#1547

IN THE MATTER OF ARBITRATION

BETWEEN

THE STATE OF OHIO

AND

THE FRATERNAL ORDER OF POLICE/OLC INC. UNIT 2

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 02-10-20011022-0078-05-02
Class Action: Merit Pay

Advocate(s) for the UNION:

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INTRODUCTION

A hearing on the above referenced matter was held on October 29, 2001 in Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted briefs in lieu of making closing arguments. The hearing was closed on November 20, 2001. The Arbitrator's decision is to be issued within forty-five (45) calendar days or no later than January 5, 2002.

ISSUE

The issue is defined as follows:

Does Article 32 or 55.08 of the Agreement, permit the Employer to deny step increases to bargaining unit employees based upon unsatisfactory performance evaluations?

RELEVANT CONTRACT LANGUAGE
(Listed for reference, see Agreement for language)

ARTICLE 32 STANDARDS OF PERFORMANCE

ARTICLE 55.08 PROBATIONARY STEP MOVEMENT

BACKGROUND

The dispute that comprises the instant matter is fairly straightforward. It is whether the Employer has the right under the Collective Bargaining Agreement ("CBA") to deny a bargaining unit member a salary step increase, based upon an annual unsatisfactory performance evaluation. The Employer claims the Agreement has given the Employer the right to base salary step movements on satisfactory performance. The Union claims the opposite. It states the Agreement only provides a restriction of salary step movement for a probationary employee.

The language in dispute is Article 55.08. It reads as follows:

> 55.08 Probationary Step Movement
>
> *"An employee shall receive a step increase upon satisfactory completion of the probationary period.*
> *Movement from one (1) step to another after probation shall occur after one (1) year of service following completion of probation in the classification if performance has been satisfactory."*

This language has existed in the Collective Bargaining Agreement ("CBA") since 1986 and only was changed once in 1989. Prior to 1989 the language contained only the first sentence as it appears above (JX 14). The second sentence was added beginning with the 1989-1992 CBA (JX 15). There have been no other changes in this language. In most circumstances, the Union carries the burden of proof in matters that pertain to a dispute over the intent of language in a collective bargaining agreement. In the instant case the Employer agreed to assume this burden.

EMPLOYER'S POSITION

The Employer makes two main arguments in support of its position. First it argues the language of Article 55.08 is clear and requires no further interpretation beyond what is contained in the plain meaning of its words. It contends that such language is undisputed evidence in matters of this nature. Secondly, it argues that it has the right to implement the unambiguous terms of the negotiated Agreement even when it previously did not enforce those contractual rights.

The Employer contends the second sentence of Article 55.08 clearly referred to movement on the salary schedule following probation. It also argues that the Arbitrator is required to follow such terms. The Employer argues that the State Employment Relations Board and many arbitrators have upheld the rights of an Employer to implement what it has negotiated, even if such implementation is delayed.

The Employer rejects the notion that the title of Article 55.08 has any bearing on its content. It contends the CBA contains language where the content has been expanded to convey meaning that no longer comports with the title of an article. It cites Article 17.04 and 59.01 as two examples in support of its argument. The Employer also rejects the Union's argument that Civil Service laws have anything to do with this issue. It is the CBA that governs this matter, argues the Employer.

The Employer argues that the existence of the second paragraph in Article 55.08 was placed in the CBA in 1989 in order to address how an employee moves from one step to another after probation. It points out that nowhere else in the CBA is there such a provision. The Employer argues that absent this language, there is no contractual guidance to govern salary step movement. The Employer contends that without language

in the CBA, it would be free to follow Civil Service law. It points out that under Civil Service, step movements on salary schedules are conditioned upon satisfactory performance (JX 19).

