ARBITRATION

BETWEEN

THE OHIO STATE HIGHWAY PATROL

and

O.C.B. GRIEVANCES NOS.
15-03-8906020087-04-1 (Plunkett)
and 15-03-8906270107-04-1
(Buchert)

FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

APPEARANCES:

For the Patrol:

Rodney D. Sampson, Assistant Chief
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Office of Collective Bargaining
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For the F.O.P.:

Paul L. Cox, Chief Counsel
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Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

Statement of the Case:

This case, well presented by the parties' representatives, was heard in Columbus, Ohio, on October 5, 1989. Testifying on behalf of the Patrol was its chief negotiator, O.C.B. Deputy Director Eugene Brundige. Testifying on behalf of the F.O.P. were Negotiating Committee Chairperson Sgt. Ronald Greenwood and chief negotiator Paul Cox. Following the hearing the parties filed helpful post-hearing briefs.

This case is governed by the parties' second contract, the 1989-1992 contract, relevant portions of which are excerpted in Appendix I. It was executed in March 1989.

This new contract improved the guaranteed minimum pay for Court appearances and provided that relief dispatchers would receive the highest shift differential rate. In June 1989, Trooper David Plunkett grieved the fact that he'd not received the improved court appearance minimum rate (Section 51.02) for the period January 1, 1989, up to the signing of the new contract, March 29, 1989. At about the same time, relief dispatcher Christine Buchert grieved the fact that she'd not received the new shift differential rate for relief dispatchers (Section 26.01) for the period January 1, 1989, up to the signing of the new contract, March 29, 1989. In other words, both grievants sought retroactively vis-a-vis Section 51.02 and 26.01 benefits, respectively. It was stipulated at the hearing that these grievances would be regarded as class grievances.

Careful examination of the record reveals no meaningful testimonial conflicts.

Negotiations for the current (1989-1991) Contract began in October 1988. Economic items were negotiated last. As credibly testified to by Sgt. Greenwood, the Patrol initially proposed a salary schedule effective with the date of the Contract. This met with strong objections from the F.O.P. Thereafter the schedule was amended by the Patrol to include retroactivity back to January 1, 1989. As Greenwood testified, it was the understanding "at least on our side," that all compensation items were to therefore be retroactive to January 1, 1989.

Deputy Director Brundige, as was Assistant Deputy Director Paul Breese, actively engaged in the negotiations on the economic items. Breese was deceased as of the date of the hearing. It was Brundige's credible testimony that he viewed the Patrol's retroactive wage proposal as relating only to an employee's base pay wage rate and that precisely what it was to include was never discussed in bargaining. As Brundige indicated, the Patrol saw that retroactivity for its wage proposal was feasible given the total "pot" of monies it had available, and hence it offered it in order to get agreement. Brundige also indicated that the retroactivity of personal leave and sick leave improvements was specifically discussed in negotiations and that retroactivity as to these items was also offered by the Patrol, and accepted by the F.O.P. Brundige conceded that there is no contract provision defining wages. Actual sessions at the bargaining table were concluded in late January.

F.O.P. negotiator Cox credibly testified that whereas the Patrol offered to define several terms, it never offered to define in the contract the term "wages," and that this term remains undefined in the Contract. Cox also indicated that the F.O.P. viewed wages as defined in O.R.C. 4117.01 (L), namely, as including, besides hourly rates of pay, "other forms of compensation for services rendered." It was further Cox's testimony that in his discussions with Breese he informed Breese that "retroactivity of the wage package was an absolute necessity." According to Cox, these discussions with Breese led to the following letter to him, Cox, from Breese, dated February 10, 1989:

> "Pursuant to our conversation of February 9, the Sick Leave and Personal Leave day increases are retroactive to January 1, 1989. We agreed that this retroactivity constitutes 11/12's of each increase of one day.
>
> The second area we discussed was the effective date of the 4% 1989 wage increases which is reflected by the revised language in Article 60."

Cox indicated that he viewed wages as embracing anything that put money in the F.O.P.'s members pockets, and that his Committee advised him that money items had to be retroactive to January 1, 1989, the date of expiration of the old contract.

