ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 628

OCB GRIEVANCE NUMBER: 02-10-901210-0002-02-11

GRIEVANT NAME: LONGEVITY ISSUE - CLASS GRIEVANCE

UNION: 1199

DEPARTMENT: ALCOHOL, LEGAL RIGHTS, DAS, DDEV, AGING, HEALTH, DYS, R&C, MH, MED BOARD, PSYCH BD, BWC, MR/DD, EDUC, HUMAN SERVICES, REHAB SERVICES, VETS HOME, VETS CHILDRENS HOME, NURSING BOARD, PHARMACY BOARD

ARBITRATOR: SILVER, HOWARD

MANAGEMENT ADVOCATE: WAGNER, TIM

2ND CHAIR: LIVENGOOD, RACHEL

UNION ADVOCATE: WOODRUFF, TOM

ARBITRATION DATE: MAY 22, 1991

DECISION DATE: JULY 8, 1991

DECISION: GRANTED

CONTRACT SECTIONS AND/OR ISSUES: DID THE STATE VIOLATE ART. 43.10(D) WEHN IT DENIED PAYMENT TO OR TOOK BACK PAYMENT OF LONGEVITY FROM THE B/U MEMBERS IN SCHEDULE C?

HOLDING: "THE UNION DID NOT AGREE WITHIN THE LANGUAGE OF ART. 43.10 THAT B/U MEMBERS OTHERWISE ELIGIBLE FOR LONGEVITY PAYMENTS UPON PROVIDING 5 YEARS OF ELIGIBLE SERVICE BE DENIED SUCH BENEFITS. THE PARTIES DID NOT AGREE IN 1986 THAT THE LONGEVITY SYSTEM THEN ENJOYED BY B/U 11 AND 12 BE DISMANTLED." ARBITRATOR AWARDED BACK PAY TO THOSE THAT HAD BEEN DENIED AND REIMBURSEMENT TO THOSE WHO HAD BEEN PAID AND THEN LATER TAKEN BACK.

ARB COST: $600

Howard D. Silver
Arbitrator
Columbus, Ohio

In the Matter of Arbitration
Between

The State of Ohio

and

The Ohio Health Care Employees Union
District 1199, WV/KY/OH,
National Union of Hospital and
Health Care Employees, SEIU, AFL-CIO

Consolidated Class and
Individual Grievances

Grievance No.:
02-10-901210-0002-02-11

#628

APPEARANCES

For: The State of Ohio

Tim Wagner, Management Advocate

Rachael Livingood, Management Advocate 2nd Chair

For: The Ohio Health Care Employees Union,
District 1199, WV/KY/OH,
National Union of Hospital and
Health Care Employees, SEIU, AFL-CIO

Tom Woodruff, Labor Advocate

Ervin Crenshaw, Labor Advocate

ISSUE

Did the State violate the contract, Article 43.10(D), when it denied payment to or took back payment of longevity from the bargaining unit employees?

The hearing in this matter was held on May 22, 1991, within the offices of the Ohio Department of Administrative Services's Office of Collective Bargaining, 65 East State Street, Columbus, Ohio. The parties were afforded a full and fair opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and make arguments supporting their positions. The record in this matter was closed on May 22, 1991.

BACKGROUND

The State of Ohio and Ohio Health Care Employees Union, District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, SEIU, AFL-CIO (hereinafter the Union), have a bargaining history which includes a collective bargaining agreement which took effect June 12, 1986 and ended on June 11, 1989. The parties now operate under a collective bargaining agreement which took effect June 12, 1989 and will remain in effect until 11:59 p.m. on June 11, 1992.

The 1986 through 1989 collective bargaining agreement between the parties, Joint Exhibit 2, contains Article 40, entitled Wages, and is comprised of sixteen sections, designated 40.01 through 40.16.

The collective bargaining agreement presently in effect between the parties, Joint Exhibit 1, contains Article 43, entitled Wages, and is comprised of twelve sections, designated 43.01 through 43.12.

Significant parts of Article 40 of the earlier contract were modified through bargaining by the parties and these changes may be seen within express language in the present contract. It is true as well, however, that significant parts of Article 40 within the earlier contract remained untouched and appear unchanged within express language in the contract now in effect between the parties.

The issue in this matter has at its core a single sentence found within Section 43.10(D) of Article 43 of the contract now in effect between the parties. This sentence reads as follows:

> ... Employees with less than two (2) years of service will no longer be eligible for longevity payments...

Section 40.15 of Article 40 within the previous contract between the parties contains the following language within Section 40.15(D):

> ... Employees with less than two (2) years of service will no longer be eligible for longevity payments...

Article 43.10 of the parties' present contract is almost but not entirely identical in language to its predecessor, Article 40.15 in the parties' predecessor contract. Both articles, in similar but not identical language, agree to implement Professional Achievement Incentive Levels, pay supplements intended to recognize professional status and encourage career development. Also discussed within Article 43.10 and its predecessor, Article 40.15, is a longevity program utilized to grant pay supplements intended to recognize years of service.

The issue in this matter addresses the intentions underlying the parties' present contract as to longevity payments available to eligible bargaining unit members. Pointing to the same language, the parties disagree on whether a select group of bargaining unit members are entitled to longevity benefits under Article 43.10(D).

