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In the Matter of Arbitration	*	
Between	*	Case Number:
State Council of Professional Educators/OEA	*	27-11-(7-29-93)-209-06-10
	*	Before: Harry Graham
and	*	
The State of Ohio, Department of Rehabilitation and Correction	*	

Appearances: For State Council of Professional Educators:

Henry L. Stevens
Labor Relations Consultant
Ohio Education Association
5026 Pine Creek Dr.
Westerville, OH. 43081

For State of Ohio:

David J. Burrus
Labor Relations Officer
Department of Rehabilitation and Correction
1050 Freeway Drive, North
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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing both 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 July 5, 1994 and the record in this dispute was declared closed.

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

Did the Employer violate the Collective Bargaining Agreement when it failed to credit the Grievant with his time spent in military service for purposes of computing his pay? If so, what shall the remedy be?

Background: The events prompting this proceeding are straightforward and not a matter of controversy. The Grievant, John Arvai, is employed as a teacher at the Lebanon Correctional Institution at Lebanon, OH. His initial date of employment is January 24, 1993. Prior to becoming employed at Lebanon Mr. Arvai had been a member of the armed forces of the United States. When the Grievant came to be placed on the negotiated salary schedule that placement did not reflect his time spent in the military. Accordingly, Mr. Arvai regarded his salary to be incorrect; it was too low. In his view had proper credit been given for military service time he would have had a higher placement on the salary schedule. This would have produced a higher salary for him.

In order to protest this action by the State a grievance was filed. It was processed through the procedure of the parties without resolution and they agree that it is properly before the Arbitrator for determination on its merits.

Position of the Association: The Association cites both contractual language and external law in support of its view that the Grievant has been improperly placed on the salary schedule. At Article 1, Sections 1.04 and 1.05 the Agreement contains text that bears upon this dispute. Section 1.04 provides that where the Agreement contains no specification

about a matter that the parties are bound by "all applicable state laws pertaining to the wages, hours, terms and conditions of employment for public employees." No reference is found in the Agreement for military service credit. Section 1.05 provides that the Agreement be in compliance with the Constitutions of the United States and Ohio and all other applicable federal laws. The Ohio Revised Code provides that if a collective bargaining agreement is silent on a topic that the parties are bound by all applicable state or local laws concerning conditions of employment. In this connection, the Ohio Revised Code is specific concerning veterans rights. No discrimination against veterans is permitted. As Mr. Arvai did not receive credit for his military service time the Association contends that the sort of discrimination prohibited by law occurred in this instance.

The Ohio Revised Code specifically deals with accounting for military service credit when placing teachers on a salary schedule. Section 3317.14 provides that a person be "provided full credit for a minimum of five years of actual teaching and military experience...." This section of the Code has been the subject of litigation. Among other decisions, the Association points specifically to Schlueter v. Cleveland Board of Education, 12 OMisc 186, 40 002d 427, 230 NE2d 364. This decision held that a person who has served in the armed

forces "must" be given full credit for such time on a salary schedule. A similar opinion was issued by the Ohio Attorney General.

In addition to substantive violation of the Agreement and Code, the Association points to procedural violations committed by the State in the processing of this grievance. At Section 6.06 of the Agreement provision is made for exchange of witness lists five days prior to the start of the arbitration hearing. In this instance the State did not provide the requisite witness list to the Association. In addition, the State has asserted that this dispute does not represent a class action grievance. Examination of the grievance trail indicates that is not true. Finally, there was a third step hearing held in this dispute on September 16, 1993. Section 5.05, C of the Agreement pertains to Step 3 of the grievance procedure. It provides that the department director or a designee is to hold a hearing and render a decision within 45 days of receipt of the grievance. That did not occur in this instance. These procedural defects mandate an award in favor of the Grievant in this instance the Association asserts.

