

In the Matter of Arbitration Between:

THE STATE OF OHIO

and

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, LOCAL 11, AFSCME

Re: 14-00(91-03-12)0020-01-09
Janet Collins

Hearing held December 16, 1992 in Columbus, Ohio

Decision issued January 15, 1993 in Toledo, Ohio

APPEARANCES

Employer

Rachel Livingood, Assistant Chief of Arbitration
Services, OCB
Edith Barlar, OCB, Second Chair

Union

Carol Bowshier, Staff Representative
Tim Miller, Staff Representative
Marianne Steger, Assistant Executive Director
Janet Collins, Chapter President

Arbitrator

Douglas E. Ray

I. BACKGROUND

This case arises out of a March 11, 1991, grievance filed by Janet Collins, Chapter President. The grievance claims that:

There are employees presently and formerly employed by the State of Ohio/Ohio Department of Health who have not received their retroactive class modernization monies. According to ODH Personnel, employees who were employed at the time class mod was implemented and have since left state service, will not be paid their retroactive monies, per DAS

The remedy sought is "all past and present employees owed retroactive monies as a result of class modernization receive their retroactive pay and be made whole."

Under "employee name" the grievance lists "all employees past and present adversely affected/Union." Under "agency," are typed the words "Ohio Department of Health."

The grievance was denied by the State and processed to arbitration before the undersigned arbitrator. At hearing, the parties stipulated that:

1. The Classification Modernization program involved the study of the State of Ohio's classification and compensation system as negotiated in Article 20 in both the 1986-1989 and 1989-1991 agreements.
2. Through this program the State adjusted, created and deleted classifications and increased pay ranges for some classifications.
3. The State allocated positions to the revised classification system causing an increase in pay for some and pay to remain the same for others.
4. Classification specifications developed under the class mod program carry the effective date of March 26, 1990.
5. The Classification Modernization program was retroactively effective to March 26, 1990.
6. If the arbitrator finds this grievance arbitrable and the Union prevails, the arbitrator will retain jurisdiction in the implementation of the award.

II. ISSUE

The parties stipulated that one issue was:

1. Is this grievance arbitrable?

In addition, an issue proposed for stipulation but not initialed by the parties involved whether employees who were employed on the effective date of class mod increases, March 26, 1990, but left State employment before back pay payments were made, were entitled to retroactive pay from March 26, 1990 until the date they left State service? At hearing, additional issues were raised concerning the scope of the grievance. After reviewing the positions of the parties and the disputes between them, the arbitrator determines the remaining issues to be:

2. Are any employees who were employed on March 26, 1990 but left State service before receiving class mod back pay entitled to retroactive payments up to the date they left State service?

3. Is this grievance limited to employees of the Ohio Department of Health?

III. RELEVANT COLLECTIVE BARGAINING AGREEMENT PROVISIONS AND MEMORANDA OF UNDERSTANDING

In arguing this case, the parties referred to a number of contract provisions and other documents. Among the provisions and documents reviewed by the arbitrator are Article 20, Classification Modernization
Article 25, Grievance Procedure
Memorandum of Understanding, May, 1990

Memorandum of Understanding, October, 1990, in which the parties, to resolve outstanding issues, agree to a number of conditions understood to be the final actions necessary to fulfill the conditions prescribed by Article 20 of the Agreement. Under the agreement, employees reassigned through class modernization were to be paid the difference between what they were paid from March 26, 1990 through June 16, 1990 and what they would have been paid had the class modernization plan been implemented on March 26. Payments were to be included in the employee's normal paycheck and were to be for an amount which excluded prior retroactive payments made due to any prior class modernization agreement. All retroactive payments were to be made by February 28, 1991. The agreement provided that individual reconsiderations in addition to those set forth in the agreement were not to be permitted. The memorandum concluded with a paragraph by which the Union agreed to withdraw and dismiss related litigation including grievances, unfair labor practice charges or other claims and refrain from further litigation, grievances, ULP's or other claims except those which arise over interpretation or execution of this agreement or the previous May 9, 1990 Memorandum of Understanding.

IV. ARBITRABILITY

At the outset of the hearing, the State challenged the case on arbitrability grounds and, pursuant to Article 25.03, the arbitrator heard evidence and arguments on the

issue in an attempt to resolve it. Finding that the issue of arbitrability could not be resolved at the time, the arbitrator took the issue under advisement and asked the parties to proceed to the merits.

A. Positions of the Parties

The following represents a partial summary of the arguments presented by the parties.

1. The State

The State argues that the grievance is not arbitrable for three reasons. First, the State argues that paragraph 6 of the memorandum bars the Union from bringing grievances such as this. The State points out that retroactive payments were to be made by "normal paychecks" and, thus, there is nothing to grieve inasmuch as former employees no longer received normal paychecks. Second, the State argues that the arbitrator may not alter the terms of the memorandum which was to constitute a full and final settlement. Third, the State argues that Article 20, section .03 narrowly limits the scope of challenges to class modernization and that the Union may not challenge implementation under Article 20. Fourth and finally, the State argues that the allegedly affected class had no standing to file a grievance because neither the contract nor the memorandum extend protection to former employees.