POSITIONS OF THE PARTIES

Position of Management

The State of Ohio points out that the language at issue in this matter has not changed from June 12, 1986, the effective date of the parties' earlier contract, through the duration of the parties' present contract, a contract that extends through June 11, 1992. The State of Ohio argues that as the articles are identical, the intent underlying both articles is identical as well, and therefore the intentions of the parties as expressed by Article 43.10(D) in the present contract between the parties is the same as the intentions of the parties when they negotiated and agreed to Article 40.15 in the earlier contract.

At hearing, Management contended that the negotiations underlying the June 12, 1986 contract between the parties intended to create a new supplemental pay system entitled Professional Achievement Incentive Levels, commonly referred to as PAIL, and this new system was intended to, over time, replace a statutory longevity system used for many years to supplement the pay of

bargaining unit members. This longevity system is expressed within Chapter 124. of the Ohio Revised Code.

Management claims when it negotiated the dismantling of the longevity system previously used by the parties, through the establishment of PAIL, it agreed with the Union that the longevity system would have to be phased out over time so as not to disadvantage bargaining unit members who had a contractual right to longevity payments.

Management points out that as PAIL benefits do not accrue until a bargaining unit member has accrued ten years of eligible service, the establishment of PAIL effective June 12, 1986 and the phasing out of longevity payments created three classes of bargaining unit members. First, there was a group of bargaining unit members who had at least five years of eligible service but less than ten years of eligible service. Management agrees that these bargaining unit members continued under a contractual right to draw longevity payments until the achievement of ten years of eligible service, at which time PAIL benefits would be paid and longevity payments would cease. Both Article 40 within the predecessor contract and Article 43 in the present contract between the parties expressly state that, "An employee who receives a PAIL level shall no longer be eligible to receive a longevity supplement." This language appears in the last sentence in Article 43.10(D) and the last sentence in Article 40.15(D).

The second group of employees created by the June 12, 1986 contract between the parties were bargaining unit members who had

less than two years of eligible service. Management contends that it was the intention of the parties during negotiations leading to the June 12, 1986 contract and Article 40.15(D), that any bargaining unit member with less than two years of eligible service would never become eligible for longevity payments, but would, after ten years of eligible service, receive PAIL benefits.

The third group of employees identified by Management as existing on June 12, 1986 were those who had ten years or more of eligible service comprising a group who would receive PAIL benefits and would not receive longevity payments.

After June 12, 1986, however, the State of Ohio continued to pay longevity benefits to bargaining unit members who were within group two, that is, bargaining unit members who on June 12, 1986 had had less than two years' eligible service but who later amassed five years of eligible service. Management admits that these payments were made but only under a misinterpretation of the parties' contract by benefit payors within the Ohio Department of Administrative Services.

In support of its contention that the parties had agreed during bargaining on the June 12, 1986 contract that Article 40.15(D) intended to stop forever any opportunity for longevity payments for those bargaining unit members who had less than two years of eligible service, Management offered the testimony of David Norris, at present the Deputy Director of Human Resources for the Ohio Department of Mental Retardation and Developmental Disabilities. Prior to serving in this role, Mr. Norris served

with the Ohio Department of Administrative Services's Office of Collective Bargaining as a Labor Relations Specialist. As a Labor Relations Specialist, in 1986, Mr. Norris participated in the negotiations leading to the June 12, 1986 contract between the parties. During these negotiations Mr. Norris took notes and at hearing produced the notes he had prepared during the eighteenth and final bargaining session on the June, 1986 contract, a session which took place at the Sheraton Hotel in downtown Columbus, Ohio.

Mr. Norris recalled that during this bargaining session the Union had been concerned that bargaining unit members had no incentive to remain in state service after providing eight years of state service, as after eight years of service bargaining unit members reached the highest and last pay level available to them. The Union pointed out to Management that the State of Ohio was throwing away employees with experience and expertise who were of great value to the State's work. Mr. Norris recalled that while the Employer did not disagree with the Union's concern on this point, the State remained concerned about the cost of increasing the levels of longevity payable to bargaining unit members. Mr. Norris recalled that the State was particularly concerned about the costs of a dual system of payments. According to Mr. Norris, the State therefore proposed that a new pay supplement system be installed and the statutory longevity system then employed be phased out.

In support of his testimony Mr. Norris offered a copy of the notes he prepared during the final session of the 1986 negotiations

between the parties. These notes, Management Exhibit 1, reveal dialogue between the chief negotiator on behalf of the Union, Tom Woodruff, and the then chief negotiator on behalf of Management, Edward Seidler. At page four of Mr. Norris's notes the following appears:

> E.S. Before I prepare language back on P.A. Incentive; we are pretty close on the concept and have technical problems to resolve. The way I interpret what you said; is step after?
>
> T.W. Put incentive like this you are putting in after ten, fifteen, twenty, after initial longevity; you get it at the increments.
>
> E.S. This trying to deal with lack of steps; not like longevity; will grandparent those receiving longevity now.
>
> Person work thru classification Series, before get the level. Recognizing service within the classification Series. Will grandparent all service time in the system, but new employees will have to have the service time in class series.
>
> T.W. We recognized we have wiped out longevity. Imp. to recognize only bargaining seniority that would recognize time with the professional classifications.
>
> In seniority, we have defined bargaining unit seniority.
>
> E.S. In trying to recognize professional achievement, we don't want to bring in a lot of other seniority. The other problem we have is those employees who have 10 years of service but are not at top of the pay range.
>
> T.W. We have to grant further in those currently in the system. Will not be a problem in the future, because we have excluded new lines.

