# ARBITRATION SUMMARY AND AWARD LOG

## OCB AWARD NUMBER: 630

OCB GRIEVANCE NUMBER: 34-00-900720-0105-02-12

GRIEVANT NAME: MACK, CHARLES L. & BUTLER, FRED L.

UNION: 1199

DEPARTMENT: WORKERS' COMPENSATION

ARBITRATOR: FULLMER, JERRY

MANAGEMENT ADVOCATE: PRICE, MERIL

2ND CHAIR: BUTLER, VALERIE

UNION ADVOCATE: KEPLER, RICH

ARBITRATION DATE: JUNE 18, 1991

DECISION DATE: JULY 8, 1991

DECISION: MODIFIED

CONTRACT SECTIONS AND/OR ISSUES: BUTLER & MACK CLAIM THAT THEIR STATE SENIORITY SHOULD INCLUDE CERTAIN PERIODS WHICH THEY WERE LAID OFF.

HOLDING: MR. BUTLER WAS ORIGINALLY COVERED BY OCSEA UNTIL HE TRANSFERRED TO THE INDUSTRIAL COMM AT WHICH TIME HE WOULD BE COVERED BY 1199. MR. BUTLER SHALL BE GIVEN STATE SENIORITY CREDIT FOR THE PERIOD 6/29 - 12/7/86. MR. MACK WAS LAID OFF BY OBES AND NEVER RECALLED BY THEM. HE WAS LATER HIRED BY THE INDUSTRIAL COMM WHERE HE WAS REPRESENTED BY 1199. HE IS NOT ENTITLED TO CREDIT FOR HIS PREVIOUS 17 MONTH BREAK IN SERVICE BECAUSE THE BREAK EXCEEDED ONE YEAR.

COST: $846.37

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| IN THE MATTER OF ARBITRATION<br><br>Between<br><br>STATE OF OHIO,<br>BUREAU OF WORKERS' COMPENSATION<br><br>The Employer<br><br>-and-<br><br>OHIO HEALTH CARE EMPLOYEES UNION<br>DISTRICT 1199, WV/KY/OH<br>NATIONAL UNION OF HOSPITAL<br>AND HEALTH CARE EMPLOYEES,<br>SEIU, AFL-CIO<br><br>The Union | OPINION AND AWARD<br><br>Fred L. Butler and<br>Charles L. Mack "State<br>Seniority" Grievance<br><br>34-00-900720-0105-02-12<br><br>Merits Issues |

#630

APPEARANCES

For the Employer:

Meril J. Price, Chief, Administrative Support
Advocate
Valerie Butler, 2d Chair
Gretchen Green, Manager Labor Relations - BWC

For the Union:

Rich Kepler, Organizer
Advocate
Fred Butler, Grievant
Charles L. Mack, Grievant

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This case [1] concerns a claim by the Grievants, Fred Butler and Charles L. Mack, that their state seniority should include certain periods during which they were laid off.

## I. THE PRIOR PROCEEDINGS IN THE CASE

A hearing was held in this case on January 22, 1991. After full discussion that hearing was eventually confined to the issues of procedural and substantive arbitrability. An Opinion and Award dated February 5, 1991 was entered by the arbitrator holding the grievances at issue to be both procedurally and substantively arbitrable. These aspects will not be discussed further.

In the aftermath a second hearing was scheduled for June 18, 1991 to consider the merits of the grievances. This Opinion and Award deals with those issues.

## II. FACTS

The facts of the case were stated by the arbitrator in the

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[1] The State of Ohio (hereafter referred to as "the Employer" and Ohio Health Care Employees Union, District 1199, WV/KY/OH National Union of Hospital and Health Care Employees, SEIU, AFL-CIO (hereafter referred to as "the Union"), are parties to a collective bargaining agreement (Jt. Ex. 1) providing in Article 7 for settlement of disputes through a grievance and arbitration procedure. A dispute has arisen between the parties concerning a claim by the Grievants, Fred Butler and Charles L. Mack, that their state seniority should include certain periods during which they were laid off

The grievance (Jt. Ex. 3), (#34-00-900720-0105-02-12) concerning this matter was dated July 13, 1990. It was submitted to arbitration before this arbitrator who serves on the parties' permanent arbitration panel. A hearing was held on the merits of the case on June 18, 1991 in the Office of Collective Bargaining in Columbus, Ohio. Both advocates made opening and closing statements and presented and cross-examined witnesses.