2. The Union

The Union argues that this matter is arbitrable. First, the Union argues that it is not barred by Section

20.03 because it deals with the non-payment of back pay, not allocation appeals or classification disputes. Second, the Union argues that the matter is not barred by the memorandum because of specific language added to paragraph 6 to enable the Union to pursue grievances pertaining to the interpretation and execution of the memorandum.

B. Resolution

As the State argues, citing *Olinkraft, Inc.*, 73 LA 194 (Bloch 1979) ("a deal is a deal."), an arbitrator should not allow arbitration of a matter that has been resolved by a final and binding settlement agreement. To do so is to deprive the parties of their bargain. In this case, however, the arbitrator finds that the parties' bargain did specifically allow, in paragraph 6 of the October 5 memorandum of understanding, for grievances "which may arise over the interpretation and/or execution of this agreement . . ."

Thus, to deny arbitrability would be to risk rendering the agreement meaningless and unenforceable. The arbitrator further finds that arguments dealing with the intent of the parties, such as the "normal paycheck" language, are more properly dealt with in reaching the merits as they involve "interpretation." Finally, it seems that the issue of whether the former employees are entitled to grieve or be represented in this matter is dependent on interpretation of the agreement as well. The arbitrator is persuaded by the reasoning of the *Dover Corp.* decision, 48 LA 965 (Volz 1966)

(vacation pay case), argued by the Union, holding that former employees may arbitrate contractual rights which accrued before they left employment. Arbitration of the merits is necessary to determine if such rights exist. For these reasons, the matter is determined arbitrable.

IV. MERITS

A. Positions of the Parties

The following represents a brief summation of the arguments of the parties.

1. The Union

The Union argues that the class modernization system was to go into effect March 26, 1990 and that employees who later left state service should not be penalized where, because of the size of the unit and the number of classifications, the parties were not able to complete all arrangements by March 26. The Union asserts that persons who left service after March 26, 1990 should be included in those receiving retroactive pay. The Union further argues that there are no terms in the October memorandum that decree employment on the date of payment is a prerequisite for payment. The intent of the memorandum was to provide for retroactive pay and the agreement does not say "so long as employed." The Union asks the arbitrator to uphold the grievance and direct the State to make retroactive payments to all entitled persons who were employed March 26, 1990.

2. The State

The State argues that employees who voluntarily terminated their employment with the State prior to full implementation of the class modernization changes waived any benefits which might accrue. The position of the State is that, to qualify for payment, a person had to be employed on the payment date. The State argues that there is no provision in the negotiated agreements which entitles former employees to payments. The State further notes that the October 5 memorandum specifies payment by "normal paycheck" and only those persons still employed could receive "normal" paychecks. This, in the State's view, constitutes evidence that the agreement contemplates payments only to those persons still employed at the time of payment.

Without compromising its position that retroactive payments were due only to persons still employed at the time of payment, the State argues that, in the alternative and in any event, there could be no justification for awarding pay to persons who left employment before the October 22, 1990 date on which the agreement was signed.

B. Resolution

After considering the testimony, exhibits and arguments of the parties, the arbitrator believes that there is a basis for granting relief to at least some of the employees who left employment before receiving their retroactive pay.

The parties agreed in writing in the October 5, 1990 memorandum of agreement that retroactive payments were to be paid employees and included in the employee's "normal paycheck." Apparently this language resolved the Union's request that separate checks be issued. The agreement sets forth the basis for the payments as well as rules for their calculation and provides that payments shall be calculated and made by February 28, 1991.

The arbitrator holds that persons employed on October 22, 1990 when the agreement was signed were the beneficiaries of this settlement. To allow the State to refuse them payment because they left employment prior to receiving the money would be to reward the State for delay. If payments had been made quickly, all persons employed at the time could have received their payments in "normal paychecks." The agreement does not say that payments shall be made by February 21, 1991 to employees provided they are still employed at that time. It says that retroactive payments are to be made to "employees." Thus, persons employed on October 22, 1990 are in the identified class of payment recipients whether or not they subsequently left employment.

From the correspondence between the parties prior to October and the fact that this agreement is to settle unfair labor practice charges related to class modernization, it appears that the parties were not in total

agreement over the terms or calculation of retroactive payments prior to the October, 1990 memorandum. Thus, in the absence of language indicating an intent to pay persons who left before October 22, the arbitrator feels constrained to limit the recovery to those people who were employees at the time the memorandum of agreement was signed.

As noted above, the arbitrator finds this case arbitrable because certain employee rights may have vested before the employees left service. As arbitrator Frost stated in *South Lyon Bd. of Educ.*, 86 LA 399 (Frost 1985), "non-employees sometimes have access to the grievance procedures where the provisions in dispute concern rights or benefits which the former employees accrued during the time of their employment." The arbitrator now determines that the rights vested or became accrued at the time of the agreement. Thus, employees who left employment before October 22, 1990 did not accrue them "during the time of their employment." They did not have accrued or vested rights and their claims are not arbitrable. Employees who left employment after October 22, 1990 may recover because their rights accrued "during the time of their employment."