The F.O.P.'s Position:

It is the F.O.P.'s position that Section 60.02 of the parties' new contract is "clear," and that it provides that "compensation at new contract rates for relief dispatcher shift differential and minimum court appearance would be retroactive

to January 1st [1989]. The Contract [Section 60.02] expressly provides that 'wages' or 'pay' shall be retroactive to January 1st . . . Webster defines 'wage' as 'money paid to an employee for work done.' The F.O.P. submits that all monies paid to employees in return for work done fall within the description of the definition of wage and are therefore necessarily retroactive to January 1st. Compensation for shift differential or court appearance time is indisputably a 'wage' or 'pay'. . . . Relief dispatcher shift differential and court appearance compensation are paid to employees in their paychecks. Both forms of compensation are wages.

It is the F.O.P.'s contention that "the definition of 'wages' in O.R.C. Section 4117.01 (L) governs the contract. [It] defines wages as 'hourly rates of pay, salaries, or other forms of compensation for services rendered.' There is no definition of wages in the contract . . . Because there is no definition . . . the definition in Ohio Revised Code must govern. In fact, the contract specifies that the Code governs.

Article 3 of the contract provides that the 'agreement is meant to conform to . . . the Constitution of the United States, . . . of the State of Ohio, all applicable federal laws, and Chapter 4117, Ohio Revised Code. . . . Had the employer intended for a different definition of wages to govern, it should have negotiated that definition."

Additionally, the F.O.P. points to the Breese letter and asserts that it indicates the "employer's understanding that all forms of compensation would be retroactive. The Employer

had clear knowledge that retroactivity was required, and it guaranteed it in Mr. Breese's letter.

The Employer denied the employees' grievances on the basis that the contract did not specify retroactivity in the sections dealing with shift differential and court appearance rates. However, neither did the contract specify retroactivity in the sections dealing with sick or personal leave. Breese's letter guarantees retroactivity for leave and wages, and thereby indicates intended retroactivity for shift differential and court appearance rates.

In sum, the F.O.P. asserts that "based on the language of O.R.C. 4117.01 (L), the language of the contract in Articles 3 and 60, and the letter from Mr. Breese . . . the F.O.P. requests that it be recognized that all wages were to be retroactive, and that the grievances be sustained."

The Patrol's Position:

The Patrol takes the position that "the Arbitrator is presented with a clear case of contract interpretation, as to whether there exists within the four corners of the Contract or in any document submitted with evidence, language that speaks to retroactive compensation for relief dispatchers for 'all hours worked' and 'minimum court appearance' of two and one-half hours for employees, from January 1, 1989 through March 28, 1989. Absent such language, the Union as the moving party has the burden to show clear bilateral intent through intent testimony that such was to be the case." And in this

regard the Patrol argues that "the Union has not presented any degree of sufficient evidence necessary to meet the burden required of it to prove the claims of the respective Grievants. . . . The Union's contention that the Retroactive Pay Increase was to apply to all 'wages' and/or 'forms of compensation' is not supported by the facts."

It is the Patrol's position that "the Union's contention that the definition of wages [at O.R.C. 4117.01 (L)] should supersede the specific definition of wages contained within the Contract that was negotiated [Article 60, Section 60.01] remains without material evidence or persuasive testimonial argument. . . . The Union's argument that the S.E.R.B. definition of wages should apply to this dispute is erroneous, since S.E.R.B. derives it's authority and responsibility from the Ohio Revised Code. . . . In its role S.E.R.B. addresses a number of matters of Administrative Agencies, related to defining the relationships of the parties, i.e., Unit determinations and as to whether Unfair Labor Practices have been committed, etc. It is clear that once a Unit determination is made and Collective Bargaining ensues, culminating in an Agreement, the definition of what constitutes Wages and Benefits, as set forth in the Collective Bargaining Agreement(s) is prevailing."

The Patrol also points to the proceedings before the State Legislature with respect to securing the Legislature's approval of the economics of the parties' new Contract, which purportedly failed to make any reference to retroactivity vis-a-vis court appearance pay and swing shift differential

pay, and asserts that "there is nothing in the record which indicates that the Union was not aware that legislative approval was necessary and imperative before any contract can become final and binding." Additionally, the Patrol asserts that it "has and continues to respectfully contend that the Arbitrator is not empowered with the authority to override a Contract that has been approved by law by the Legislature of the State of Ohio."

So it is that the Patrol urges that the grievances be denied.

The Issue:

The Patrol perceives the issue to be:

"Did Management violate the Contract, Articles 26.01 - Permanent Shifts and 60.02 - Pay Schedules, by not paying swing shift dispatchers shift differential and/or minimum court appearance leave for other employees, at two and one-half hours, retroactive from January 1, 1989 through March 28, 1989."

