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In the Matter of Arbitration *
Between *
*
OHIO CIVIL SERVICE EMPLOYEES *
ASSOCIATION, LOCAL 11, *
A.F.S.C.M.E., AFL/CIO *
*
and *
*
STATE OF OHIO, *
DEPARTMENT OF HEALTH *
* * * * * * * * * * * * * * * * * *

OPINION and AWARD

Anna D. Smith, Arbitrator

Case 14-00-(891124)-79-01-07

Norman Gambill, Grievant

Longevity Pay

#684

Appearances by Brief

For OCSEA Local 11, AFSCME:

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For the State of Ohio:

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I. Background

On November 24, 1989, grievance #14-00-891124-0079-01-07 was filed by Norman Gambill alleging he was improperly denied longevity pay in violation of the Collective Bargaining Agreement in effect at the time of his employment and the subsequent Agreement, which is currently in effect. The matter being unresolved in lower steps of the grievance procedure, the case was appealed to arbitration for final determination pursuant to the terms of the Collective Bargaining Agreement.

By mutual agreement of the parties oral hearing was waived and the matter was submitted to the Arbitrator on briefs. Briefs and replies being being timely filed, the record was closed on September 26, 1991. This opinion and award is based solely on the record as described herein.

II. Stipulations

The parties agreed to the following stipulations of the issue, facts, and pertinent Contract provisions:

Issue

[redacted]

Facts

1. [redacted] was employed with the Ohio State [redacted] Patrol from [redacted] 1988.
2. On September 9, 1988, he retired from the Ohio Highway Patrol.
3. [redacted] the Department of [redacted]lth.

Pertinent Contract Provisions

ARTICLE 36 - WAGES

§36.07 - Longevity Pay

Beginning on the first day of the pay period within which an employee completes five (5) years of total state service, each employee will receive an automatic salary adjustment equivalent to one-half percent (1/2%) times the number of years of service times the first step of the pay rate of the employee's classification up to a total of twenty (20) years. This amount will be added to the step rate of pay.

Longevity adjustments are based solely on length of service. They shall not be affected by promotion, demotion or other changes in classification.

Effective July 1, 1986, only service with state agencies, i.e. agencies whose employees are paid by the Auditor of State, will be computed for the purpose of determining the rate of accrual for new employees. Service time for longevity accrual for current employees will not be modified by the preceding sentence.

ARTICLE 43 - DURATION

§43.01 - Agreement

To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for Ohio Revised Code Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

§43.02 - Preservation of Benefits

To the extent that State statutes, regulations or rules promulgated pursuant to Ohio Revised Code Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives.

III. Arguments of the Parties

Argument of the Union

The Union states that the longevity pay provision as originally negotiated for the 1986-89 Agreement is essentially the same as that in the current (1989-91) Agreement. [redacted]

[redacted] Code Section 123:1-37-02 and Ohio Revised [redacted]:

> Those employees who have completed a minimum of five years of total service with the state or any of its political subdivisions shall receive the longevity pay supplement which shall be a percentage equal to one-half of one percent for each year of such service. This percentage shall be an automatic pay supplement administered by the Department of Administrative Services, and shall be applicable to the entire pay period in which that date occurs. A maximum accumulation of ten percent shall be applicable after twenty years of total service.
>
> O.A.C. 123:1-37-03 (Union Ex. D)

> Beginning on the first day of the pay period within which the employee completes five years of total service with the state government or any of its political subdivisions, each employee in positions paid under salary schedules A and B of section 124.15 of the Revised Code shall receive an automatic salary adjustment equivalent to two and one-half per cent of the classification salary base, to the nearest whole cent. Each employee shall receive thereafter an annual adjustment equivalent to one-half of one per cent of his classification salary base, to the nearest whole cent, for each additional year of qualified employment until a maximum of ten per cent of the employee's classification salary base is reached. The granting of longevity adjustments shall not be affected by promotion, demotion, or other change in pay range for his class. Longevity pay adjustments shall become effective at the beginning of the pay period within which the employee completes the necessary length of service. Time spent on authorized leave of absence shall be counted for this purpose.
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> O.R.C. 124.181(E) (Union Ex. E, but cf. Union Br., 5)

However, in 1987, the Revised Code was changed by Amended Substitute House Bill 178 (Union Ex. F) which, in relevant part, eliminated retirees' prior service in the calculation of longevity pay upon re-employment by the State or political subdivision. T[redacted]

[redacted]. The parties therefore intended to give the 1989 language the same meaning as

the 1986 provision, argues the Union. Thus, since 1987, the language of the Contract and the Revised Code have been in conflict with respect to longevity pay. The resolution of this conflict is the problem before the Arbitrator.

The Union rejects the Employer's argument that §124.181(E) O.R.C. (as amended) applies by incorporation through 4117.10(A) O.R.C. It states that §124.181(E) is not applicable because it addresses longevity pay provided under the Code, not longevity pay provided under the Contract:

> An employee who has retired in accordance with the provisions of any retirement system offered by the state and who is employed by the state or any political subdivision of the state on or after June 24, 1987, shall not have his prior service with the state...counted for the purpose of determining the amount of the salary adjustment provided under this division.
>
> (Emphasis added in Union Reply at 1)

[redacted] the Code, [redacted] reference the Code. The parties might have incorporated Code language for longevity pay, as they did in other sections of the Contract, but they did not do so. Hence, §124.181 has no significance in this case.