E.S. Would have a pay table that has 3 more steps. The presumption is you would go to them after you have gone to the last step of the pay range.

T.W. If just recognizing bargaining unit seniority and was promoted, what you are saying is that they loose PA1.

To set-up rules to do what we don't want them to do defeats the system. Once you say must be at last step, then this discourages promotions.

E.S. If you received PA1 and were promoted, when calculating your promotion; you receive a step increase based an your current rate.

T.W. Ex pay range 31, assuming PA1-$13.70 if bid and got a 32; they would go to step in 32 that would guarantee five percent.

E.S. Would get 14.64

T.W. When you go to 15.74, when go to PA1 again?

E.S. After one year would go to PA1, if then had fifteen years would go to PA2.

T.W. If after one year would have one five years; would go to PA2?

E.S. Yes.

T.W. You saying, you would loose for in promotion would get at least five percent and would serve one year in last step before getting ten, fifteen, or twenty years.

E.S. Pay ranges reassignments handled like promotions; at least five percent.

Will try to generate a table.

T.W. We have a table.

E.S. Other questions about those who do not get longevity. We are trying to get out of old longevity system.

T.W. An impossibility of taking someone with four 1/2 years and deny them; we would not want just five to nine's we can discuss new hires, but want the 0-5's to be in. We propose State Seniority.

Continuing the 0-4's cannot be that expensive to have them get longevity.

You have proposed constricting the ranges of the pay scale to take this back and the longevity is politically impossible.

E.S. Would like to take back and work on it some more.

Management contends based on the above bargaining that the parties agreed that the longevity system should cease except for those bargaining unit members who had provided at least five years' eligible service but had provided less than ten years' eligible service. Mr. Norris explained at hearing that it was the intention of the parties that those with two to five years' eligible service would receive longevity upon reaching five years of service. Eventually, according to Mr. Norris, it was intended that all of those eligible for longevity payments would either leave State employment or achieve ten years of service, at which time they would become eligible for PAIL payments. Mr. Norris testified that it had been the intention of the parties that those bargaining unit members with less than two years of service would never receive longevity payments.

Management presented Management Exhibit 2, a memorandum issued by Edward Seidler, Deputy Director, to Donald E. Smeltzer, Manager,

Payroll Systems, dated November 24, 1986. Within this memorandum Mr. Seidler wrote:

> Employees in the bargaining unit as of June 12, 1986 with less than two (2) years of state service will not be eligible for longevity when they reach five (5) years of service. They will be eligible for PAIL when they reach ten (10) years of service.
>
> Those employees in the bargaining units as of June 12, 1986 with two (2) years or more and less than five (5) years of service are eligible for longevity when they reach five (5) years of service. They will continue to receive longevity until they reach ten (10) years of service, then they will lose longevity and pick up PAIL.
>
> Those individuals who are hired into the bargaining units as new hires to the state after June 12, 1986 will not receive longevity and will receive PAIL once they have been in the bargaining unit (bargaining unit seniority) ten (10) years.

Management Exhibit 3 is a memorandum dated January 7, 1987, from Edward Seidler to Karen Nowak, Assistant Director, Ohio Department of Administrative Services. Language within this memorandum reads, for all intents and purposes, identically to the language within the November 24, 1986 memorandum set out above. Within his January 7, 1987 memorandum Mr. Seidler points out that Article 40, Section 15 is designed to eliminate the longevity system within bargaining units 11 and 12; that employees in the bargaining units, as of June 12, 1986, with less than two years of state service will not be eligible for longevity payments when they reach five years of service; that employees in the bargaining units

with two years of service or more but less than five years of service will remain eligible for longevity payments when they reach five years of service; and those hired into the bargaining unit as new hires or individuals with a break in state service will not receive longevity payments, but will receive PAIL benefits once they have provided ten years of eligible service.

Mr. Norris served as the chief spokesperson on behalf of the State of Ohio in its bargaining with the Union about the parties' 1989 collective bargaining agreement. Mr. Norris pointed out that during these negotiations the Union had wanted to expand PAIL but the Union had made no new proposals on the longevity system. Mr. Norris testified that it had been the intention of the parties in their 1989 negotiations that the language and intent of Article 40.15(D) in the earlier contract remain in effect within Article 43.10(D) of the new contract. Mr. Norris stated that the only revision of this provision was a change as to service eligibility, changing eligible service from bargaining unit service to state seniority. Mr. Norris pointed out that otherwise the language within these articles remained identical.

Mr. Norris also pointed out that the bargaining session on PAIL during the 1989 negotiations occurred on the final day of bargaining, a hectic day. Mr. Norris testified that 85% of the negotiations occurred during the last week of bargaining and remembered that a great number of articles were addressed in the last few days of bargaining.