February 5, 1991 Opinion and Award at pages 2-3 in the following terms:

> "Both Grievants started their employment with the State of Ohio well prior to dates when the State of Ohio entered into collective agreements with the Union (June 12, 1986) or with the Ohio Civil Service Employees Association, Local 11 (July 1, 1986. This union is sometimes hereafter referred to as "OSCEA"). Both entered State employment with an agency (Ohio Bureau of Employment Services, hereafter sometimes referred to as "OBES") other than the one by whom they are now employed. (Bureau of Workers' Compensation, hereafter sometimes referred to as "BWC") Both were laid off by OBES starting in the second quarter of 1982 (Butler for approximately six months and Mack for approximately seventeen months). Both eventually became employed by the Industrial Commission of Ohio and were then transferred to BWC on February 11, 1990 under the provisions of S.B.222. During these events the Grievants' state seniority had been calculated without giving them credit for the periods which they had spent on lay off.
>
> In late January or early February the Grievants' attention was drawn to an article in an OSCEA newsletter touting an arbitration decision in which the arbitrator was claimed to have ruled that the grievants were entitled to credit under the State/OSCEA contract for an eleven month lay off they had incurred in 1982. The Grievants sought similar credits. They made several telephone calls to Columbus and sent two letters on the subject dated February 9 and June 1, 1990."

At the hearing on the merits on June 18, 1991, both advocates were asked by the arbitrator to review the above statement of facts and point out any errors. They both consulted with their clients and indicated to the arbitrator that there were no errors.

A more complete statement of the facts concerning the Grievants was set out in a Stipulation of Facts at the January 22, 1991 hearing. This Stipulation provided as follows:

[BUTLER]

> "1. Fred F. Butler was hired by the Ohio Bureau of Employment Services on September 15, 1975.

2. Mr. Butler was laid off from the Bureau on June 29, 1982.

3. He was reinstated from separation on December 20, 1982 and hired back to the Bureau of Employment Services.

4. Mr. Butler was promoted and transferred to the Industrial Commission on December 7, 1986. He was placed in the position of Industrial Rehabilitation Consultant, which, since unit determinations, was in bargaining unit 12.

5. Mr. Butler was in a bargaining unit covered by the OSCEA/AFSCME contract from the inception date of that contract, July 1, 1986 until his promotion and transfer to the Industrial Commission on December 7, 1986.

6. Mr. Butler has been represented by 1199 since accepting the position at the Commission.

7. Mr. Butler was transferred to the Bureau of Workers Compensation under HB222 in February of 1990 and is still represented by 1199."

[MACK]

"8. Mr. Charles Mack was hired by the Ohio Bureau of Employment Services on September 13, 1965.

9. Mr. Mack was laid off on May 22, 1982 from the Bureau of Employment Services.

10. The Bureau of Employment Services did not recall Mr. Mack from layoff.

11. Mr. Mack was hired by the Industrial Commission on October 31, 1983.

12. There was no collective bargaining agreement between the State of Ohio and 1199 on October 31, 1983.

13. Mr. Mack was represented by 1199 from the inception of their first contract with the State of Ohio, beginning June 12, 1986"

## II. APPLICABLE CONTRACT PROVISIONS

### ARTICLE 28 - SENIORITY

Sec. 28.01 Seniority Definition

A. State Seniority

The total length of continuous service in a position or succession of positions within the employ of the State dating back to the first date of hire.

Side Letters to the Contract

March 3, 1986

Dear Mr. Woodruff:

Per our discussion of seniority for present employees of bargaining units 11 and 12, the State of Ohio agrees that seniority on the effective date of the collective bargaining agreement shall be based on the previous guidelines used in determining State service. These guidelines shall include the crediting of previous time after a break in service, if the employee was reinstated within one year of the break in service.

[s] Edward H. Seidler

III. ISSUE

Does the Agreement and Side Letter between the Employer and the Union require that the Grievants' seniority include periods during which they were laid off in 1982?

IV. POSITIONS OF THE PARTIES

The Union Position

The Grievants have been credited with the total state service of time worked at OBES and at their present state agency. Mr. Butler has close to 15 years and Mr. Mack has close to 28 years. The only time that hasn't been credited toward their service is the time they spent in layoff.

The issue as to the time they spent in layoff arose because of a decision by Arbitrator Klein involving another union. In that case the arbitrator awarded the grievants their time spent in

layoff both as to their total state seniority, including any past due longevity and vacation accrued. The key to the matter is that the total state seniority issue in that case was settled by the Employer prior to going to arbitration. That is all the Union is asking for in this case, just seniority, not for longevity or vacation accrual.

The Employer's argument so far has been insufficient as to the reasons asserted. It is the Union's position that the Grievants should have their time in layoff counted as total state seniority because none of the four conditions which constitute a break in continuous service by Section 28.01 F. of the contract have occurred.

