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In The Matter of the Arbitration

-between-

Ohio Civil Service Employees  
Association, AFSCME, Local 11

-and-

The State of Ohio  
Ohio Industrial Commission

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SUMMARY OPINION AND AWARD  
Grievance 17-00-01-02-08-002-01-14  
The Sandra Rolletta Matter

#1541

#### FACTS

The Grievant began her State employment with the Industrial Commission on January 21, 1986. Shortly thereafter, she sought service credit for her prior employment with Licking County and the Franklin County Public Defenders Office.

The Grievant began her State employment prior to the effective date of the first collective bargaining contract on July 1, 1986. It was stipulated by the parties that: "At the time Grievant started her employment with the State in January 1986, if it had been determined that the Franklin County Public Defenders Office was a public employer, Grievant would have been credited the time for purposes of calculating her vacation accrual, and longevity pay." The Grievant testified and it was not disputed that she did, indeed, receive service credit for her work with Licking County for purposes of vacation accrual and longevity pay. Her request for service credit for her tenure at the Franklin County Public Defenders Office (FCPDO) was denied because this office did not make contributions to PERS on behalf of its employees.

The parties agreed that prior to July 1, 1986 that a person who begins State employment could include prior service with any Ohio public entity such as a unit of a city or a county. The basis

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for this stipulation was two Ohio statutes that had been in existence prior to July 1986, Ohio Revised Code Chapter 124.181 and Chapter 9.44.

Years passed, and the Ohio Supreme Court decided Mallory v. Public Employees Retirement Board 82 St.3d 235 (1998). The Grievant then received information from PERS late in 1999 that she had received a service credit for the period of time that she was employed by FCPDO--May 24, 1984 to January 15, 1986. The Grievant took the Mallory decision as well as the service credit award from PERS to the Industrial Commission on December 13, 2000, and requested service credit for her work with FCPDO in longevity pay and vacation.

The Department of Administrative Services (DAS) disapproved the Industrial Commission's Personnel Action seeking service credit for the Grievant's tenure with FCPDO that occurred from May 24, 1984 to January 15, 1986. The decision appears to have been made early in 2001. The agent for DAS who had a major role in the disapproval stated the request had been submitted in December of 1999 when the current contract requires that credit for prior service for longevity and vacation time be "service with State agencies."

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 purposes of determining the rate of accrual for new employees. (Sections 37.07 and 28.01).

The DAS agent stated that she did not consider the time of the Grievant's tenure with FCPDO, nor the hire date of the Grievant

with the Industrial Commission as important in appraising the Grievant's request for service credit.

STIPULATED ISSUE

Did the employer violate Sections 28, 36, or 44 of the contract when it denied the grievant's request to add service time from the Franklin County Public Defenders Office to her service time with the State of Ohio? If so, what shall the remedy be?

MERITS

A) Arbitrator's Authority

The arbitrator noted at the hearing the obvious question of whether the arbitrator had authority to resolve the question on the merits. The necessary analysis includes consideration of two statutes predating the first collective bargaining contract in July 1986--statutes superseded by the contract; also, consideration of scope of the Supreme Court decision. 1) The contract states: "Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration." (Article 25.03). Yet, the Union's claim is the DAS decision early in 2001 should not be measured by the terms of the current contract, or even of any of the contracts between the parties;<sup>1/</sup> 2) the DAS decision should be based on the two statutes

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<sup>1/</sup> The joint issue adopted by the parties raises the question of whether the employer violated Articles 28, 36, or 44 of the contract on the denial of the Grievant's request to add service time from her tenure at FCPDO. On the other hand, the Union argued that the key sentences contained in Article 28 and 36 were inapplicable because the Grievant's tenure at FCPDO predated the first collective bargaining contract between the parties.

governing longevity pay and wages in existence before the Grievant's tenure at FCPDO--statutes that were superseded by the first collective bargaining contract.

This is a problem of substantive arbitrability, i.e., does the claim of the Grievant fall within the terms of the contract over which the arbitrator has been given the authority to interpret and apply?

The answer to this problem is that the State accepted the authority of the arbitrator to decide the merits of the Union's claim. The State "wanted a decision." The State further limited its grant to this case.

B) The Answer

The parties agreed that had the Grievant's prior service with FCPDO been with a unit or county government, the Grievant would have been entitled to service credit for longevity and vacation at the time of her state employment with the Industrial Commission on January 21, 1986. The parties also agreed that the particular rub in this case was the peculiar history of the establishment of the Franklin County Public Defenders Office.

As the Ohio Supreme Court noted in the Mallory decision, the Ohio legislature enacted the Public Defender Act in 1976, enabling counties to create public defender commissions. Counties created commissions, appointed public defenders, and staffed the office under this Act. As the Court noted, twenty-three counties treated employees of their public defender offices as county employees. Franklin and Summit counties were the only two that considered

employees of the Public Defenders Office to be private employees. According to the Court, the State Auditor informed Summit County officials that the County's Public Defenders Office was operating illegally, and the parties stipulated in this case that FCPDO was informed in 1980 that it was not legally constituted.