The Employer also points out that Fact-finder, Harry Graham, in his follow-up letter (addendum) to his Fact-Finding Report recognized the "effect" of the second paragraph contained in Article 55.08. He stated:

> *"The exiting Article 32 and Section 55.08 provide authority for the State to conduct evaluations and refer to step movement. They are in conceptual accord with the 'pattern' established between the State and other unions on this issue. No further contract language is required." (MX 2).*

The Employer rejects the Union's argument that the Fact finder Graham's addendum should not be considered in this matter. It contends that the provisions of the Mutually Agreed Upon Dispute Settlement (MAD) did not contain any prohibitions against such an addendum.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union argues that the second paragraph of Article 55.08 does not refer to salary step movements after probation. It contends that when the second paragraph was added in 1989 it was to address a timing issue. The second paragraph was added to answer a question that had arisen regarding the proper cycle to be used for step increases for probationary employees, argues the Union.

The Union argues that the Employer, after losing its argument in fact-finding to alter Article 32, decided that Article 55.08 now applies to all employees and not just those on probation. The Union argues the Employer is attempting to obtain in arbitration

what it could not obtain in negotiations. It is distorting what the intent of the language contained in Article 55.08 and the findings of Fact-finder Graham to this end, asserts the Union.

The language of Article 55.08 was never meant to apply to anyone else but probationary employees, contends the Union. The Union supports its argument by referring to the language of the OCSEA contract (UX 1) and the Troopers contract (UX 3). In both of these contracts, merit pay step increases exclude probationary employees and they are identified in a separate section of the contract. The Employer proposed current language under Article 55.08 and sought the change to a merit pay step system by a proposed modification to Article 32, argues the Union. The Union contends that the Employer wanted to include the same language that appears in UX 1 and 3 in the FOP Unit 2 CBA, under Article 32. The Union asserts that the Employer was not successful and no such language exists under Article 32. The Union also points out that the Employer proposed the "pattern merit step pay language" for the Attorney General's Office bargaining unit, Unit 46. It was not successful in these negotiations based upon a rejection by Fact-finder, Kohler.

The Union contends that if merit pay was already included in Article 55.08, why would a proposal for Article 32 be necessary? The Union argues that a reasonable person would not try to negotiate additional language, but would simply seek to clarify its pre-exiting right to have a merit pay step system that is contained in Article 55.08. The Union rejects the Employer's contention that a past practice existed that it unilaterally ended in March of 2001. The Union argues the implementation of the merit pay step system is a matter that must be negotiated with the Union. It is a term and condition of

employment. The Union also argues that nothing in the Salary Schedule provisions, Articles 55.02 to 55.05, tie salary step increases to an evaluation system.

The Union also rejects the Employer's argument Fact finder Graham recognized that the Employer already had the right under Article 55.08 and 32 to implement the "pattern" for step increases based upon satisfactory evaluations. The Union does not agree that Dr. Graham's letter states that the Employer has the right to incorporate merit pay in the CBA. Furthermore, Dr. Graham's fact-finding report devotes several pages to why merit pay for Unit 2 was not necessary and rejected any changes in Article 32. The Union also argues that the letter from Dr. Graham, if considered to be an addition to Dr. Graham's fact finding award, is problematic and violates the rule of SERB (O.A.C. 4117-9-05 (L)). The Union contends there was no mutual agreement to have any clarification to Dr. Graham's report was submitted to SERB and no party filed a motion with SERB. The Union contends that substantive omissions or errors in a fact-finding report require action by SERB, before a clarification may occur (SERB 94-013 (7-12-94)).

Based upon the above, the Union requests the grievance be granted.

DISCUSSION

The Employer carries the burden in this case and it must demonstrate by a preponderance of the evidence that the language of the Agreement permits it to deny step increases to FOP Unit 2 employees based upon an unsatisfactory evaluation.

In the instant matter the meaning of the language within the context of probation supports the Union's position and not the Employer's position. In order to glean the intended meaning of the words contained in Article 55.08, it is necessary to consider the

context in which they exist. This includes other words in the provision, the history of bargaining, and the unique nature of the business. (J. Murray, *Murray on Contracts: A Revision of Grismore on Contracts*, (1974) §114, at 245). In title and content it appears to only involve probationary employees. The State is seeking a more liberal interpretation of said language that would apply to all employees of the bargaining unit. It is generally understood that the party seeking a meaning other than the plain meaning of the words of a provision must bear the burden of showing why the plain and often more conservative meaning was not intended (See N. Singer, Sutherland Statutory Construction (4th ed. 1984) at 58.01, 58.03).