Section 28.01 A. defines seniority as including the total length of continuous service dating back to the first date of hire. It is clear that this definition picks up service prior to the July 1, 1986 effective date of the State/1199 agreement.

Arbitrator Klein decided that "Seniority was not broken by your layoff and subsequent reinstatement." The Grievants in this case were employed under the same Civil Service laws as the grievants in the Klein case. The same principles should apply here. The arbitrator should sustain the grievances and grant the Grievants their 17 months (Mack) and 6 months (Butler) that they have lost toward their total state seniority.

The Employer Position

The case is about total length of continuous service. The Greivants are seeking credit for the time they spent in a laid off

status as counting towards their continuous service. The Employer contends that the time the Grievants spent in a "terminated" laid off status cannot be counted towards their continuous service. The case requires analysis not only of the provisions of Section 28.01, but also the Side Letter of March 3, 1986 (the "Side Letter").

Turning first to Grievant Mack, the Employer agrees that Mr. Mack was covered as a "present" employee by the Side Letter. That Letter states that seniority shall be based upon the previous guidelines in determining state service. Under those guidelines Mr. Mack experienced a break in service when he was laid off for seventeen months. Since he was not reinstated, but was instead newly hired by another agency, he was not entitled to regain any time for the period that he was on lay off.

The situation of Mr. Butler is different. He was not an employee in Bargaining Unit 11 or 12 on the date of June 12, 1986. Thus he was not a "present" employee for the purposes of the Side Letter. He was thus not entitled to the benefit of the provision of the Side Letter which provided that after a break in service, previous time would be credited if the employee was reinstated within one year. He was similarly not entitled to the benefit of the May 26, 1987 State/AFSCME letter (Emp. Ex. 2) because he was not employed in that unit at that time.

Seniority is a bargaining unit concept and is defined in each contract. Each contract is different and there are two different side letters. The arbitrator cannot incorporate practices or provisions of another collective bargaining agreement. To do so

would exceed the arbitrator's jurisdiction under Article 7.07(E). The grievance should be denied on the merits.

V. DISCUSSION

A. Introduction

The parties' first bargaining agreement became effective on June 12, 1986. It undertook, in Section 28.01 A. to define "State Seniority" and in Section 28.01 F. to define the commencement and the interruption of "continuous service". The present controversy has to do with the circumstances, if any, under which State Seniority of the Grievants will be deemed to include periods of lay off prior to the June 12, 1986.

The subject is a difficult one. Some of these difficulties should be pointed out at the outset. They are, first, with the terms of the parties' agreement; second, with the terms of the Letter of Agreement; third, with the "Nomenclature" of the Ohio Revised Code; and fourth, with the Klein arbitration award.

1. The Agreement

As always the first reference is to the terms of the agreement itself to see if a plain answer to the issue is provided. Section 28.01 A. defines State Seniority as:

> "The total length of continuous service in a position or succession of positions within the employ of the State dating back to the first date of hire."

A first difficulty is that there is a tension in this language between the concept of "continuous service" and that of the "first date of hire". This is because given employee's first date of hire may in fact not be followed by a period of entirely continuous

service.[2] The same tension exists in the language of Section 28.01 F. which indicates that "Continuous service shall commence on the original date of hire". The original date of hire may similarly not be followed by a period of entirely continuous service.

A second difficulty is in the listing of four causes for interruption of continuous service in Section 28.01 F. (i.e. separation because of resignation, discharge, failure to return from leave of absence and failure to respond to recall from layoff). The implication is that a person who does respond to recall from lay off has not had an interruption of continuous service. But, 28.01 F. does not indicate expressly whether it is to be applied retroactively to situations preceding June 12, 1986 or only prospectively.

2. The Side Letter

In 1986 the parties apparently recognized that the terms of the agreement were unlikely to resolve all the questions and they entered into a Side Letter dated March 1, 1986 (quoted in full, supra). They agreed that seniority of "present employees" was to be based on "the present guidelines used in determining State service." There is no particular guidance as to what these "guidelines" are. Had the parties intended that the term meant only

[2] E.g. An employee hired by Agency A on January 1, 1975 who serves through December 31, 1980. He resigns and beachcombes for two years. He is then hired by Agency B on January 1, 1983 and serves five years more. As of December 31, 1988 is the employee's State Seniority measured by the "first date of hire", i.e. January 1, 1975, or by the most recent period of continuous service, i.e. January 1, 1983-December 31, 1988, or by some other calculation?

the "Nomenclature" of Chapter 123:1-47 of the Ohio Administrative Code, it would seem to have been simple enough to so referenced it.

