In the Matter of Arbitration	*	
Between	*	Case Numbers:
Fraternal Order of Police-Ohio Labor Council	*	24-02-921014-0624-05-02 23-10-921104-0171-05-02
and	*	Before: Harry Graham
The State of Ohio, Departments of Mental Health and Mental Retardation	*	

Appearances: For Fraternal Order of Police-Ohio Labor Council

Gwen Callender
Fraternal Order of Police-Ohio Labor Council
222 East Town St.
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For The State of Ohio:

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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on March 12, 1993 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on April 28, 1993 and the record in this dispute was closed.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the State violate Article 55.07 of the 1992-1994

Collective Bargaining Agreement when it failed to pay the 4.0% pay supplement to certain police officers? If so, what shall the remedy be?

Background: The parties agree upon the events that prompt this proceeding. In 1992 they came to bargain revisions to the Agreement that was then in effect. They were unable to reach agreement on the terms of the successor Agreement and the Ohio State Employment Relations Board appointed a Factfinder, Professor Nels Nelson. He conducted a hearing in June, 1992. Among the issues in dispute was the language of Article 55, Section 55.07 of the Agreement. In due course Professor Nelson issued his recommendations to the parties. It was ratified by the Union and the State and took effect on July 1, 1992. The Union believed that all people in the Police Officer 2 classification were to receive a 4.0% wage increase. This increase was to be separate from the general wage increase (or lack thereof) that was to be in effect for other members of the bargaining unit. No wage increase was made by the State and in due course the Union filed a grievance. It was processed through the procedure of the parties. The State does not agree that it is properly before the Arbitrator. The Union asserts that the grievance is arbitrable and must be decided on its merits.

Position of the Union: The Union views this grievance as being properly before the Arbitrator. There is no procedural defect which would render it not arbitrable it insists. In

the Grievance procedure is found the agreed upon time limits for processing grievances. Article 20, Section .05 provides that class grievances must be filed with 14 days of the date on which the grievants knew or reasonably could have known of the events which prompt the grievance. In this situation the Union Staff Representative, Jack Holycross, did not know the State would not make the 4.0% wage increase regarded as appropriate by the Union until after the Agreement took effect. Employees waited for the payment to occur. When it did not, they grieved. Even if they were late there is the concept of the continuing grievance. That is, this contract violation, if indeed there be such, has occured each pay period. This arbitrator has upheld the concept of the continuing occurence as establishing arbitrability when there is a recurring violation of the Agreement. (See: Chester L. Shroyer et. al., p. 10). This dispute is identical to the Shroyer case with respect to the arbitrability question. It should be decided the same way the Union insists.

When the parties came to bargain what became Section 55.07 of the 1992-1994 Agreement the State proposed what it termed a "housekeeping" change in the language. It sought to clarify what it regarded as vague terminology therein. When the parties went to Factfinding the Union was well aware of the pattern settlement agreed upon by another Union representing employees in State service, OCSEA/AFSCME Local

11. That Union had agreed upon no (0.00%) increase for the contract year commencing July 1, 1992. The FOP-OLC understood it was unlikely that the Factfinder, Professor Nelson, would depart from that pattern. Nonetheless, it sought what at the arbitration hearing were termed "wiggles." That is, minor changes in the pattern settlement to advantage some groups of employees. In its opinion, it secured such a "wiggle" in this situation. When the State came to present its final proposal prior to Factfinding it proposed certain changes in Section 55.07. In the preceding Agreement the analogous language (found in Section 55.08) indicated that people classified as Police Officer 2 "as of the effective date of this Agreement shall receive a pay supplement equal to four percent (4.0%) of their step rate of pay." The proposal of the State which found its way into the 1992-1994 Agreement omitted the phrase "as of the effective date of this Agreement." The disputed language now reads that people "classified as Police Officers 2 shall receive a pay supplement equal to four percent (4%) of their step rate of pay." The omission is substantive in the Union's view. It signifies the Agreement of the parties to provide the disputed 4.0% increment to all people classified as Police Officer 2. The Union understood this to be the case.

