
In the Matter of Arbitration *
Between * Case No.:
Fraternal Order of Police- * 25-17-891130-0002-05-02
Ohio Labor Council *
and * Before: Harry Graham
The State of Ohio, Department *
of Natural Resources *

#509

Appearances: For Fraternal Order of Police:

Paul Cox
Fraternal Order of Police-Ohio Labor Council
222 East Town St.
Columbus, OH. 43215

For Department of Natural Resources:

Jon E. Weiser
Labor Relations Administrator
Department of Natural Resources
Fountain Square, Building D-2
Columbus, OH. 43224

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on October 15, 1990 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. No post hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument.

Issue: At the hearing the parties were able to agree upon the issue in dispute between them. That issue is:

Did the State violate the Labor Agreement by not counting Ms. Muench's time employed by Ohio University towards her State seniority? If so, what shall the

remedy be?

Background: The events that give rise to this dispute are not a matter of controversy. The Grievant, Karen Muench, first came to be employed by the Ohio Department of Natural Resources on June 6, 1988. She was employed in the position of Watercraft Officer. On the same date the Department employed another person, Sherrie Hustead, as a Watercraft Officer as well. Prior to assuming her duties with the Department of Natural Resources Ms. Muench had been employed at Ohio University. She had been in a full-time position as Coordinator of Athletic Equipment for the University's Department of Intercollegiate Athletics since January, 1985. She left that position in order to take the Watercraft Officer job with the Department of Natural Resources.

Before becoming a full-time Watercraft Officer with the Department on June 6, 1988 Ms. Hustead had worked for the Department as a temporary employee. She was a Natural Resources Aide from June 16, 1986 to September 12, 1986. She was a Natural Resources Specialist from June 14, 1987 to September 25, 1987 and again from January 19, 1988 to April 23, 1988. From April 24, 1988 to May 23, 1988 she was a Clerk 1 on a 30 Day Emergency Appointment.

In the Fall of 1989 the Department posted for bid a position as a Watercraft Officer Specialist. Both Ms. Muench and Ms. Hustead bid on the position. It was awarded to Ms.

Hustead. In the opinion of the Department she was qualified for the position and possessed more seniority than did Ms. Muench. As that was the case in the opinion of the Department it was appropriate that Ms. Hustead fill the vacant position. Ms. Muench and the Union disagreed with that assessment. It was their view that Ms. Muench had more seniority than Ms. Hustead. Consequently they were of the opinion that the State had erred and violated the Labor Agreement when it awarded the Watercraft Officer Specialist position to Ms. Hustead. In order to protest that action a grievance was filed. It was processed through the machinery of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points to the record of service in the employ of the State by the people involved in this situation. Ms. Muench came to work at Ohio University in January, 1985. She worked there in a full-time capacity until taking the position as Watercraft Officer on June 6, 1988. Ms. Hustead first came to be employed by the Department of Natural Resources on June 16, 1986. This was 18 months after Ms. Muench entered State service in the Union's opinion. Examination of the entry dates of both Ms. Muench and Ms. Hustead shows beyond doubt that Ms. Muench has more state service than does Ms. Hustead. As that is the case the State violated the Labor Agreement when it determined Ms. Hustead

was senior to Ms. Muench and awarded her the position of Watercraft Officer Specialist. Specifically, the violation committed by the State was of Section 31.02 of the Agreement which provides in relevant part that when abilities of applicants for promotion are determined to be equal seniority will be the deciding factor in making promotion decisions. That language must be read in connection with the language found in Section 34.04 of the Agreement. That Section deals with the question of determining seniority of employees who have identical hire dates. It specifies that in the event two or more employees have the identical hire date the tie shall be broken by State seniority. The uncontrovertible record indicates that Ms. Muench has more service time with the State than does Ms. Hustead. As that is the case the State violated the Labor Agreement by awarding the promotion to Watercraft Officer Specialist to Ms. Hustead the Union asserts.

Section 4117.01 of the Ohio Revised Code defines public employees. Included in the definition are "state institution(s) of higher learning." That includes Ohio University and must prompt the conclusion that Ms. Muench was a State employee during her service with OU. As a State employee she accumulated seniority that was disregarded by the State in the promotion decision under scrutiny in this proceeding. Additional support for this view is provided by

the Code at 4117.10 D which permits the bargaining agency of the State, the Office of Collective Bargaining, to represent State supported universities.

The Union points out that at various places in the Agreement, eg. Article 37 dealing with vacations, the term "state agencies" is used. This term is different from the concept of the "State" which is used elsewhere in the Agreement. Ms. Muench was an employee of the State while she worked at Ohio University according to the Union. Hence the Department improperly disregarded her seniority when it awarded the Watercraft Officer Specialist to Ms. Hustead the Union claims. It seeks an award directing the Department to promote Ms. Muench to the position of Watercraft Officer Specialist together with back pay as compensation for her loss.

Position of the Employer: According to the Employer it properly disregarded Ms. Muench's employment at Ohio University when determining to promote Ms. Hustead. In its view, the University is not synonymous with the State under the terms of the Agreement. Employees of the State are paid by a Warrant from the Auditor of State. Employees of universities do not receive pay in that fashion. Rather they get paid directly by the University. This is indicative of the fact that the University is not synonymous with the State for purposes of the Labor Agreement according to the

Employer.