Management argues that in order to understand Article 43.10(D) in the parties' present contract the arbitrator must understand the background and intentions underlying Article 40.15(D) of the parties' previous contract. As the intentions behind these articles are the same, any tampering by the arbitrator with phasing out the longevity system would violate Article 7.07(E) of the contract now in effect between the parties. Management points out that under this article the arbitrator has no power to add to, subtract from, or modify any of the terms of the collective bargaining agreement, nor is the arbitrator permitted to impose on either party a limitation or obligation not specifically required by the express language of this collective bargaining agreement. Management contends that to impose upon the Employer a requirement that longevity payments be paid to those bargaining unit members who had not attained at least two years of eligible service by June 12, 1986, would impose upon the Employer an obligation that was never agreed by the parties and an obligation not specifically required by express language within the contract between the parties. The State of Ohio therefore urges the arbitrator to deny the grievance in its entirety.

Position of the Union

The Union claims that the language in Article 43.10(D) of the present contract between the parties is unambiguous and therefore only requires the arbitrator to enforce the express and obvious intention of this contract language. The Union argues that the

language, "Employees with less than two years of service will no longer be eligible for longevity payments," means exactly what it says, namely, that those with less than two years of eligible service are not entitled to longevity payments. The Union admits that as the statutory longevity system addressed by this language found within Ohio Revised Code Chapter 124. does not begin to provide longevity payments until an employee reaches five years of eligible service, the language appears to be mere surplusage. The Union points out, nonetheless, that whatever the reason for this language, nothing within this sentence or any other part of the June 12, 1989 contact between the parties intends to dismantle a longevity system to which bargaining unit members have had access over a long period of time. The Union categorically denies that Article 43.10(D) intended in any way to deny longevity payments to bargaining unit members who had achieved, after June 12, 1986, five years of eligible service.

The Union points out that the arbitrator is to make his decision in this matter within the boundaries of the contract submitted to him, an agreement which includes the language the parties have agreed the arbitrator is to interpret, namely language within Article 43.10(D). The Union points out that nowhere within this provision does there appear the date June 12, 1986, and the Union contends that the arbitrator should limit his focus to only this language as previous contracts are not now in effect and thus do not apply to the agreed issue submitted to the arbitrator.

The Union agrees that Article 43.10(D) contains no changes from previous contracts and argues therefore that the negotiations in 1989 had nothing to do with dismantling a long employed longevity system.

Like the Employer, the Union reminds the arbitrator that Article 7.07(E) of the contract now in effect between the parties, the contract underlying this arbitral proceeding, expressly prohibits the arbitrator from adding to, subtracting from, or modifying any of the terms of the contract. The Union also reminds the arbitrator that he is expressly prohibited from imposing on either party a limitation or obligation not specifically required by express language in the contract. The Union argues that to deny bargaining unit members longevity payments when they have provided five years of eligible service is to impose a limitation on the parties not expressed by contract language now in effect and presented to the arbitrator for interpretation.

The Union points out that while Article 43.10(D) remained unchanged from previous language, Article 43.10(C) was significantly modified. The last sentence of this article reads:

> ... Effective the pay period which includes July 15, 1991, the computation of PAIL shall be based upon state seniority instead of years of service in the bargaining unit.

The Union points out that this was a significant modification of eligibility rules for PAIL payments. The Union therefore concludes that Article 43 of the contract between the parties now in effect

was examined closely by the parties, was revised by the parties in certain places, but was left purposefully unchanged in Article 43.10(D).

The Union provided the testimony of Tom Woodruff at hearing, the chief negotiator for the Union during both the 1986 and 1989 negotiations. Mr. Woodruff explained that the goal of the Union during the 1986 negotiations had been to solve the problem of employees who had "X'd out", that is, had reached the ceiling of their pay range. Mr. Woodruff recalled that he had proposed the doubling of longevity at different levels of state service but had been unable to achieve all of the goals in this area desired by the Union.

Mr. Woodruff testified that in 1989, bargaining with the State of Ohio resulted in new proposals being made by the Union to the State. Mr. Woodruff testified that the chief negotiators on behalf of the State of Ohio had been able negotiators who brought to the table a long history of collective bargaining experience. Mr. Woodruff recalled that on April 14, 1989, a tentative agreement about a new contract was reached by the parties.

Mr. Woodruff presented as Union Exhibit 1 a compilation of the proposals made by the Union to the State of Ohio on January 18, 1989. Page eight of these proposals reflects a recommendation that PAI levels extend to five percent at five years and twenty-five percent at twenty-five years. This proposal was rejected.

Mr. Woodruff identified Union Exhibit 2 as a compilation of the proposals made by Management during the 1989 bargaining. Union

Exhibit 2, an exhibit of 22 pages, contains many but not all of Management's proposals. The date appearing on each of these proposals is February 1, 1989.

Mr. Woodruff testified at hearing that in late March, 1989 he proposed to the State of Ohio that PAI levels be extended to five percent for five years and twenty-five percent for twenty-five years. During an evening bargaining session on April 13, 1989, the chief negotiator for the State of Ohio expressed Management's position that there was no possibility for upward movement in longevity as the Union's bargaining unit members already had one of the richest longevity systems available. Mr. Woodruff recalled that the Union then "got off" the five year/five percent and twenty-five year/twenty-five percent proposal. Mr. Woodruff testified at hearing, however, that at no time during the 1989 negotiations did the Union agree that longevity payments should not be paid to bargaining unit members.