[redacted] employees, but a law regarding [redacted] pay. Therefore, it is not a retirement law superseding contractual provisions pursuant to §4117.10(A).

[redacted] Union's view, because the Contract does address longevity pay, it prevails over the Revised Code according to Section 43.01 of the Collective Bargaining Agreement. In support

of this position, it cites Arbitrator Pincus's Evans decision (Parties' Grievance No. G87-0285, Union Ex. H), w[redacted] clear and unambiguous contractual language prevents an arbitrator from looking to the Administrative Code. The Contract, it maintains, is clear: Section 36.07 of the 1989 Agreement, like §36.06 of the 1986 Agreement, states eligibility for longevity pay solely in terms of "total state service" and further provides that adjustments shall be unaffected "by promotion, demotion or other changes in classification." C[redacted] the Employer's position, the Grievant did experience a change in classification from his position with the Highway Patrol and his longevity pay should be unaffected by this change. Also, the Contract does not specify that longevity pay is based on continuous state service or that retirement service is based on total state service. It clearly and unambiguously says "total state service." The Union goes on to argue that the Employer's use of OCSEA and Shockley v. State of Ohio, Grievance No.17-00-880204-0008-01-09 is misplaced, because that case involved the rate of pay, which is impacted by classification change while longevity payments are not.

Since the language is clear, the Employer's proposition that the Contract is unclear must be rejected, as must the conclusion that the Revised Code should apply pursuant to O.R.C. 4117.10(A). The Union distinguishes the Feldman case cited by the Employer from the instant one on the basis that the section of the Contract pertinent here does contain specific language on eligibility requirements unlike the provision in dispute before Arbitrator

Feldman. Similarly, the subject contract, unlike that in State, ex rel. Clark v. Greater Cleveland Transit, 48 Ohio St. 3d 19 (1990), does address the issue of prior service credits through "other changes in classification" and its statement that longevity adjustments "are based solely on length of service."

If however, the arbitrator determines that the contract is silent with respect to the facts of this case, the Grievant would have been eligible for longevity pay under the 1986 Agreement because Section 43.02 incorporates external State benefits. Clearly the parties meant longevity benefits and eligibility to continue in the 1989 Agreement, since they did not change the provision to conform to the Revised Code amendment.

The Union further asserts that it is improper for an arbitrator to correct negotiation mistakes or to otherwise grant benefits previously negotiated away, citing Section 25.03 of the Contract and the parties' Grievance No. 27-01-880127-0001-01-03. The Union urges the conclusion that the language is clear and that the Grievant is entitled to receive longevity pay.

Argument of the Employer

The Employer first contends that this case is not substantively arbitrable because 43.02 makes Agreement contrary with Chapter 4117, Ohio Revised Code, an exception to the precedence of the Agreement. O.R.C. 4117.10(A), which supersedes the Contract, states that "laws pertaining to civil rights, affirmative action, unemployment compensation, workers' compensation, the retirement of public employees, prevail over

conflicting provisions of agreements between employee organizations and public employers." Therefore, House Bill 178, which amended §124.181(E), governs this case because the legislation and this case address the retirement of public employees. Since retirement is a prohibited subject of bargaining and §124.181(E) prevails, the Arbitrator has no authority to decide the issue.

However, if the Arbitrator determines that the matter is arbitrable, the Employer asserts that §124.181 should govern anyway, because it does not conflict with the Contract. Section 36[illegible] says [illegible] deduction of [illegible] is [illegible] classification but a change in [illegible] status. Thus, the Agreement is silent with respect to rehired retirees and, pursuant to 4117.10(A), the Code applies:

> [illegible] matter, the public employer and public employees are [illegible] a[illegible] hours and terms and c[illegible] employment for public employees.

In support of this position, the Employer cites Arbitrator Feldman in the parties' case G87-72, who held that the Code prevails where the Contract makes no specification about a matter. The Employer also directs the Arbitrator's attention to State, ex rel. Clark v. Greater Cleveland Transit, 48 Ohio St. 3d 19 (1990), in which the Court held that the Code prevails where there is no conflict between a contractual provision that makes no specification about prior service credit, while the Code does.

The Employer counters the Union's use of §25.03 to constrain the Arbitrator by stating that the Arbitrator is not barred from

applying Chapter 4117 and other external laws because of their incorporation through Sections 12.01 and 49.03. The State further asks the Arbitrator to adopt the generally held arbitral assumption that the parties intended to negotiate a valid contract and thus would not negotiate a prohibitted subject. It disputes the Union's contention that the Grievant is eligible under the 1989 Agreement by virtue of his eligibility under the 1986 Agreement, saying that he was not eligible under the earlier contract. He was ineligible, the Employer claims, because the 1986 Collective Bargaining Agreement's provision was superseded by a law pertaining to retirement of public employees, namely House Bill 178.