In Continental Conveyor Co. 41 LA 1023 (McCoy, 1968) the arbitrator was of the view that no matter where the equities

were to be found, the language of the disputed contract clause was clear it should be enforced. The dispute in this case concerns language proposed by the State and agreed upon by the Union. The State proposed the phrase "as of the effective date of this Agreement." It was aware or should have been aware that this represented a substantive change in the language which gave a "wiggle" to some members of the bargaining unit.

When Factfinder Nelson drafted his report he had before him proposals from the State and the Union. He recommended inclusion of the State's proposal. He knew what he was doing. The State cannot belatedly argue that the disputed 4.0% increase does not exist today. Had it made that point to the Factfinder his decision on the general wage increase might have been different from what was finally recommended to the parties. That the Union understood it had secured the 4.0% professional certification pay is shown by its ratification process in regard to the Factfinder's report. Union representatives told bargaining unit members they had secured the 4.0% pay increment for all Police Officer 2's. That is what the language indicates and that is what was agreed upon by Union members it asserts.

In a somewhat analogous dispute involving OCSEA/AFSCME Local 11 I determined that the history of negotiations gave life to contract language such that notwithstanding the clear

phraseology of the Agreement, the intent of the parties was otherwise. In so doing, I upheld the position of the State in that dispute. This situation is different according to the Union. There was no understanding on the record in this case as there was in the OCSEA/AFSCME Local 11 witness leave dispute. The language is clear in the FOP-OLC Agreement. It was proposed by the State and the Union agreed to it. Now the State does not like the bargain it made. Clear contract language must be enforced though it may not have been what one of the parties intended. The State never indicated to the Union that the 4.0% increase at issue in this dispute was not to be extended to all Police Officer 2's. The State proposed the language and now seeks to renege on its Agreement. It cannot do so according to the Union. Hence, it urges the grievance be sustained and appropriate back pay be awarded.

Position of the Employer: The State asserts that this grievance is not arbitrable. In its view, the Grievance is untimely. The members of the bargaining unit voted on the report of the Factfinder in July, 1992. The Grievance was not filed until October, 1992. There is a 14 calendar day time period for the filing of grievances. That period tolls from the date grievants knew or "reasonably could have had knowledge of the event giving rise to the class grievance." (Section 20.05). Bargaining unit members were aware they did not receive the 4.0% increment which is the focus of this

dispute. They should have grieved but they did not. Hence, the grievance should be dismissed according to the State. Additionally, the Union sat on its hands. If it prevails in this situation more than a year of back pay will be granted. Enough is enough according to the State. That the Union did not grieve should not prompt a back pay liability of such magnitude according to the State.

The concept of Professional Certification pay is of longstanding in the Agreement. In 1986 the parties negotiated Section 55.12 which provided for a 4.0% increment to all bargaining unit members if the completed OPOTC training. In 1989 the Union sought an automatic progression of Police Officer 1's to Police Officer 2's. The State agreed and the bargain involved the Union giving back the 4.0% Professional Certification pay for those people who moved from a 1 to a 2. In order to make the bargain clear the phrase "at the effective date of this Agreement" was included in the text of Section 55.08. Police Officer 2's retained the 4.0% supplement. Police Officer 1's who were promoted to 2's received the higher rate attendant upon that classification but lost the 4.0% pay supplement.

When the parties came to bargain in 1992 it was the view of the State that no wage increase was possible. The State had no money. The 4.0% pay supplement at issue in this proceeding was not discussed. The State never proposed nor

understood that there was contemplated by the Union the 4.0% supplement at issue in this proceeding. It is not to be believed that the State somehow agreed to an increase for approximately 200 people in the bargaining unit while at the same time taking the position that no wage increase whatsoeverwas to occur in 1992. There was a Factfinding proceeding with OCSEA/AFSCME Local 11 that set the pattern of no wage increase in State service for 1992. Factfinder Nelson whose report explicitly dealt with this bargaining unit did not contemplate a wage increase for a small number of people. Had he done so, he would have said so. He did not. He recommended the zero percent (0.00%) increase that was the pattern in the State.