Mr. Woodruff explained at hearing that bargaining unit members with less than two years of eligible service on June 12, 1986, but who reached five years of eligible service at some point following June 12, 1986 were paid longevity as required by the contract and Ohio Revised Code Chapter 124. Mr. Woodruff pointed out, however, that subsequently these longevity payments were unilaterally and arbitrarily halted by the Employer, and amounts equal to longevity paid to certain bargaining unit members were withheld from subsequent paychecks. The Union strenuously objects to the removal of this money for two reasons. First, the Union believes that the

longevity payments were due these bargaining unit members and were paid properly and appropriately under the collective bargaining agreement between the parties; second, the Union believes that in the event the State of Ohio wishes to take action that directly affects bargaining unit members, action which is the subject of a dispute between the Employer and the Union, the matter should be bargained and if necessary arbitrated under the grievance procedure of the contract between the parties before any direct action is taken unilaterally to the detriment of bargaining unit members. The Union argues that the contract between the parties presently in effect provides a mechanism through which these kinds of disputes may be resolved, and emphasizes that these mechanisms must be utilized first before direct and unilateral action is taken by the Employer, when the dispute has been brought to the contractual grievance mechanism.

The Union requests that the arbitrator, in issuing his decision and award, address the withholding of wages from bargaining unit members by the Employer because of what the Employer believed to have been overpayments, at a time when this dispute had been submitted to the grievance procedure authorized by the contract between the parties.

The Union stresses that it never agreed to a diminution of the longevity system to which bargaining unit members are entitled, and the continuation of this system is what is intended by the express language in Article 43.10(D) of the contract between the parties. The Union points out that nothing within this language reveals any

intention by the parties to destroy the longevity system and emphasizes that this language was considered by bargaining unit members in the spring of 1989 when they had to decide whether this contract was acceptable or not. The Union contends that to place before these bargaining unit members very brief and simple language which makes no mention of the destruction of their eligibility for longevity payments, and then to find that this longevity system was destroyed because the bargaining unit members agreed to this destruction through their votes, would displace the intentions underlying the votes approving this language and withhold a significant benefit program from these and other bargaining unit members upon language that clearly indicates that the longevity system would continue. The Union urges that the arbitrator honor the express language placed before these bargaining unit members and approved, grant this consolidated grievance, restore to these bargaining unit members the longevity payments improperly withheld from them, restore to those bargaining unit members the money which was paid to them as longevity payments but which was improperly taken from them, and instruct the Employer that in the event a dispute invokes the grievance procedure of the collective bargaining agreement between the parties, no direct action on the dispute may be made by either party unilaterally, until the dispute has been resolved under the terms of the parties' collective bargaining agreement.

ANALYSIS

Based upon stipulations of the parties, this matter is determined arbitrable and properly before the arbitrator.

Both parties have expressed their respective positions both as to facts and argument in very precise and clear presentations. Both parties have expressed in great detail the foundations of their positions and both presentations were found to be highly persuasive by the arbitrator. Nothing within these presentations revealed any misstatement or misapplication of the events underlying this dispute; neither case has within it any weakness of logic or faulty analysis of the circumstances giving rise to this dispute.

There is much that is agreed by the parties in the history of this matter, the most significant being that there was no intention to change the language of Article 40.15(D) during bargaining on the 1989 contract, and the language within Article 43.10(D) of the parties' present contract mirrors the earlier article. While both parties concur that no change was intended, the parties strongly disagree about the significance of this retention of previously agreed anguage.

Management reasonably concludes that if no change was intended under the new language, the intention of this carry-over language is the same as when the language was bargained for the previous contract. Management claims therefore that to understand the intention of Article 43.10(D), based on the lack of change from

previous language, it is necessary for the arbitrator to consider the intentions underlying the predecessor article to Article 43.10(D), namely the intentions underlying the agreed language in Article 40.15(D) of the 1986 contract between the parties. The Employer has provided evidence as to the bargaining underlying Article 40.15(D) and urges the arbitrator to find, based on this evidence and this reasoning, that Article 43.10(D) continues the intention of Article 40.15(D), an intention to end once and for all access to the Ohio Revised Code Chapter 124. longevity system, except for those employees who had at least two years of eligible service for longevity payments by June 12, 1986. With this intention underlying the 1986 language, which later became Article 43.10(D), with no change to the previous language, the Employer urges that the arbitrator find that the parties within Article 43.10(D) had simply carried forward a long term intention dating from June 12, 1986, that the longevity system formerly made available to bargaining unit members be phased out, and that any bargaining unit member lacking two years of eligible service on June 12, 1986 not be paid longevity payments, ever. The Employer argues that these employees will be paid Professional Achievement Incentive Level payments beginning with the attainment of ten years of eligible service. In support of this view the Employer points out that the PAIL payments are substantially more generous than longevity payments, in effect doubling the longevity payments, and therefore the increased cost of PAIL was intended by both parties

to be offset by the dismantling of the Ohio Revised Code Chapter 124. longevity system.

The Union contends that as there was no change in Article 43.10(D), there is no evidence that the Union agreed that the longevity system employed for bargaining unit members be dismantled. The Union emphasizes that the 1989 contract which is at issue in this matter is entitled to be construed by the arbitrator in a manner which gives full force and effect to this contact, in a way that does not require the present collective bargaining agreement between the parties to be modified, amended, or revised by previous contracts between the parties which have expired. The Union argues that the present collective bargaining agreement between the parties is the only constitution of labor-management relations between the parties which is entitled to be enforced through these proceedings. The Union also emphasizes that action by the arbitrator which uses the 1986 agreement to modify the express language of the 1989 agreement would constitute action which would not only diminish the force and respect to which the present collective bargaining agreement between the parties is entitled, but would undercut the decisions of bargaining unit members who voted on the present agreement upon the language within this agreement. The Union claims that to use a previous contract to delete a benefit program upon which bargaining unit members in the spring of 1989 voted, is to apply an agreement between the parties which no longer exists.