I do not find that the language of Article 55.08 is complicated. The fact that it is entitled "Probationary Step Movement" immediately imparts a specific meaning. The Employer argues that paragraph two of this provision conveys a meaning that has nothing to do with probationary periods. Absent, supportive evidence, I find such an interpretation strains the bounds of reason. Although I do not find that such an interpretation directly conflicts with the title or what is clearly contained in the first sentence of Article 55.08, it is a dramatic departure from the topic of probation.

The Employer argued that the second sentence of Article 55.08 was added to the CBA because nowhere in the Agreement is there guidance on how one moves through the steps in the Salary Schedule. The sentence reads:

> *"Movement from one (1) step to another after probation shall occur after one (1) year of service following the completion of probation in the classification if performance has been satisfactory"*

This is one interpretation. However, if this language is intended to address movement of non-probationary employees all the way through the seven to twelve steps

of their salary schedule (depending upon the classification), why does it keep referring to the probationary period? Circumstances, it they have probative value are often helpful in making the meaning of words plain (*A. Corbin Contracts* § 542 at 101–105 (rev. ed. 1960)). Step increase dates change when employees change classifications. This is a concept that often causes confusion among less experienced employees. Considering the circumstances that result from changing a classification, it is more reasonable to conclude that this language was added to the first sentence, *"An employee shall receive a step increase upon satisfactory completion of the probationary period"* simply to clarify when the next step occurs following probation.

According to Article 31.03 employees who are promoted serve a probationary period of 180 days. If the parties intended to clarify the fact that the annual step increase date changes when one is promoted and successfully completes his/her probationary period, the language contained in the second paragraph of Article 55.08 provides this information.

From the standpoint of sentence construction it is more reasonable to conclude that the last phase in the second sentence, *"...if performance has been satisfactory"* is a qualifying phrase related to *"completion of probation in the classification."* There is less reason to believe *"if performance has been satisfactory"* relates to any step movement beyond the probationary period.

When the immediately proceeding provision, Article 55.07 Promotions, is considered in conjunction with the language of 55.08, the position of the Union is further supported. It states in its last sentence, *"Subsequent step increases will be provided pursuant to Section 55.06."* If step increases were based upon merit and not merely years

of service, why is there no reference to Article 55.08? When other standards of interpretation and evidence are considered such as bargaining history, it is the Union's position and not the Employer's that gains more credibility.

The intent conveyed to each party by way of proposals, counter-proposals, and communications can be a useful source to help determine the intent of language (City of Burlington, 83 LA 971,975 (Trayor). Most arbitrators generally hold that an unsuccessful attempt to obtain a specific enlargement of rights in negotiations is an indication that the right does not exist by agreement or by past practice (Montgomery County Sheriff, 105 LA 217 (Murphy 1995). However, a rejection of a proposal that was proposed for purposes of clarity or operational detail does not necessary mean the claimed right is non-existent (B. Landis, Value Judgments in Arbitration: A Case Study by Saul Wallen , 63 (1977). The key is to be able to prove the right existed prior to the negotiations and the proposal was merely made for purposes of clarification. Because the Employer assumed the burden of proof in this case, it had to prove that it already negotiated the right to tie satisfactory evaluations to salary step increases in Article 55.08.

This Arbitrator is familiar with the settlements reached in negotiations with the SEIU 1199 bargaining unit and with OSTA, the bargaining unit that represented the State Highway Patrol Troopers. In both negotiations, the parties agreed to incorporate the pattern language that was initially adopted by OCSEA as a result of a fact-finding report also issued by Dr. Graham.

There is no question that the evidence in this case demonstrates that during negotiations for the current Agreement, the Employer sought to modify Article 32 in order to incorporate the patterned language regarding merit step pay increases (UX 5).