The Agreement bears directly upon this controversy and provides the foundation for the action of the Department in this situation it insists. At Section 34.01 the Agreement provides that "State Seniority" is the "total length of continuous service in a position or succession of positions within the employ of the State dating back to the last date of hire." Ms. Hustead had no break in service during her tenure with the Department. Consequently it properly examined the total length of state service in breaking the tie between Ms. Muench and Ms. Hustead when determining who to promote. When that was done, it was clear that Ms. Hustead had more State seniority than did Ms. Muench. She had worked for the Department and accumulated State seniority. Ms. Muench had been employed at OU and did not possess as much State seniority as did Ms. Hustead in the opinion of the Department.

Section 4117.01 B of the Ohio Revised Code defines public employers within the State. Included among those are "public institutions of higher learning." This definition must be read in conjunction with Section 4117.10 D of the Code which establishes the State Office of Collective Bargaining. The language found there provides that the Office of Collective Bargaining shall not negotiate on behalf of certain public entities in the State. Included on that list

are Boards of Trustees of State Institutions of Higher education "who shall be considered as separate public employers for purposes of Chapter 4117 of the Revised Code." The statute continues to provide that the Office of Collective Bargaining "may" represent public universities. In fact it has not done so and the clear language of 4117 10. D compels the conclusion that Ms. Muench did not accumulate State service for purposes of this dispute the Department insists.

When Ms. Muench came to the Department she did not bring her fringe benefit package from OU. She did not transfer to the Department from the University. She was a new hire. Consequently her seniority date is properly to be considered as June 6, 1988. As Ms. Hustead is senior she was properly awarded the position of Watercraft Officer Specialist in the opinion of the Department. Consequently it urges this grievance be denied.

Discussion: Attention must initially be directed at the definitions of public employers set forth in Section 4117 of the Ohio Revised Code. Section 4117.01 B defines a "public employer" as "the state or political subdivision of the state...including, without limitation... state institution(s) of higher learning...." (Emphasis added). In the language of the statute public universities in Ohio are grouped with political subdivisions of the State. They are not synonymous

with the state as a public employer. This is indicated by the word "or" in Section 4117.01 B of the statute.

This view is buttressed by plain language found elsewhere in the statute. Section 4117.10 D establishes the Office of Collective Bargaining within state government. Its functions are to negotiate on behalf of "state agencies, boards and commissions...." Section 4117.10 D continues to specify that "~~the office shall be the exclusive bargaining agent for all employees of the state who are employed by a state agency, board or commission.~~" (Emphasis added). The statute continues to provide that the Office of Collective Bargaining "may" negotiate on behalf of university trustees but the relevant section of the statute is highlighted above. State institutions of higher education are distinguished from the State as a public employer by the clear language of the statute.

Further indication of the distinct nature of service in a public university and state government is provided by the mechanics of the pay made to employees. University employees are paid by a university check, from university funds. State employees are paid by a warrant from the Auditor of State. Universities secure their funds from a variety of sources. State monies are provided to them. Revenues are also


generated by tuition dollars, grant receipt and endowment funds to specify but a few other sources of revenue available to public universities. Public universities have flexibility to use such funds that is absent from the various departments of the State such as Natural Resources.

Both the Grievant and the person who was promoted, Ms. Hustead, were employed on a full time continuous basis by the Department of Natural Resources as Watercraft Officers on the same day, June 6, 1988. At Section 34.04 the Labor Agreement specifies the procedure to be utilized when it is necessary to break a tie in Classification Seniority which was the situation in this instance. The State must have recourse to State Seniority. State Seniority is defined in Section 34.01 as "~~the total length of time an individual has been employed in a position within the employ of the State dating back to the last date of employment~~" in this case Ms. Hustead had been employed by the Department of Natural Resources on June 16, 1986. The Department is unquestionably the "State" for purposes of determining the employer. Her service was broken on occasion. On January 19, 1988 she became a Natural Resources Specialist and has served in the Department without interruption since that date. Ms. Muench became an employee of the Department on June 6, 1988, approximately six months after Ms. Hustead. As an employee of the State she is junior to Ms. Hustead.

Joint Exhibit 4 is the Civil Service Application completed by Ms. Muench. Joint Exhibit 5 is her application for employment with the Department of Natural Resources. Those exhibits are precisely what they purport to be, applications for employment. They are not forms requesting transfer from a position at Ohio University to a position with the Department. When initially employed by the Department on June 6, 1988 Ms. Muench was a new hire, not a transferee. As such, she possessed less state seniority within the meaning of the Labor Agreement than did Ms. Hustead. ~~There is no evidence that Ms. Muench's seniority is different from Ms. Hustead's seniority at Ohio University.~~ She entered upon her duties with the Department as one newly employed with one exception; she carried with her sick leave earned at Ohio University. This was due solely to the provisions of the Collective Bargaining Agreement in effect in 1988 governing transfer of sick leave and specific to that benefit. But for that single exception the language of the statute and the Agreement indicates clearly that Ms. Muench is junior to Ms. Hustead in State service which is the appropriate computation to made in this dispute.

Award: The grievance is denied.

Signed and dated this 29th day of October, 1990 at South Russell, OH.



Harry Graham
Arbitrator