The Union is correct in its emphasis upon honoring the present collective bargaining agreement between the parties as it is the

preeminent memorialization of the agreement between the parties on how the Employer and the Union are to interact during the terms of the contract upon matters relating to the employment of bargaining unit members. The actual agreement voted upon by bargaining unit members is entitled to be enforced and the votes of bargaining unit members are entitled to great respect.

This matter, however, does not address what bargaining unit voters had in mind when they voted on Article 43.10(D). This arbitral proceeding addresses what was intended by the parties who negotiated this language, namely negotiators on behalf of the State of Ohio and negotiators on behalf of the Union. This arbitation is not intended to honor what bargaining unit voters had in mind when they perused the language presented to them, nor is this a proceeding intended to gauge how deputy directors within the Ohio Department of Administrative Services interpreted this language. The arbitrator has been employed to assess what the parties, namely the Employer and the Union, through their bargaining in the spring of 1989, intended by the language within Article 43.10(D). If the parties intended the language to mean something and voters or deputy directors reading this language misconstrued what had been agreed, such a circumstance is unfortunate but does not constitue the issue presented to the arbitrator. The dispute in this case goes to what was intended by the Union and the Employer when they reached agreement on Article 43.10(D) language during bargaining.

In determining the intention of the language within Article 43.10(D) of the present contract between the parties it is not enough to say that this language remained unchanged from language contained within the previous contract. The maintenance of the status quo as to this express language is a significant feature in solving the puzzle of what is intended by this language, but it does not in and of itself answer the riddle.

The evidence presented reveals a single attempt during 1989 bargaining to modify the language of Article 40.15(D) in the predecessor contract, namely moving PAIL levels down to five years and up to twenty-five years and paying percentages commensurate with these amounts of state service. This proposal was rejected. As no other change was proposed for Article 43.10(D), it must be presumed that the intention of this article was the same as its predecessor. With so little bargaining on Article 43.10(D), the intention of this language must flow from its source, namely Article 40.15(D) of the previous contract. To read this language in a vacuum, that is, to read it as if this language first appeared in the June 12, 1989 contract, with no history, is a misstatement of the circumstances underlying this language. Had 43.10(D) truly been negotiated as original language appearing for the first time during the 1989 negotiations, the record in this matter would include evidence of the bargaining underlying this language. The arbitrator does not find it reasonable to treat the language of Article of 43.10(D) as if it were original language arising in 1989 because, with the exception of a single rejected item relating to

five and twenty-five years of service, Article 43.10(D) has no bargaining history in 1989. Viewing the language of Article 43.10(D) in such a light denies its bargaining history, misstates its birth, and treats the language as if it mystically appeared with virtually no discussion by the parties.

The arbitrator agrees with the Union's contention that the 1989 collective bargaining agreement between the parties is the paramount agreement under which this matter must be resolved. However, the bargaining history of contract language is neither immaterial nor irrelevant to an understanding of the agreement reached between the parties resulting in such language. The evidence presented as to the 1989 negotiations on Article 43.10(D) reflects no discussion between the parties for the establishment of this language other than to continue previous language from the 1986 contract. Without understanding the bargaining history of this article, a history which includes negotiations underlying Article 40.15(D) of the predecessor contract, Article 43.10(D) would be unconnected to any significant bargaining of the parties. As contract language by its very nature must arise from the bargained agreements of parties, the arbitrator finds that the bargaining which took place in 1986 must be considered in determining the intention of the language within Article 43.10(D) within the 1989 contract between the parties.

It should be remembered that the longevity system employed for bargaining unit members prior to June 12, 1986 had been in place for some time. This system is statutory and has a long history.

It is presumed that many of the bargaining unit members being paid longevity payments had received longevity payments under this statutory system prior to entry into the bargaining unit.

The long term nature of the longevity system addressed by the parties in 1986 bargaining raises a presumption that any material alteration of this long term longevity system would be addressed in express language, both within the negotiations of the parties and, more importantly, through express language within contractual terms intended to describe such a modification of this long term system. The notes of Mr. Norris are credible, as is all of Mr. Norris's testimony. On page four of Mr. Norris's notes we read Mr. Norris's paraphrasing of the Union's chief negotiator who, according to these notes, stated that he recognized the Union and the Employer had wiped out longevity. These notes show the Union negotiator to have said that certain bargaining unit members would be grandfathered in under a continuing longevity system, but later these notes reflect the Union negotiator stating that the Union desired that employees with zero to five years of eligible service remain within the longevity system. The final comment noted by Mr. Norris in his notes as to longevity discussions appears on page five, with the chief negotiator on behalf of the State of Ohio saying that Management would like to take the issue back and work on it some more.