More importantly, is the evidence contained in UX 6. The Position Statement of the Employer submitted to the Fact-finder prior to fact-finding pursuant to ORC 4117.14 (C) (3) (a) and OAC 4117-9-05, contains several statements that support the Union's position that the Agreement does not contain any language regarding the Employer's right to deny salary step increases to employees based upon performance (UX 6). For example, the following words under the heading "PRESENT PROVISION" under Article 32 state:

"There is no provision regarding step movement conditioned on satisfactory evaluations."

Under the heading "EMPLOYER POSITION" the Employer also states:

"The Employer wishes to provide for annual performance evaluations for all employees during the sixty-(60) days immediately preceding the employee's next step increase, and annually thereafter."

At the very least this demonstrates that the Employer did not believe that Article 32 contained any step movement restrictions based upon evaluation outcomes. However, it is not unreasonable to surmise that the Employer may have been speaking in broader terms. There is also no question that Dr. Graham did not recommend any modification of the language of Article 32. He specifically departed from what he had previously recommended for the OCSEA bargaining unit and the "pattern" for other unions, and provided extensive rationale for this departure. In his own words Dr. Graham states,

"Members of this bargaining unit work in such a different circumstances from their fellows as to compel a different outcome on this issue. It is recommended that Article 32 remain unchanged."

What is not clear is what Dr. Graham intended by his letter dated March 29, 2001. This letter was issued three (3) days following his Fact-Finding Report dated March 26, 2001. There was no evidence presented to clarify what was intended by this additional wording or how it is to be interpreted in light of the extensive rationale contained in the

Fact-finding Report. The Report highlights the unique and independent (from supervision and otherwise) circumstances under which the bargaining unit members of Unit 2 work. It calls for a *"different outcome on this issue."* (p. 12, JX 4).

The Union's argument regarding the requirements of SERB that substantive clarifications of a fact-finding report needs to be approved by SERB is well understood among those of us who do this kind of work. However, whether the same requirements apply to a MAD agreement is not completely clear. In Section 5 of MX 3, it clearly states in pertinent part:

> *"The parties shall have fourteen calendar days following the receipt of the Factfinder's written recommendations to either accept or reject those recommendations and all other tentative agreements reached during the course of negotiations pursuant to ORC Section 4117.14 (C)(6)."*

The MAD does not permit or prohibit addendums to be issued following the fact-finder's report. As a Fact-finder, at different times I have had SERB take opposing positions on clarifications of reports under a MAD agreement versus clarifications under the statutory procedure. Nevertheless, such a distinction appears inconsequential when it is not even clear what is intended by wording in the addendum or what it means in the greater context of the fact-finding rationale.

Finally, if for eleven (11) years the Employer had the right to deny step increases based upon evaluations, why was this right or its existence never used in any advantageous manner? With the exception of the last round of negotiations, there was no evidence presented to demonstrate that the Employer proposed similar language in bargaining with other unions following 1989. Nor was evidence presented that Article 55.08 was used as internal comparable data in a fact-finding hearing to persuade a fact-finder of the merits of its position with other unions.

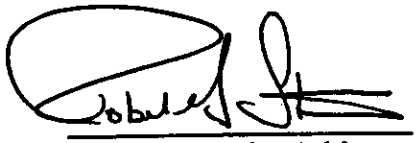
Based upon the above, I do not find that there is sufficient evidence to support the Employer's interpretation that the language contained in Articles 32 or 55.08 permits the Employer to deny salary step increases based upon the results of evaluations. It was clear from the hearing that matters of good faith bargaining were at stake in this dispute. As with all arbitration hearings, the evidence in the record is what is controlling. What occurred during the bargaining process, what may have been verbally agreed upon, or what was thought to have been agreed upon is only known to the individuals who participated in the process.

AWARD

The grievance is sustained.

The language contained in Article 55.08 concerns only probationary period employees.

Respectfully submitted to the parties this 4th day of January, 2002.



Robert G. Stein, Arbitrator