The legal character and status of the FCPDO was raised in September, 1994 when an employee clerk-attorney of FCPDO requested service credit in PERS for her fourteen years of employment with FCPDO. PERS denied the request because FCPDO had been organized as a private, nonprofit organization under the laws of Ohio dealing with nonprofit organizations. This case wound through a process of administrative hearings, lower courts, and finally received a decision by the Ohio Supreme Court in 1998.

The State argued that the decision in Mallory is limited to the question of whether FCPDO was a public employer for purposes of contributions to the Public Employees Retirement System. The State noted that the decision in and of itself does not deal with longevity pay or vacation accrual. Indeed these words do not appear in the opinion of Mallory.

The majority decision in Mallory, however, considered the status and legal character of FCPDO in order to determine whether the employee was a public employee for purposes of PERS. The Court noted that the FCPDO was established pursuant to the Public Defender Act and exercised independent public duties that embodied part of the sovereignty of Franklin County. The Court concluded that the FCPDO exercised duties under the Act to comply with the

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public, or governmental duty, to provide assistance to indigent criminal defendants.

In the case at bar, the commission was established and Kura was appointed as the Franklin County Public Defender pursuant to the Public Defender Act of 1976. "A 'public office' generally denotes exercise of certain independent public duties and embodies part of the sovereignty of the governmental unit involved." (Citations). Both the commission and Kura exercise powers and duties pursuant to the Public Defender Act to comply with the governmental duty to provide assistance of counsel to indigent criminal defendants. (Mallory v. Public Employees Retirement Board 82 Ohio St.3d 235, 240-241 (1998)).

The arbitrator finds this analysis by the Court of the nature of the FCPDO instructive on whether the Grievant in this case was engaged in public employment with a subdivision of Franklin County during her tenure with the FCPDO from May 24, 1984 to January 15, 1986. Further, the parties stipulated that prior to July 1, 1986, a person who began State employment could include prior service with any Ohio public entity such as a unit of a county.

The final question on the merits is whether the Grievant's request for service credit should have been appraised under the two statutes in existence at the time of her initial hiring by the Industrial Commission in January of 1986. The position of the State is simply: even if these two statutes predating the collective bargaining contract were applied to the Grievant's request, the FCPDO was not a public employer, and no service credit should be granted. The State's position, further, is that the status of the FCPDO may not be enlightened by the 1998 Mallory decision because Mallory did not apply to longevity and vacation

accruals. Therefore, the Grievant's request should be considered by the provisions in the contract applicable at the time of the request in December of 1999, and should be denied.

This argument is rejected because of the sweeping analysis in Mallory on the character and legal status of FCPDO when it was organized under the Public Defender Act. The Court's observations about the status of FCPDO as well as the Court's decision on the facts of that case were retroactively applicable. Consequently, the Grievant's request for service credit should have been considered under the two statutes in existence at the time of her tenure with FCPDO enlightened by the observations of the Court in Mallory on the status of FCPDO.

#### REMEDY

The Union first argued that the service credit should be granted to the Grievant from the date of her hire by the Industrial Commission in January of 1986. This would be inequitable and difficult to square with the contract between the parties. The parties agree that during the Grievant's tenure the FCPDO was established under Ohio law as a nonprofit, private corporation. Indeed, it was not until 1998 that the Court considered the legal status of FCPDO as of the time of its establishment. As the State correctly argued, the State should not be penalized for Franklin County's inaccurate assessment of its duties under the Public Defender Act when it established FCPDO in 1976.

The Union further argued that service credit could be awarded retroactively to December 13, 2000 when the Grievant first raised

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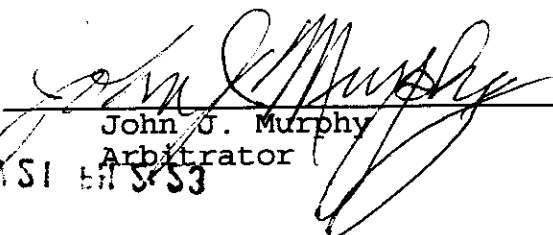
the question of service credit with the Industrial Commission. The Union claimed that the Grievant was lulled into not filing her grievance until February 8, 2001 by virtue of the positive responses by the Industrial Commission to her request. Whatever the reason, the fact is that the grievance was not filed and signed by the Grievant until February 8, 2001.

The grievance did not expressly request retroactivity of the grant of service credit to any day. Indeed, the subject of retroactivity was not raised on the face of the grievance. Accordingly, the service credit will be awarded as of ten days prior to the date of the grievance. This date is selected based upon the contract provision: "All grievances must be presented not later than ten (10) working days from the date the Grievant became or reasonably should have become aware of the occurrence giving rise to the grievance . . ."

AWARD

The grievance is granted, and service credit for the Grievant's tenure with the Franklin County Public Defender's Office should be awarded to the Grievant for purposes of longevity wage and vacation accrual. The service credit should be effective ten (10) days prior to the date of the filing of the grievance stipulated by the parties to be on February 8, 2001.

Date: November 17, 2001

  
John J. Murphy  
Arbitrator  
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