The Employer has argued, based upon Mr. Norris's recollections and notes, that the Union agreed that the longevity system should be phased out, with anyone with less than two years of eligible

service on June 12, 1986 forever prohibited from receiving longevity payments. This class of bargaining unit member would not receive supplemental payments totalling 2.5% at five years, 3% at six years, 3.5% at seven years, 4% at eight years, or 4.5% at nine years. This group of bargaining unit members would have to wait until ten years of eligible service had been provided at which time 10% of their base salary would be paid to them as a Professional Achievement Incentive Level award. The Employer also points to Article 43.10(D) of the present contract between the parties and argues that the language, "Employees with less than two (2) years of service will no longer be eligible for longevity payments," expresses the intention that this prohibition be eternal for those with less than two years of service, and emphasizes the words, "no longer" as expressing this intention. The Employer points out that prior to June 12, 1986, those employees with two years or three years or four years of eligible service were not eligible for longevity payments, so the inclusion of this language as to those with less than two years of service is nonsensical if all it intends is to state the obvious, that is, that those with less than two years of eligible service are not entitled to longevity payments. The Employer points out that a much more reasonable interpretation of this language, and what was therefore intended by the parties when they agreed to this language, is that the longevity system under Ohio Revised Code Chapter 124. was no longer available to any bargaining unit members with less than two years of eligible service on June 12, 1986.

In support of this view the Employer has provided two memoranda from its chief negotiator in 1986. Within both of these memoranda the following language is used:

> Article 40.15 professional achievement incentive levels (PAIL) is designed to eliminate the longevity system for unit 11 and 12 employees.
>
> Employees in the bargaining units as of June 12, 1986 with less than two (2) years of state service will not be eligible for longevity when they reach five (5) years of service. They will be eligible for PAIL when they reach ten (10) years of service.

The Employer contends the language in the aforementioned paragraphs, expressed by Deputy Director Seidler within his November, 1987 and January, 1988 memoranda, is exactly what is intended by, "Employees with less than two (2) years of service will no longer be eligible for longevity payments."

The arbitrator has no trouble comprehending the intentions underlying Deputy Director Seidler's language contained within his memoranda of November 24, 1986 and January 7, 1987, Management Exhibits 2 and 3. In both memoranda Deputy Director Seidler is detailed and precise in his written comments about the dismantling of the previously employed longevity system, about employees with less than two years of eligible service on June 12, 1986 no longer being eligible to receive longevity payments, and about all such bargaining unit members having to wait ten years to receive PAIL payments. Within these writings Deputy Director Seidler used unambiguous language to express his view of the import of Article

40.15 of the previous contract between the parties. Once again, however, this matter does not address the opinion of a chief negotiator of what the language at issue means; this matter addresses what was agreed by the parties. Each party may have a different intention about how particular language is to be construed after the ratification of the language. It is what was intended by both parties at the time the language was agreed that must be employed in construing this language.

The arbitrator is struck by the very clear, detailed, and expansive explanation of the intentions underlying Article 40, Section 15 expressed by Deputy Director Seidler within his memoranda in late 1986 and early 1987. The detail, clarity, and lack of ambiguity expressing Mr. Seidler's views on the intentions underlying Article 40.15(D) stand in stark contrast to the brevity, vagueness, and ambiguity of the language acutally used within Article 40.15(D), and later Article 43.10(D). While Mr. Seidler within his memoranda speaks boldly of eliminating the longevity system and prohibiting benefits to a certain class of bargaining unit members, the language agreed by the parties for inclusion within the 1986 contract and later in the 1989 contract contains none of the precision of Mr. Seidler's memoranda.

The longevity system enjoyed by bargaining unit members prior to June 12, 1986 provided supplemental payments, increasing in amount from five to ten years. The establishment of the PAIL system, while doubling the amount of these longevity supplements, also required a five year eligible employee who otherwise would

qualify for supplemental longevity payments, to wait another five years before receiving an initial benefit under PAIL. Such a change is clearly available to the parties should such a change be agreed. A determination of whether such a modification was in fact agreed by both parties and not simply intended by the Employer is the core issue of this grievance.

As significant a benefit as longevity payments undoubtedly were to bargaining unit members, the arbitrator is not persuaded that a significant change involving the dismantling of such a system was agreed by the parties during negotiations in 1986 or 1989. Certainly such a significant change, resulting in such a significant economic impact to so many bargaining unit members, if actually agreed, would have rated more than the following language:

> "Employees with less than two (2) years of service will no longer be eligible for longevity payments."

It is true that if the arbitrator were to place weight upon particular pieces of evidence in a way the Employer claims is deserved, the sixteen words set out above could be read to mean that the longevity system available to bargaining unit 11 and 12 employees is to be eliminated; that employees in the bargaining units as of June 12, 1986 with less than two years of eligible service will not ever be eligible for longevity payments, even when they obtain five years of eligible service; that new employees to the bargaining unit will never be eligible for longevity payments; and July 12, 1986 is the cutoff date for determining who within

the bargaining units would ever receive longevity benefits under Ohio Revised Code Chapter 124. There is evidence in the record which, if weighted in a particular way, would lead to this conclusion as the agreed intention which produced: "Employees with less than two (2) years of service will no longer be eligible for longevity payments." To do so would mean the parties, both parties, intended that these sixteen words, comprising a single sentence, destroy a major benefit program available to bargaining unit members.

The arbitrator does not find the Employer's arguments or analysis in this matter mistaken or unreasonable. The arbitrator, however, is not persuaded, based on the evidence presented, that what was agreed by the parties in the spring of 1989, for the 1989 contract between the parties now in effect, intended a continuation of an agreed intention reached in 1986 that the longevity system available to bargaining unit members be eliminated. The language within Deputy Director Seidler's memoranda issued in November, 1986 and January, 1987, if it had been printed in the contract ratified by the bargaining unit members, would have persuaded the arbitrator otherwise.

