In the Matter of the
Arbitration Between

State Council of Professional Educators
Ohio Education Association

Union

and

Office of Collective Bargaining
Gallipolis Developmental Center

Employer.

Hearing Date: February 12, 1990

Briefs Due: March 13, 1990

Decision Date: April 16, 1990

Grievance No. 24-07-(06-30-89)-193-06-10

Grievant: Archie Combs

For the Union: Henry L. Stevens

For the Employer: Meril J. Price

Present in addition to the Grievant and the advocates named above were the following persons: Lou Kitchen, OCB Second Chair, Jack Hayes, Cambridge Developmental Center (witness), Robert Merkel, DAS (witness), Donald Walker, Gallipolis Developmental Center (witness), John Kinhela, Auditor's Office (witness), Jennifer Toth, OEA Consultant (witness), Robert Sauter, OEA Attorney (witness), Carrie Smolik, Vice President Grievance Chairperson, SCOPE (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the

sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. Witnesses were sequestered. All witnesses were sworn.

Jointly Stipulated Facts

1. Mr. Archie Combs was hired by the State of Ohio on October 1, 1977.
2. Date vacation bank of hours was reduced was July 29, 1989.
3. This matter is properly before the arbitrator and there are no procedural problems.

Jointly Stipulated Documents

1. Contract between SCOPE-OEA NEA and the State of Ohio -- July 1, 1986 through June 30, 1989
2. Grievance trail
3. ORC 124.13 vacation
   ORC 124.01 definitions
   ORC 9.44 public employees' anniversary of service for

vacation leave computation

Issue

Does Management at the Gallipolis Developmental Center violate the Agreement (1986-89) between the State Council of Professional Educators and the State of Ohio when they unilaterally reduced compensation from Grievant, a teacher at the Center?

If so, what shall be the appropriate remedy?

Facts

The Grievant was hired as a teacher at the Gallopolis Developmental Center on October 1, 1977. The Grievant testified that prior to his hire, he was overtly recruited by the Director of the Gallopolis Developmental Center. The Grievant said he was directly asked by the Director to apply as experienced teachers were desperately needed. As part of the bargaining process, the Grievant sought service credit for his past teaching experience from Kentucky. The Director agreed and allegedly said that he could grant credit up to 10 years. During the first year of employment, the Grievant noticed that the prior service was not credited. He again approached the Director who said that 1 year must pass before the credit is recorded. At the end of the year,

the Director asked the Grievant to provide proof of his prior service. On February 27, 1980, the Superintendent of Jackson City Schools, Jackson, Kentucky, wrote a statement concerning the Grievant's 6-1/2 years of service. The Personnel Department of Gallipolis Developmental Center received the letter on 3/24/80 (Exhibit U-4) and on April 4, 1980, Janet L. Nibert, Chief Payroll Officer wrote to the Auditor and gave his prior service credit as 6 years and 182 days (Exhibit E-10). The Grievant was so credited and from that time until July 29, 1989, over 9 years, his payroll stub reflected this credit. Sometime in 1989, another employee complained about the Grievant's service credit. The Employer investigated and concluded that the 6-1/2 years had been granted in error.

Management's position as found in the 3rd Step Grievance Response is that . . ."Gallipolis Developmental Center erred when computing the Grievant's service time . . . Gallipolis Developmental Center is burdened to correct this error." (Exhibit J-3)

On July 1, 1986, an agreement went into effect between SCOPE/OEA and the Employer. That Agreement provided in part as follows:

> Article 21 - Wages
> § 21.01 - Teacher, Teaching Coordinator, Educational Specialist 1, Educational Specialist 2, Student Services Counselor, and Guidance Counselor
>
> 1. Years (step) - Effective with this Agreement each employee will be credited with the same number of years that the last payroll prior to the effective

date of this Agreement lists as years of service. Employees hired on or after the effective date of this Agreement shall be given credit for years of experience in accordance with the provisions of Section 3317.13(A)(1)(a), (b), and (c) of the Ohio Revised Code provided that a total of not more than ten (10) years of experience shall be credited. An employee will advance to the next step upon satisfactory completion of a year of service and the salary advancement will be reflected in the next payroll.

§ 21.05 - Application

During the terms of this Agreement, no employee paid under Section 21.01 shall receive a decrease in compensation which is less than that received prior to the adoption of this Agreement.

Exhibit U-3 is the 6/21/86 payroll stub of the Grievant (the payroll immediately prior to the implementation of the contract). That payroll stub shows 15 years, 98 days of total service and accrued vacation leave of 351.4 days and 380.2 days of accrued sick leave. The employer unilaterally removed the 6-1/2 years of service credit on July 29, 1989 and, in addition, alleged that the Grievant owed $5,072.00 in over payment of wages.