The concluding sentence of the letter states that:

> "These guidelines shall include the crediting of previous time after a break in service, if the employee was reinstated within one year of the break in service."

This sentence is not clear on its face as to whether the "reinstated within one year of the break in service" employee is to be credited only with the time that he had accrued prior to the break in service or with all his previous time including the time that he spent on his layoff/break in service.

3. The Nomenclature of the Ohio Administrative Code

The Employer maintains that the "guidelines" referred to by the Side Letter are essentially the provisions of Chapter 123:1-47 of the Ohio Revised Code concerning "Nomenclature". Two different editions of the Nomenclature were placed in evidence, one effective August 5, 1982 (Emp. Ex. 3) and one effective October 25, 1983 (Emp. Ex. 4). It would have been the latter edition which would have been in effect on the June 12, 1986 effective date of the parties' collective bargaining agreement.

One difficulty is as to which edition of the nomenclature it is which constitutes the "guidelines" referred to by the Side Letter. It is not an academic question because the 1982 edition includes the following language in the definition of "break in service":

> "Means an employee has had a separation from service which includes, .....Any separation in service lasting

> thirty days or less....shall not constitute a break in service. An employee who separates from service for more than thirty days is deemed to have a break in service. An employee who separates and is later reinstated from the separation shall not be deemed to have had a break in service except that the time the employee was separated shall not be counted towards the calculation of retention points for continuous service...." (emphasis added)

The 1983 edition had a re-drafted definition which stated:

> "Means an employee has had a separation from service of thirty-one days or more. An authorized leave of absence, ...or any separation from service which carries with it the right to reinstatement, shall not constitute a break in service, provided the employee is reinstated within the allowable time. The time the employee was separated shall not be counted towards the calculation of retention points for continuous service."

The language is quite different.

4. The Klein Award

In 1989 a case proceeded to arbitration under the terms of the bargaining agreement between the Employer and OSCEA, Local 11. In that case, i.e. Grievance No. G-87-0733, grievants Blackwell and Garrett had both worked for OBES prior to the effective date of the Employer/OSCEA agreement (July 1, 1986). Each had incurred an approximately 11 month "layoff" in 1982 and been "recalled" in December of that year. The Employer had conceded in Step 4 of the grievance procedure that the Grievants' "seniority was not broken by your layoff and subsequent reinstatement". Arbitrator Klein was asked to determine the issue of whether the Grievants' vacation accrual and longevity pay should be adjusted to reflect the inclusion of the eleven month period of layoff.

Arbitrator Klein decided that it should be so adjusted. The

core of her reasoning was as follows:

> "As it pertains to the merits, the Arbitrator finds that the evidence supports the position taken by the Union. Although there was no contract until July 1, 1986, the parties agreed by virtue of the language of Article 16 that an employee's seniority would be his/her `total length of service in a permanent position or succession of positions within the employ of the State dating back to the last date of hire'. The contract language signifies that seniority dates can be adjusted retroactively; Management acknowledged this in its Step 4 response to the instant grievance.
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> Seniority benefits exist by virtue of the contract and seniority rights may be modified in successive contracts. In this case, the concept of seniority came into being for the parties in 1986 and Article 16 defines seniority and continuous service. The May 26, 1987 letter establishes that the parties agreed that both seniority and service credits were encompassed by the 1986 contract.
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> Article 16.02 sets forth five circumstances by which an Employee's State service shall be interrupted. None of the items are applicable here. The seniority provision outlines the events which break continuous service; it does not say that seniority benefits are excluded for any reasons other than items A through E. This signifies that in all other circumstances, seniority is not broken and continuous service is not interrupted. In the grievants' case, their continuous service was not interrupted.
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> If the Employer undertakes to limit seniority rights other than as mutually agreed upon in Article 16.02, such action constitutes a violation of the collective bargaining agreement.
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> As defined in the contract, the term `seniority' encompasses length of service, and vacation accrual and longevity pay are based upon length of service. By virtue of their seniority and uninterrupted `continuous' service, the eleven month period of layoff should have been credited to the grievants for purposes of computing vacation accrual and longevity pay." (Opinion, p. 7-8)

Article 16.01. A. and 16.02 of the Employer/OSCEA agreement are quite similar to the provisions of Article 28.01 A. and F. of the

parties' agreement.