This is not to cast doubt in any way upon the credibility or veracity of either Deputy Director Seidler in his written comments or Mr. Norris in his testimony and bargaining minutes. It must be noted, however, that these evidentiary items emanate from negotiators then serving as advocates on behalf of Management. The bargaining notes of Mr. Norris reflect a discussion on the subject

of longevity but do not, in the opinion of the arbitrator, denote agreement between the parties as to the elimination of the longevity system. Radical changes to benefit programs previously enjoyed by bargaining unit members would, in the opinion of the arbitrator, produce more concrete evidence of radical change, both in the language of the contract memorializing an agreement that the benefit program be significantly altered, and within evidence revealing a bargaining history which reflects that such an agreement had in fact been reached.

It has been argued that to read Article 43.10(D) as recommended by the Union the language becomes surplusage, making no sense for its inclusion in the article. It is agreed that it is obvious that those with two years or less of eligible service are not eligible for longevity payments under the longevity system utilized by the bargaining unit, but neither is it sensical to have included this language in the 1989 agreement if, effective June 12, 1986, the parties had agreed that anyone with less than two years of eligible service on June 12, 1986 would forever be denied longevity payments. Had that in fact been the case, doesn't this language in June, 1989 also become surplusage? Further, if June 12, 1986 as the cutoff date was intended to be honored under the June 12, 1989 contract, why does the date June 12, 1986 not appear in Article 43.10(D)?

It is the determination of the arbitrator that the Union did not agree within the language of Article 43.10(D) that bargaining unit members otherwise eligible for longevity payments upon

providing five years of eligible service be denied such benefits. The arbitrator also finds that though discussed, the parties did not agree in 1986 that the longevity system then enjoyed by bargaining units 11 and 12 be dismantled. The consolidated grievances filed in this matter are therefore sustained.

The arbitrator has been requested to address the unilateral action of the Employer in withholding money from certain bargaining unit members as a result of the Employer's view that these monies represented longevity overpayments paid to bargaining unit members in violation of the contract. The Union has argued that the unilateral action of the Employer in this matter, a matter submitted to the grievance procedure of the contract between the parties, represents a violation of the contract. The Employer counters this argument by pointing out that Management has not only contractual obligations but statutory obligations as well. The Employer argues that under Ohio law the State of Ohio is required to take the action taken.

During the course of these proceedings the arbitrator was rightfully reminded of the limitations on his authority enunciated by Article 7.07 of the contract presently in effect between the parties. Article 7.07(E) directs that the arbitrator shall have no power to add to, subtract from, or modify any of the terms of this agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this agreement.

There is, however, another arbitrator limitation expressed within Article 7.07. Article 7.07(G) reads as follows:

> Prior to the start of an arbitration hearing under this Agreement, the Employer and the Union shall attempt to reduce to writing the issue or issues to be placed before the arbitrator. The arbitrator's decision shall address itself solely to the issue or issues presented and shall not impose upon either party any restriction or obligation pertaining to any matter raised in the dispute which is not specifically related to the submitted issue or issues.

The issue originally presented to the arbitrator involves the application of language within Article 43.10(D). This was the written issue presented to the arbitrator agreed by the parties prior to the arbitration hearing. Article 7.07(G) directs the arbitrator to address himself solely to this agreed issue and not to address any restriction or obligation allegedly pertaining to either party which is not specifically related to the submitted issue.

Article 43 of the present contract between the parties addresses wages and wage supplements. The grievance procedure within the contract now in effect between the parties is expressed in Article 7. Neither the agreed issue presented to the arbitrator nor the arbitral hearing in this matter addressed head-on the authority of the Employer to act unilaterally in recouping payments to bargaining unit members that the Employer determined should not have been paid. The authority of the Employer to act unilaterally in such a matter is an issue of great importance to the parties and

deserves to be determined upon adequate evidence and contemplation. To answer the question urged upon the arbitrator by the Union, Article 7 of the contract between the parties would have to be construed, an article not addressed by the parties in their presentations. The arbitrator respectfully declines to address the actions of the Employer in retrieving what the Employer unilaterally decided were overpayments to bargaining unit members, under the prohibition contained within Article 7.07(G) of the contract now in effect between the parties.

AWARD

1. The consolidated grievances addressed by this arbitration are sustained.
2. Bargaining unit members within State Bargaining Units Eleven (11) and Twelve (12) are entitled to longevity payments under the provisions of the longevity system expressed within Ohio Revised Code Chapter 124.
3. Any eligible bargaining unit members who have been denied longevity payments under Ohio Revised Code Section 124. since June 12, 1986, shall receive payment of such longevity payments in the amount they would have received had they not been denied the payments upon provision of five years of eligible service.

4. Any bargaining unit members who were originally paid longevity payments under Ohio Revised Code Chapter 124. after attaining five years of eligible service and had these longevity payments removed will be reimbursed for the amounts taken and shall be made whole in every way in relation to the longevity payments to which each was entitled upon reaching five years of eligible service following June 12, 1986.

Howard D. Silver
Arbitrator

July 8, 1991
Columbus, Ohio