONTRACT PROVISIONS

ARTICLE 2 - EFFECT OF AGREEMENT - PAST PRACTICE

This Agreement is a final and complete agreement of all negotiated items that are in effect throughout the term of the Agreement. No verbal statements shall supersede any provisions of this Agreement.

Fringe benefits and other rights granted by 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.

ARTICLE 4 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:

(1) Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;

ARTICLE 20 - GRIEVANCE PROCEDURE

§20.06 Grievance Procedure

The following are the implementation steps and procedures for the handling of grievances:

Preliminary Step:

A member having a complaint shall first attempt to resolve it informally with his or her immediate supervisor at the time the incident giving rise to the grievance occurs. At this step, the grievant may have a Labor Council representative present to represent him/her if the grievant so desires. Within three (3) days from the conclusion of the meeting, the supervisor will advise the grievant of his/her decision and complete a standard form indicating that the preliminary step was conducted. If the member is not satisfied with the result of this informal meeting, he/she may pursue the formal steps which follow.

Step 1 - Post Commander or Equivalent Supervisor or Designee

A member who is not satisfied with the response of the supervisor in the preliminary step, may request a Step 1 hearing. A member having a grievance shall present it to his or her Post Commander or equivalent supervisor within fourteen (14) days of the date on which the grievant knew or reasonably should have had knowledge of the event giving rise to the grievance.

Grievances submitted beyond the fourteen (14) day time limit will not be honored. In addition, if the requirements of the preliminary step have not been attempted, the employer shall have no obligation to process the grievance. The

grievance at this step shall be submitted to the Post Commander or equivalent supervisor in writing using a form mutually agreed upon. The grievance forms may be obtained at each facility. On this form the grievant shall specify the article, section or combination thereof of the Agreement which he or she alleges has been violated, and specify the remedy sought. The Post Commander or equivalent supervisor shall indicate the date and time of his or her receipt of the form. Within five (5) days of the Post Commander's or equivalent supervisor's receipt of the written grievance, he or she shall schedule a meeting with the grievant to discuss the grievance. A Labor Council representative shall attend this meeting. He/she may represent the grievant if requested to do so by that person. The Post Commander or equivalent supervisor shall respond to this grievance by writing his/her answer on the grievance form and returning a copy to the grievant and a copy to the Fraternal Order of Police, Ohio Labor Council, Inc. within nine (9) days of the meeting required above.

ARTICLE 43 - VACATION ALLOWANCE

§43.01 Accrual Rate

Effective with the approval of this Agreement, only service with state agencies, i.e. agencies whose employees are paid by the Auditor of State, will be computed for purposes of determining the rate of accrual for new employees in the bargaining unit. Service time for vacation accrual for current employees will not be modified by the preceding sentence.

ARTICLE 62 - LONGEVITY PAY

Effective with the ratification of this agreement only service with state agencies, i.e., agencies whose employees are paid by the Auditor of State, will be counted for the purposes of computing longevity for new employees in the bargaining unit.

FACTUAL BACKGROUND

Linda K. Wyman, the Grievant, commenced her employment with the Ohio State Highway Patrol (Employer) on March 18, 1986. She

initially was employed as a dispatcher at District 10 but later transferred to the Elyria post where she presently serves in the same capacity.

Shortly after her initial date of employment the Grievant received a booklet from the Employer entitled "Working for Ohio" which outlined benefits available to employees of the State of Ohio. In particular she noted a section of that publication headed "Prior Service Credit". (Joint Exhibit 5). That section provides, in pertinent part, as follows:

If an employee was previously employed with any state, county, or city government agency, he or she may receive credit for prior service. Previous employment credit will count toward years of service, vacation, sick leave, longevity, and in most cases, retirement.

The Grievant had accumulated approximately eight years of prior service with Ohio local and county government.

Grievant alleges that she questioned the Employer's District 10 staff lieutenant, now Captain Lowell P. Hardesty, upon receipt of the above noted information regarding her eligibility for prior service credit. She claims that she was told by Captain Hardesty that the provisions of the Working for Ohio booklet regarding prior service credit would no longer be in effect since a collective bargaining agreement was about to be ratified. Captain Hardesty now does not recall whether or not such a conversation occurred between himself and the Grievant. It is important to note that the testimony establishes that any such conversation would have predated the April 28, 1986, execution of the Contract (Joint Exhibit 1).

Some time later, in October, 1987, the Grievant reviewed her personnel file, once again found the Working for Ohio booklet and questioned Sergeant N.F. Hack regarding her eligibility for her prior service credit. Upon Sergeant Hack's advice that she was eligible for such credit she subsequently submitted the required confirmatory paperwork to the Employer on February 19, 1988, some four months later. She began receiving credit for her prior service time commencing with the pay period starting February 28, 1988.