The F.O.P. perceives the issue to be:

"Did Management violate the contract by not paying employees swing or relief dispatcher shift differential and/or minimum court appearances compensation of two and one-half (2-1/2) hours at the new contract rates retroactive to January 1, 1989."

As can be seen, both parties are essentially in agreement concerning the issue. The F.O.P.'s statement of the issue being somewhat more succinct, I adopt it.

Discussion and Opinion:

From the foregoing it is clear that this case involves the question of whether or not the Patrol's commitment to retroactivity of wage increases encompasses all forms of compensation, and in particular, relief shift differential and minimum Court appearance pay, as the F.O.P. subjectively assumed, or whether it encompassed only the base pay rate, as the Patrol subjectively assumed. As the record reflects, each side subjectively had the intention it asserts and argues for in arbitration, but neither one had clearly manifested that intention outwardly to the other. Thus stating the nature of the parties' dispute, wherein different assumptions of fact are held by the parties, it is clear that a "misunderstanding" exists here. As observed by authors Marvin Hill and Anthony Sinicropi in their learned treatise, "Remedies in Arbitration"1/:

> "This problem [of misunderstanding] generally arising in contract formation, involves faulty communication between parties, so that each one reasonably believes that the contract is different in material respect."

1/ BNA Books Inc., First Edition, 1981, Washington, D.C., pp. 175-177.

Resolution of such misunderstanding problems are resolved in arbitration by resort, as is often the case,to principles of contract law. The rule on misunderstandings is stated in Section 227 of the Restatement of Contracts Second, and provides in essence, as Hill and Sinicropi put it, "that the term [here 'wages'] is to be interpreted according to the meaning attached to it by one of the parties if that party had no reason to know of any different meaning attached to it by the other, and the other did have reason to know the meaning attached by the first party." Applying that analysis to the facts at hand, I find that the Patrol's interpretation and subjective intent should prevail, since the F.O.P. should have realized that the Patrol did not intend the expansive meaning the F.O.P. ascribed to the Patrol's retroactive wage commitment. In my view, express retroactivity for the 4% increase rather overwhelmingly[2/] contemplated only the base rate, as testified to by Deputy Director Brundige. In bargaining safety forces contracts, forms of compensation other than wages such as court pay, shift differential, hazardous duty pay, etc., are typically negotiated, both because they are triggered by particular circumstances not at all times shared by all bargaining unit members (in contradistinction to wages which are so shared), and because were these additional compensation items costed out and simply rolled into the wage

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2/ The statutory analysis the F.O.P. urges, while flawed, as elaborated upon hereinafter, is sufficiently plausible to characterize as at least "reasonable" the subjective intent harbored by the F.O.P.

level, such would result in increases unacceptably high to the public. In addition, having specifically sought express written assurances from Breese concerning retroactivity of specific items having fiscal impact, namely, personal leave and sick leave, in addition to "wages," it was reasonable for the Patrol to assume that the F.O.P. was not assuming that other items having fiscal impact and typically distinguished from wages per se, such as shift differential and court pay, would also be retroactive.

In my judgment the O.R.C. 4117.01 (L) analysis urged by the F.O.P. is fundamentally flawed,principally for the reasons foreshadowed above, namely, that the concept of wages is essentially a term of art in contract negotiations indicating base pay only. Additionally, one must keep in mind the statutory purpose. Thus, wages is expansively defined in O.R.C. Chapter 4117 in order to create bargaining obligations for Employers beyond mere hourly rates of pay. Put another way, by giving an expansive definition to "wages" in 4117.01 (L), and then creating a bargaining obligation in 4117.03 (A) (4) with respect to "wages," the Legislature has merely expressed its intent that Employers have an obligation to bargain both with respect to hourly rates and with respect to other circumstances of working conditions which traditionally are viewed as warranting added compensation. The Legislature did not intend that Employers could duck bargaining about e.g. court pay, merely because it was not wages per se.

Finally, I view the evidence received concerning the information furnished to the Legislature for their approval of the economic package of the new contract as simply too secondary to enlighten one as to the parties' intent. Hence contentions made with respect thereto need not be, and are not, addressed. The issue posed is answered in the negative and the grievances must therefore be denied.

Award

For the reasons more fully set forth above, the grievances are denied.

Dated: December 29, 1989

Frank A. Keenan
Arbitrator