The Employer contends that the Union's reliance on the Pincus Evans case is misplaced because it was decided before Clark. The question left open by Clark is how much contract specificity is required for 4117.10(A) to apply. The Employer's contention is that since there is no reference to working retirees in the Contract, the law applies, not the Contract.

The Employer goes on to argue that the exemption of retirement from collective bargaining is good public policy because it prevents double-dipping from the public well and allows the Legislature to monitor retiree issues without interference from public employers and employee organizations. It further asserts that the Union cannot show that the Collective Bargaining Agreement requires the Employer to give credit for prior State employment, and cites OCSEA and Shockley v. State of Ohio, Grievance No.17-00-880204-0008-01-09. The Union, says the State, has the burden of

proof here and can prove neither that the matter is arbitrable nor that the Employer has violated the Contract. It additionally implores the Arbitrator not to consider as established facts the matters alleged in the written grievance, Union Ex. A. In conclusion, the Employer requests that the grievance be denied and the legislative bar upheld.

IV. Opinion of the Arbitrator

The arguments of the parties can be simply summarized as follows: [redacted] in conflict with external law. On the other hand, the Employer urges application of external law, saying that there are two ways in which the Arbitrator might do so. For one, the Arbitrator might hold that the Contract is silent on the matter and that external law therefore applies per §43.02. For the other, she might hold that the Contract is not silent but is in conflict with external law and that the law should apply by virtue of §43.01's Chapter 4117 exception.

The first matter to be dealt with is substantive arbitrability, which is raised by the Employer. The Employer's position assumes two things, first that the Agreement conflicts with ORC 4117 and, second, that it does so because the matter is one concerning the retirement of public employees. [redacted] it. Whether granted by law as in §124.181(E) or by the Collective Bargaining Agreement as in

§36.07, I think not. If a worker retires is due longevity benefits, it is by virtue of his status as an employee because the benefit was legislated or negotiated as a right of employment, not a right of retirement. As the Union points out, §124.181 is not a law governing retirement of state employees. Neither does §36.07 govern retirement, but employment. I therefore hold the issue to be within my jurisdiction.

The second way in which the Employer attempts to supplement the Contract with the Code is with the assertion that the Contract is silent on the subject of pre-retirement service. It is true that the provision in dispute does not appear to deal specifically with the factual situation presented. In such cases, an arbitrator might declare the Contract silent and therefore that §43.02 applies, thus getting to 124.181(E). Alternatively, the arbitrator could give meaning to the subject provision by applying its terms and principles to the facts at hand. In any event, the analysis must begin with the language as negotiated. The [illegible] condition for receiving longevity pay is the completion of five years of "total state service" (emphasis added). No exceptions or conditions being named, this creates the presumption that there are none. The next paragraph confirms and clarifies this presumption: "Longevity adjustments are based solely on length of service. They shall not be affected by promotion, demotion or other changes in classification." The Grievant here did experience a change in classification, as the Union argues, upon his re-employment post-retirement. Such employment to a different job in a different

agency, whether it follows retirement or other separation, is of the same type of classification change as promotion and demotion in the context of this section of the Contract. Until the last paragraph, the section contains only inclusive or no modifiers to length of service as the basis for computation. It is either "total state service" or simply "service," never "continuous" service or some other adjective disqualifying pre-retirement or other pre-separation time. The plain words mean to include all state service in the calculation. Finally, the last paragraph provides an exclusion for certain employees: only [redacted] paid by the Auditor of State [redacted] after July 1, 1983. It is apparent that had the parties intended to provide for the exception of pre-retirement service, they would have done so as they did for public services not compensated by the State. One is left with the [redacted] total state service as the base [redacted] calculation of longevity supplemental pay. Although the words "working retirees" (Employer Reply Br., p. 4) are not present in the section, the provision contemplates their eligibility for longevity pay: they, like all bargaining unit members, are eligible when they complete five years of state service and all service is to be counted, subject to the last paragraph. To hold otherwise is to adopt the view that "total" somehow means less than total. I conclude that the Contract's §36.07 is not silent with respect to pre-retirement state service as it is encompassed in the phrase "total state service." Therefore, §43.03 does not apply and

124.181(E) is not incorporated. It is evident that the parties negotiated a different longevity benefit from that provided employees subject to §124.181.

The State relies upon the Clark decision in much of its argument. That case deals with rights granted by law, which the Court held do not disappear by virtue of collective bargaining unless specifically excluded in the contract. The case before this arbitrator is distinguished by the source of the benefits at issue. The source here is the Collective Bargaining Agreement, not the law. To borrow the Court's analogy (48 Ohio St. 3d at 23), the Grievant came to the Ohio Department of Health with his pockets filled with benefits to which he was entitled under the Ohio-OCSEA Contract. The Collective Bargaining Agreement failed to specifically take the benefits provided by §36.07 away. He thus retained his entitlement to them.

V. Award

The answer to the question submitted to arbitration is yes, a state employee who retired from one state agency, and who was then rehired by another state agency, is eligible to receive longevity payments. The grievance is sustained.

Anna D. Smith
Arbitrator

Shaker Heights, Ohio
October 30, 1991