The Grievant testified she again spoke to Sergeant Hack upon receipt of a paycheck in March, 1988, which did not include a subsidy for additional vacation pay and longevity pay retroactive to her date of employment. However, the subject grievance was not filed until August 23, 1988 (Joint Exhibit 2). The grievance trail (Joint Exhibit 2) establishes that Grievant's contentions were considered on their merits by the Employer throughout the first three steps of the grievance procedure. The procedural issue of untimeliness of the Step 1 grievance was not raised by the Employer until Step 4 (Joint Exhibit 4). In light of the finding of this Arbitrator that the grievance was timely filed it is not necessary to consider the effect of the initial raising of this issue by the Employer at Step 4.

The grievance seeks retroactive award of longevity pay and vacation pay for the period between March 18, 1986, and February 28, 1988.

POSITION OF THE LABOR COUNCIL

The Employer does not dispute the assertion that Grievant was in fact entitled to longevity pay and vacation pay based upon her non-state government service prior to March 18, 1986. Similarly the Labor Council does not dispute the fact that Grievant did not file the documentation necessary to access those benefits until February, 1988. However, that delay in filing was the result of an affirmative misrepresentation by the Employer that those benefits would not be available under the impending Contract between the Employer and the Labor Council. The Grievant is not under a duty to continually make inquiry of her right to benefits in light of that misrepresentation.

With regard to the timeliness of the grievance at Step 1, the grievance was in fact filed within the time limits provided by the Contract since she did not receive a definitive ruling from the Employer that she would not receive the retroactive benefits requested until at least August 12, 1988. (Joint Exhibit 3).

The Employer misled the Grievant, thereby causing her to delay her application for benefits until February, 1988. Therefore she should be awarded retroactive longevity pay and vacation time due her from the time of her employment on March 18, 1986.

POSITION OF THE EMPLOYER

This grievance is not arbitrable. The event complained of by the Grievant occurred in early 1986, and the grievance herein was not filed until August, 1988. Further, Grievant was made aware

in March, 1988, upon receipt of her paycheck, that she was not to receive the retroactive benefits claimed by her. Nonetheless, no grievance was filed until August, 1988, long after the fourteen day filing period provided by the Contract.

With regard to the merit issue, which is not properly before the Arbitrator, the Contract is silent with regard to the effect of the procedures required by the Department of Administrative Services to claim fringe benefits. However \$43.01 of the Contract affirmatively states that "(s)ervice time for vacation accrual for current employees will not be modified..." by the terms of the Contract. A similar contractual provision (Article 62) exists with respect to the effect of prior non-state service on the computation of longevity pay. The Grievant has in fact been properly credited with her prior non-state employment in computing her entitlement to longevity pay and vacation pay as of the date of her submission of documentation, as required by directives of the Department of Administrative Services.

This grievance should be dismissed in its entirety both because it was not timely filed and because there is no substantive merit to the Grievant's claims.

OPINION

This Arbitrator is satisfied that the Labor Council has met its burden of proof that the grievance is properly arbitrable and that the Grievant is entitled to some relief. The Contract provides that a Step 1 grievance be presented to the Post Commander or equivalent supervisor within fourteen (14) days of

the date on which the Grievant knew or reasonably should have knowledge of the event giving rise to the grievance. (Contract, \$20.06). While the Grievant indeed knew in March, 1988, that she was not receiving credit for her prior non-state governmental service, it is clear that the Employer was reviewing the issue of her entitlement to those benefits and did not finally and definitively deny them until August 12, 1988 (Joint Exhibit 3). Therefore, in the view of this neutral, the Step 1 grievance was initiated well within the time period provided by the Contract.

The substantive issue herein is more troublesome. In effect the Grievant is requesting that the Employer be held liable for a precontractual misrepresentation to her which caused her to delay her application for the subject benefits. Further it is undisputed that the Grievant took approximately four months to compile and file with her Employer the necessary documentation of her past service. The facts of this case, including the short time period between the Grievant's date of hire and execution of the contract, justify the application of equitable principles to estop the Employer from relying on the Department of Administrative Services rule regarding date of implementation of prior service credits. It is found that but for the misinformation provided by the Employer, the Grievant would have provided the necessary documentation by early September, 1986. Therefore the award in this matter will reflect an implied finding that the Grievant effectively submitted such documentation as of that time.

AWARD

The grievance is granted in part. The Employer is ordered to award the Grievant unpaid retroactive longevity pay and vacation accrual benefits for the time period starting with the first full pay period commencing in September, 1986, until February 28, 1988.


Thomas P. Michael, Arbitrator

Rendered this Twenty-Second day of
September, 1989, at Columbus,
Franklin County, Ohio.

CERTIFICATE OF SERVICE

I hereby certify that the original has been mailed to Eugene Brundige, Deputy Director, Department of Administrative Services, Office of Collective Bargaining, 65 E. State Street, 16th Floor, Columbus 43215, with copies by regular, U.S. Mail service, postage prepaid, to Ohio State Highway Patrol, Labor Relations Department, 660 E. Main Street, Columbus, Ohio 43205, and Paul L. Cox, Esquire, Chief Labor Counsel, Fraternal Order of Police, Ohio Labor Council, Inc., 3360 E. Livingston Avenue, Columbus, Ohio 43227, this 22nd day of September, 1989.


Thomas P. Michael