B. The Resolution of the Grievances at Issue

Arbitrators, of course, should not concern themselves with rendering broad philosophical discourses upon their perceived interpretations of bargaining agreements. They sit instead to resolve and dispose of grievances that the parties have not been able to resolve. The above "Introduction" has been simply the arbitrator's recitation of some of the authorities cited by the parties in this case and his indication of some of the problems in interpreting them. We turn now to the resolution of the Butler and Mack grievances.[3]

1. Fred Butler

Mr. Butler was covered by the Employer/OSCEA agreement on the date that it came into effect, July 1, 1986 "until his promotion and transfer to the Industrial Commission on December 7, 1986." (Stipulation of Facts) His pre-July 1, 1986 seniority was thus governed by the terms of the Employer/OSCEA agreement.

The Employer is correct in asserting that the present arbitrator is not empowered to apply the terms of the Employer/OSCEA agreement. He sits to interpret and apply the Employer/1199 agreement. But, arbitrator Klein was empowered to

[3] The arbitrator is aware that there may be other factual situations extant in the parties' dealings with each other than those presented by Butler and Mack in the present case. The arbitrator does not presume to pass upon those situations in the present case.

apply the Employer/OSCEA agreement. She indicated in her decision of December 11, 1989 that "In the grievants' case, their continuous service was not interrupted." by their eleven months layoffs four years prior to the effective date of that agreement. If this was true of the grievants in the Klein arbitration (Garrett and Blackwell) it was also true of Mr. Butler. All three worked for OBES; all three were covered by the Employer/OSCEA agreement and the same time period is applicable to all three.

Section 28.01 of the parties' agreement recognizes that State Seniority includes continuous service in a position or succession of positions "within the employ of the State" dating back to the first date of hire. This provision is quite broad enough to mandate the recognition of Mr. Butler's seniority from his days at OBES under the OSCEA contract, calculated in the fashion that Arbitrator Klein[4] has found to be required by that agreement. Mr. Butler was thus entitled to recognition of the almost six month period that he was on layoff in 1982.

3. Charles Mack

Mr. Mack's situation is quite different from that of Mr. Butler. The first difference is that he was covered by the parties' agreement on its effective date of June 12, 1986 and was never covered by the Employer/OSCEA agreement.

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[4] As should be obvious, the present arbitrator is not passing upon the merits of the Klein decision. Whether correct or incorrect it represents a binding interpretation of the Employer/OSCEA agreement until overturned by a court or being called into question by other arbitrations under that agreement.

The second difference is that the period between when Mr. Mack was "laid off on May 22, 1982 from the Bureau of Employment Services", when "the Bureau of Employment Services did not recall Mr. Mack from layoff", and when "Mr. Mack was hired by the Industrial Commission on October 31, 1983" (all quotations from the Stipulation of Facts) is much longer than the period of Mr. Butler's six month layoff. It is in fact over 17 months a period which is, obviously, longer than one year.

The one year is of significance. It will be recalled that the Side Letter stated that:

> "These guidelines shall include the crediting of previous time after a break in service, if the employee was reinstated within one year of the break in service."

The implication of the sentence is that if an employee is <u>not</u> reinstated within one year of the break in service, he is <u>not</u> entitled to any "crediting of previous time after a break in service". Thus Mr. Mack's seventeen month gap would seem to preclude him from any benefit from the Side Letter.[5]

Similarly, the gap exceeding one year dilutes Mr. Mack's claims to have benefitted from the principles of the Klein decision under the Employer/OSCEA agreement. Neither of the grievants in that case, Garrett and Blackwell, had been on layoff for more than one year. Moreover, even the Employer/OSCEA side letter of May 26,

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[5] The arbitrator is aware that the Employer maintains that Grievant Mack was not <u>reinstated</u> at all, let alone within one year. This portion of the Employer's argument need not be reached since it is clear that the October 31, 1983 hiring of Mr. Mack by the Industrial Commission did not take place within one year of the break in service.

1987 (Employer Ex. 2) in paragraph 6 only provided that:

> "6. An employee who is laid off and is re-employed, i.e. not recalled by any state agency, but hired by any state agency, within 18 months (prior to the contract's implementation within one year) has not experienced a break in service. This employee would continue to earn seniority while on layoff."

These provisions thus would not have covered Mr. Mack because his layoff was prior to the contract's implementation and exceeded one year.

In conclusion, it appears that the Employer/1199 Side Letter of March 3, 1986 indicates that Grievant Mack is not entitled to credit for his previous seventeen month break in service because the break exceeded one year.

VI. AWARD

Fred Butler's grievance is sustained. He shall be given State Seniority credit for the period of June 29 - December 7, 1986.

Charles Mack's grievance is denied.

Jerry A. Fullmer, Arbitrator

Made and entered this
8th day of July, 1991
at Cleveland, Ohio