In a dispute involving OCSEA/AFSCME Local 11 concerned with witness leave I found that notwithstanding what appeared to be the plain language of the Agreement that the negotiating history should prevail. That should occur in this instance as well. The Factfinder and the Chief Negotiators for both parties did not contemplate the 4.0% increment at issue in this proceeding because no such increment was ever on the table. As the State recounts the history of what is now Section 55.07 of the Agreement, only people who were receiving the 4.0% supplement in the 1989 Agreement should receive it today.

The report of Factfinder Nelson is clear on this

question. When he came to consider the wage issue he wrote:

> Unfortunately, equity would not allow this unit, or selected members of this unit, to enjoy wage increases while other state employees get no raises, or even worse, face the prospect of being laid off. (P. 5).

The Factfinder included the precise wording of the disputed Section 55.07 in his report. He did not intend it to provide a wage increase as is indicated by the text quoted above. As that is the case, the Grievance should be denied the State insists.

Discussion: The claim of the State that this grievance is not arbitrable is easily dismissed. The grievance is arbitrable. As the Union accurately points out the issue in this dispute is of a continuing nature. The contract violation, if such there be, occurs each and every pay that is made to the grievants. Any consideration of untimeliness extends only to remedy, not to the fundamental question of whether or not the grievance is to be heard on its merits.

In this dispute there are two principles of contract interpretation in conflict. One involves the reading of the Agreement and enforcement of its provisions when they meet the proverbial test of being clear and unambiguous. The other is reliance upon the negotiating history to provide guidance to interpretation of the Agreement.

The Union is absolutely correct to indicate there is but one interpretation of the language at issue in this proceeding. That interpretation supports its position

unreservedly. The 1992-1994 Agreement omits the phrase "as of the effective date of this Agreement" from Section 55.07. As the Contract now reads Police Officer 2's "shall receive a pay supplement equal to four percent (4.0%) of their step rate of pay." It must be obvious to even the most cursory reader that the language supports the claim of the Union.

The difficulty with sustaining that interpretation is that it flies in the face of the bargaining history. As was the case in the witness leave dispute involving OCSEA/AFSCME Local 11 the clear record of negotiations supports the position of the Employer in this dispute. Reference must be had to Factfinder Nelson's report. He had before him the proposal of the State for no wage increase in the first year of the Agreement. In his discussion he took pains to ensure that all members of the bargaining unit were treated in the same manner. At page 5 he wrote:

> The Factfinder also realizes that some employees in the unit are not paid from the general fund but from other funds which are much healthier than the general fund. Unfortunately, equity will not allow this unit or selected members of this unit, to enjoy wage increases while other state employees get no raises or, even worse, face the prospect of being laid off. (Emphasis supplied).

The record indicates that Professor Nelson did not contemplate any wage increase being made to any member of the bargaining unit. He knew of the different circumstances surrounding people in different positions in the unit. A wage increase was rejected for all personnel.

When the Factfinder's report was issued it was voted upon by members of the bargaining unit. They voted upon the recommendations made by Professor Nelson which specifically include the recommendation that no member of the bargaining unit receive a wage increase. That extends to the 4.0% at issue in this proceeding.

It is not to be believed as the State suggested at the hearing that the Union deliberately attempted to "snooker" it or "pull a fast one" in negotiations for the present Agreement. The Union negotiators are honorable people. Moreover, as experienced practitioners of collective bargaining they must be credited with the awareness that the negotiating process does not thrive in an environment characterized by sharp practice.

Similarly, the "wiggle" concept proferred by the Union appears to be an ex-post-facto rationale for the position advanced in this dispute. As was the case in the witness leave dispute involving OCSEA/AFSCME Local 11, the Agreement must be read in conjunction with the supporting document that furnishes a guide to its interpretation. In this instance, that is the report of the Factfinder. Nowhere in that document is there found the notion that the 4.0% pay supplement suggested by the Union to be present was ever contemplated by him. To the contrary, his clear text indicates that he recommended no wage increase for any member

of the bargaining unit. The wiggle suggested by the Union was neither considered nor recommended by the Factfinder. His report was voted upon and accepted by the parties and furnishes the basis for interpretation of Section 55.07 of the contract.

Award: The grievance is denied.

Signed and dated this 18th day of May, 1993 at South Russell, OH.

Harry Graham
Arbitrator