Position of the Employer: When the parties came to bargain their initial Agreement in 1986 they had recourse to Factfinding. The Factfinder, James Mancini, issued a report and recommended that members of the bargaining unit receive

credit "only for work of a similar nature as that performed by bargaining unit members in accordance with 3317.13 (ORC) teaching and related duties." Subsequently, the Agreement of the parties at Section 21.02 referenced Section 3317.13 (A)(1)(a),(b) and (c) of the Ohio Revised Code. Conspicuous by its absence from Factfinder Mancini's recommendation and the Agreement is subsection (d) of Section 3317.13(A)(1) of the Code. Subsection (d) provides credit of all years of military service to a maximum of five years. The Factfinder ommitted that subsection from his report. It was ommitted from the Agreement as well. That ommission was deliberate and reflects the bargain of the parties. No pay for military service time is due the Grievant under the plain terms of the Contract according to the State.

When the parties came to negotiate the initial Agreement Section 3317.13(A)(1)(d) was in effect. The Agreement deleted that benefit from those provided to members of the bargaining unit. When that occurred the parties knew what they were doing. To read into the Agreement a benefit that is not found in its text is impermissible according to the State.

The relevant language in the Agreement has remained unchanged through three rounds of negotiations. The Association has never proposed inclusion of the benefit conferred by Section 3317.13(A)(1)(d). In essence, this dispute represents an attempt by the Association to secure

today that which it did not even propose to secure in several rounds of negotiations. As such, the grievance should be denied according to the State.

Discussion: The argument of the Association concerning the procedural defects attendant upon processing this grievance by the State is a serious one. The parties have bargained several agreements. They should know what obligations those agreements impose upon them. The delay in provision of the third step answer pointed to by the Association is a significant breach of the grievance procedure negotiated by the parties. The failure of management to make the third step response within the contractually mandated 45 days is impossible to understand. That said, the Agreement does not provide that a grievance be granted if the State commits the sort of procedural violation that it did in this instance. It is not uncommon for collective bargaining agreements to indicate that a procedural defect will result in either abandonment of the grievance or its granting depending upon which party has erred. That sort of provision is not found in this Agreement. Section 5.07 of the Agreement provides that if a reply to a grievance is not made in timely fashion the Grievant may process the grievance in the next step in the grievance procedure within the contractually mandated time limits. The action of the State in delaying its third step response was improper. There is nothing in the Agreement that

confers authority upon the arbitrator to grant the grievance due to that breach of the contractual provisions by the State.

When pointing to the fact that the State did not provide the Association with a witness list as specified by Section 6.06 of the Agreement the Association raises form over substance. At the arbitration hearing a representative of the State, Lou Kitchen, pointed out that the parties had met for negotiations on May 11, 1994. At that time Mr. Kitchen had told the Association what witnesses the State intended to use at this hearing which was scheduled for May 19, 1994. The Association cannot claim ignorance. There was no element of surprise in the witnesses utilized by the State. To urge that this grievance be granted because the State informed the Union of its proposed witnesses orally, rather than in written form, is a proposition that is ill-founded.

The merits of this dispute are governed by Article 21, Section 21.02 A. That Section refers specifically to experience credit to be given to teachers in accordance with Section 3317.13(A)(1)(a)(b) and (c) of the Ohio Revised Code. Conspicuous by its absence is reference to Section 3317.13(A)(1)(d). If the parties desired to give salary credit for military service they could easily have done so. They did not. Reference to inclusion of military service for salary credit was not made by Factfinder Mancini. His report

was embraced by the parties and served as the basis for their Agreement.

Section 39.03 of the Agreement does not confer the benefit of military service credit on the Grievant as urged by the Association. That Section provides that economic benefits conferred by the Ohio Revised Code "and which are not specifically provided for or abridged by this Agreement" remain in effect. The significant concept is that of abridgement. At Section 21.02 A the abridgment referenced by Section 39.03 is found. Credit for military service is specifically not included in the Agreement. Other benefits are included but not military service time. That is the agreement of the parties and must be enforced by the Arbitrator. If the military service credit urged to be appropriate by the Association is to be provided to employees in Mr. Arvai's situation it must be negotiated into the Agreement. In its absence there can be only one outcome to this dispute.

Award: The grievance is denied.

Signed and dated this 19th day of July, 1994 at South Russell, OH.

Harry Graham
Arbitrator