V. SCOPE OF GRIEVANCE

The parties also disagree as to which persons are covered by the grievance.

A. Positions of the Parties

1. The Union

The Union argues that this grievance was intended to and does reach all affected State of Ohio employees. The Union points to contract language in Section 25.01(B) which provides that grievances may be processed on behalf of the grievant or on behalf of a group of grievants or itself. The Union asserts that this grievance was filed on behalf of the Union. The Union further asserts that the language of paragraph 6 in the October memorandum was put in for the express purpose of allowing them to challenge the State's implementation of the agreement and that this grievance surely falls within that intent. The Union further argues that Union attendees at the Step 3 meeting clearly put the employer on notice that all employees in the State of Ohio were covered by the grievance and that the contract is between the Union and the State, not with particular departments or agencies.

2. The State

The State asserts that this grievance is filed only on behalf of employees at the Ohio Department of Health. The State asserts that while this is a Union grievance, it identifies itself as filed on behalf of present and former employees of the Department of Health. The State further

argues that when the Union wishes to assert contract wide rights, the grievance makes this clear and is filed by the Union's executive director. This was not done here.

B. Resolution

This issue is difficult. Within the coverage of the contract negotiated between the State and the Union are employees of many State agencies. Many times, the issues involved will affect only one agency.

The grievance is somewhat ambiguous. It is clearly a class grievance but whether it covers all state employees or merely agency employees can be argued. The arbitrator credits Union testimony that the chapter president was told to make it clear that the grievance was to be filed on behalf of all state employees. What is left for argument is whether she succeeded. On the one hand, the "employee name" section of the grievance lists "all employees past and present adversely affected/Union" This contains no limitation. The "agency" line, however, lists "Ohio Department of Health." Although this is the chapter president's agency, it is also the agency on which the grievance was served. The statement of facts complains on behalf of "employees presently and formerly employed by the State of Ohio/Ohio Department of Health." This could be read either way. It could mean both or it could indicate the agency only as part of the State. Finally, the remedy sought is for "all past and present employees owed retroactive monies." This seems to reach the broader class.

Without the references to the Department of Health, the intent would be more clear.

The arbitrator understands that arbitration should be limited to the scope of the grievance. If this is not done, notice, jurisdiction and other problems arise. Here, the arbitrator ultimately resolves the issue in favor of reading the grievance to contemplate a state wide class. It is clearly a class grievance as allowed by Article 25. The contract does not seem to contain clear directions for telling whether class grievances clearly are department or State wide. The contract itself is between the Union and the State, not with a department or agency.

Most importantly, the State has seemingly recognized this as a state wide issue and reacted accordingly and, indeed, this is an issue that, by the admission of State officials working at the Department of Health, cannot be resolved at the agency level. The arbitrator is most persuaded by the Grievance Decision, Step 3, provided the Union on July 17, 1991. While attempting to characterize the issue as one dealing only with the Ohio Department of Health, the Decision itself demonstrates that the State had notice and that this is not an agency matter. The agency personnel services chief states: "I have determined that this matter cannot be resolved at the Step 3 level. The decision to pay or not to pay was made by the Department of Administrative Services. Mrs. Manuel had also talked to Mr. Michael Duco of the Office of Collective Bargaining, who

indicated by telephone that there would be no retroactive back pay. Based on this determination, redress, if sought must be gained at a higher level." The arbitrator reads this as an indication that the issue was throughout one that could be handled only at the State level and that officials at the State level were early apprised of the dispute. The grievance itself states that "according to ODH personnel" employees who left state service would not be paid "per DAS." Thus, the grievance complains about a decision by the same State wide agency, DAS, as the Step 3 response does. Since the grievance complains about a DAS decision on behalf of "all employees," since the body of the grievance includes language referring to " State of Ohio," since the issues under dispute can only be resolved at the State level, since the individual agency itself disclaimed any responsibility for the matter or ability to fix it, and since there appears to be no prejudice to the State from the wording of the grievance in the particular circumstances of this case, the arbitrator finds its scope to include "employees presently and formerly employed by the State of Ohio." Although the Step 3 response did contain a departmental statement that the grievance affected employees at the Department of Health, the Department's delay in responding excused any Union failure to respond to this sentence. Because of the delays in responding at Step 3, the matter had already been referred to Step 4 and the OCB by the time the Step 3 response was received.

VI. AWARD

The grievance is sustained in part.

1. The grievance is found arbitrable.
2. The State has violated the collective bargaining agreement and the October, 1990, memorandum of agreement if it has failed to pay to persons employed on October 22, 1990, who subsequently left State employment, any monies otherwise due them as retroactive payments under the October, 1990, memorandum of agreement.
3. This grievance and decision involve State employees covered by the October, 1990, memorandum of agreement. This award is not limited to employees of the Ohio Department of Health.
4. The State is directed to make retroactive payments to affected persons employed on October 22, 1990 in a manner consistent with the October, 1990, memorandum of agreement. The arbitrator shall retain jurisdiction to resolve any disputes that may arise in connection with the implementation of the award.

Toledo, Ohio, County of Lucas

January 15, 1993



Douglas E. Ray

Arbitrator