The Arbitration adduced the following information.

Both the Director and Ms. Nibert no longer worked for GDC and were unavailable to testify.

An Auditor of the State, Mr. Kinela testified that the duty of the Auditor is to audit state agencies and where a payment is improper under state law to seek recovery of the overpayment. He testified that no statute of limitations protects a person who received state funds improperly. (In support of that later position, the Employer introduced a copy of Ohio Department of

Transportation v. Sullivan (1988), 38 Ohio St. 3d 137 (Exhibit E-4). The syllabus of that case states as follows:

> The state, absent express statutory provision to the contrary, is exempt from the operation of a generally worded statute of limitations. This rule serves the public policy of preserving the public rights, revenues, and property from injury and loss.

Mr. Kinkela also stated that as yet no formal "finding" had been made and that the Auditor's office would conform its results to the results of this Arbitration; exhibits 12-13 dealing with the Audit are basically drafts and do not represent a finding as required by R.C. 117.28 (Exhibit E-3). Both Robert Sauter, Attorney for the Union and Jack Hayes, the Human Resources Director for Cambridge Mental Health Center, testified about the negotiations which lead to the 1986-1989 Contract. Mr. Hayes pointed to Article 25.01 Service Credit

> Article 25 - Service Credit
> § 25.01 - Service Credit
>
> Employees hired prior to the effective date of this Agreement shall maintain their service credit calculated as total service with the state or any of its political subdivisions.
>
> Employees who are originally appointed on or after the effective date of this Agreement shall only receive service credit for employment with the State in any agency, board, commission or department where such employment is paid by warrant of the Auditor of State.
>
> Service credit shall be utilized to calculate vacation accrual and eligibility for a longevity supplement where applicable.

and said that the words "calculated as total service with the State or any of its political subdivisions" clearly eliminated any out-of-state service credit. He pointed to R.C. 1.59 which defined the word "state" as meaning the State of Ohio (Exhibit E-8).

Mr. Sauter pointed to § 31.01 and the criteria of the last payroll as being determinative of the issue. Interestingly, both Mr. Hayes and Mr. Sauter did agree on the intent within the contract. Namely, the Union wanted to make sure no employee was harmed by the new contract; in particular, the Union wished to prevent any decrease in any member's compensation. Mr. Hayes confirmed this intent and agreed to that principal as embodied in § 21.05. He also confirmed that § 25.01 was a "grandfathering" clause. Mr. Hayes also stated that the State was aware that the payrolls had mistakes. He maintained, however per § 25.01, the state's intention was solely to "grandfather" service credit gained within Ohio. The State's witness, Mr. Merkel of DAS-Personnel, testified that the official rules between 1977 and 1986 were that only prior Ohio service was credited. To support that testimony, a Personnel Memo of 11/7/78 (Exhibit E-5) was introduced as well as R.C. 9.44 (Exhibit E-9). Witness Toth of OEA was the Union Chair of contract negotiations of the 1986 Contract. She testified that the State was fully aware that the payroll contained errors; over 700 employees were probably affected. This information was given to the Union negotiators by the State negotiators. Moreover, that since the mutual intention

was to "not harm any employee," they agreed to establish a cut-off date (any errors before that date were to remain). That date was embodied in Article 21.01(1). Mr. Hayes, the state negotiator "agreed that the date in 21.01(1) was a "cut-off date," that the state knew "mistakes" existed, and that the "cut-off date" was agreed to in the context of known payroll mistakes. Through their witnesses, both parties agreed that the final contract was based on a fact-finding done by James Mancini (Exhibit U-2). That fact finding at p. 9 (V) stated "During the term of this contract, no employee shall receive a decrease in compensation for time worked which is less than that received prior to the adoption of this agreement."

Employer's Position

An error was made in 1980 in the service credit granted to the Grievant. State official policy did not, in 1980 or since, allow credit for out-of-state service. When the State discovered the error, it had an obligation to recoup public monies. Moreover, since the State is limited by no statute of limitations, the passage of time is irrelevant. In addition, the State maintains that the 1986-89 Contract does not bar their actions. The State's position is the Article 25.01 on service credit is unambiguous and only allows for prior service in Ohio. According to the State, 25.01, because of its specificity, controls 21.01(1) and 21.05.

Union's Position

An authorized agent of the State, the Director of GDC bargained with the Grievant in 1977. As part of this bargain, the Grievant was to be credited with prior out-of-Ohio service. The Director maintained that he had actual authority to award up to 10 years credit. Whether the Director had such actual authority is irrelevant, because he clearly had apparent authority. Moreover, the State itself ratified the Director's authority by officially granting the service credit in 1980 to the Grievant. This conclusion is supported by the case of Cataland v. Cahill, 13 App (3d) 113, 13 OBR 131, 468 N.E.(2d) 388 Franklin 1983, (Exhibit U-5) where the court held that "[v]acation leave and sick leave set by statute are minimums, and additions to either or both minimum benefits may be granted as part of compensation by an appointing authority with the power to determine compensation of employees."

The Contract of 1986 had as a mutually agreed purpose to prevent harm to individual employees, and this purpose was part of the fact-finding decision and was embodied in the Contract at 21.05 which forbade a decrease in "compensation." Section 21.05 control 25.01 because in 31.05 the standard is "compensation" which includes Service Credit (25.01) (see DAS Reg. 124.151(A) Exhibit E-7).

The Union argues, in addition to ratified "State action"

affirmed in the Contract, that the State is estopped to assert the error.

Discussion

The Grievant's testimony about his recruitment and the offer of 6-1/2 years of service credit was unrebutted. Moreover, the paper trail of those 1977-1980 actions support his testimony. The Arbitrator finds that as a condition of the Grievant's employment he was granted the service credit for out-of-state service. The Arbitrator also finds (1) that official state policy in 1977-1980 did not allow out-of-state service, but (2) that the State officially ratified Gallopolis Developmental Center's error in 1980.

The question of whether the State could have recouped the funds involved prior to 1986 is not before the Arbitrator.

The Arbitrator's job is to interpret the State's unilateral action of 1989 whereby the State reduced Grievant's service credit and impliedly demanded $5,072 in allegedly improperly paid wages in the light of the 1986 Contract. The State argues that the Contract is unambiguous on its face and, therefore, the Arbitrator has "nothing" to interpret. The Employer maintains that 25.01 is clear on its face and mandates the State's preferred result.

To determine ambiguity, an arbitrator can follow one of two doctrines. The 4-Corners Test: if a contract within its 4 corners is clear to the trier of fact, no evidence may be

introduced to vary the plain meaning of the contract's words. The alternative doctrine is that if the parties can show by evidence that two plausible, reasonable meanings exist for otherwise "plain" words," evidence of both meanings and the intent may be introduced.

Here the Employer would have the Arbitrator read 25.01 and stop. However, the Arbitrator is bound to consider the contract as a whole. Reading 25.01, 21.01(1) and 21.05, the Arbitrator finds it impossible to construe those three sections consistently, hence an ambiguity exists. Testimony by both the Employer and the Union agreed that a mutually accepted premise was "no harm." No harm per both the fact-finding and the Contract (21.05) applied to "compensation" and is further embodied in the cut-off date of 21.01(1). Certainly, the Grievant was harmed by the State's action (lost of service credit) and would be further harmed were the State to collect $5,072. While arguably 25.01 might apply to the loss of service credit, 21.05 applies to $5,072 in wages, i.e., "compensation." Moreover, both parties agreed that the State and the Union were aware that many payroll errors existed as of the Contract date. The Arbitrator finds that the State's error of 1977-1980 was cemented in place by the 1986 Contract, and the State's actions violated the Contract.

Moreover, this situation is a fair opportunity to use the doctrine of equitable estoppel. The lack of a statute of limitations does <u>not</u> affect the use of an estoppel because estoppel is an equitable doctrine not a legal one and at equity

the doctrine of laches is paramount. Since the basic duty of an arbitrator is to do "justice," the doctrines of equity are especially applicable. The doctrine of laches forbids parties to assert rights which they have "sat on" for an unconscionably long time. Certainly, nine years is a "long time." In addition, the elements of estoppel also clearly apply:

1. The State made a statement of fact which it knew or should have known would be relied upon by the Grievant (i.e., the granting of out-of-state credit).
2. The Grievant relied on that statement, and his reliance was reasonable.
3. The Grievant's reliance was substantial.
4. Injustice can only be prevented by use of estoppel. To reduce credit time and demand $5,072 after 9 years is unconscionable where no intention to defraud exists on the party of the Grievant.

Estoppel can be applied against governments. (See Watkins v. U.S., 847 F.2d 1362 1988.)

Award

Grievance granted. Service credit is to be restored and the State is to seek no funds from the Grievant.

April 16, 1990
Date

Rhonda R. Rivera
Arbitrator