

#1962

IN THE MATTER OF VOLUNTARY ARBITRATION

OPINION AND AWARD

Ohio State Troopers Association,)	
)	
Union,)	
)	Issue: Seniority Step Increase
and)	
)	OCB #15-03-050714-0091-04-01
Ohio Department of Public Safety,)	
Division of the State Highway Patrol,)	Arbitrator N. Eugene Brundige
)	
Employer,)	

For the Employer:

Krista Weida, Esq.

For the Union:

Elaine N. Silveira, Assistant General Counsel
Herschel M. Sigall, General Counsel
Larry K. Phillips, President

Date of Award
December 31, 2007

This matter was presented to Arbitrator N. Eugene Brundige by briefs only, in lieu of a hearing. The briefs were submitted by the mutually agreed upon deadline of December 14, 2007. All submissions were considered in reaching the decision stated in this Opinion and Award.

Krista Weida, Attorney at Law, represented the Employer.

Elaine N. Sliver, Assistant General Counsel; Herschel M. Sigall, General Counsel; and Larry K. Phillips, President, represented the Union.

The Union's issue to be decided before the Arbitrator is, "*Did the Employer violate Article 60.08 when it denied movement to Step 6 of Pay Range 11 when a Trooper had or attained ten (10) years seniority, effective July 2, 2005, as a Highway Patrol Trooper? If so, what shall the remedy be?*"

The Employer's issue to be decided before the Arbitrator is, "*Does service time between July 1, 2003, through June 30, 2005, count towards 'qualifying' seniority in order to receive the additional step of five percent (5%) that is paid to all Troopers with ten (10) years of seniority, as contemplated in Article 60.08 of the Collective Bargaining Agreement?*"

The parties jointly submitted and exchanged the following exhibits:

Joint Exhibit 1: Collective Bargaining Agreement, Ohio State Troopers Association, Inc., Unit 1, 2003-2006.

Joint Exhibit 2: Grievance Trail #15-03-050714-0091-04-01 and all related grievances.

- a. Grievance forms;
- b. Step 2 Response, dated August 8, 2005;
- c. Letter of Intent to Arbitrate, dated September 26, 2005.

Joint Exhibit 3: Department of Administrative Services Payroll Letter #840, dated June 23, 2003.

Joint Exhibit 4: OSP Personnel Bulletin, dated October 2007.

Joint Exhibit 5: Letter from Steven Loeffler, Office of Collective Bargaining, dated December 5, 2005, to Herschel Sigall.

Joint Exhibit 6: Paycheck – Trooper David Sizemore; Paycheck Date: 11/12/2005 through 12/10/2005.

- a. Base Rate = \$23.63;
- b. Longevity = \$0.78;
- c. Professional Achievement Pay = \$1.95* Trooper Sizemore is a Pilot;
- d. Total Rate = \$26.36.

Joint Exhibit 7: Paycheck – Trooper Thomas Bee; Paycheck Date: 3/16/2007.

- a. Base Rate = \$23.63;
- b. Longevity = \$0.88;
- c. Total Rate = \$24.51;
- d. Service Time = 11 years, 10 months, 3 days;
- e. Longevity Time = 9 years, 10 months, 1 day.

The parties jointly agreed to the following stipulations:

Stipulation 1: Grievances include only those current members of the 125th Academy Class to the 143rd Academy Class.

Stipulation 2: Troopers Thomas Bee and David Sizemore are members of the 127th Academy Class and graduated on November 17, 1995. Their paychecks are submitted for illustrative purposes.

Stipulation 3: Academy Graduation Dates:

- | | |
|-----------------------------------|-----------------------------------|
| a. 125 th – 11/12/1993 | k. 135 th – 09/01/2000 |
| b. 126 th – 07/08/1994 | l. 136 th – 03/09/2001 |
| c. 127 th – 11/17/1995 | m. 137 th – 09/28/2001 |
| d. 128 th – 07/25/1997 | n. 138 th – 04/26/2002 |
| e. 129 th – 11/14/1997 | o. 139 th – 10/04/2002 |
| f. 130 th – 05/10/1998 | p. 140 th – 02/21/2003 |
| g. 131 st – 10/30/1998 | q. 141 st – 03/26/2004 |
| h. 132 nd – 04/02/1999 | r. 142 nd – 11/19/2004 |
| i. 133 rd – 07/30/1999 | s. 143 rd – 06/03/2005 |
| j. 134 th – 12/10/1999 | |

Stipulation 4: If the grievances are sustained, back pay liability will cease upon the date any member left Bargaining Unit 1.

Stipulation 5: If the grievances are sustained, back pay liability will not be retroactively applied during the period from July 1, 2003, through June 30, 2005.

BACKGROUND

In this instant case it is important to note that after the negotiations for the Ohio Civil Service Employees Association, dated 2003-2006, the fact finder in those negotiations recommended no wage increases for the first two (2) years and a four percent (4%) increase for the third year of the agreement. The fact finder also recommended there be no non-probationary step movement for the first two (2) years, and that the employees' step indicators be frozen from July 1, 2003, through June 30, 2005. The Department of Administrative Services issued Payroll Letter 804 to this effect on June 23, 2003 (See Joint Exhibit 3).

In December of 2003, the Ohio State Troopers Association and the Ohio Department of Public Safety, Division of the State Highway Patrol, ratified their Collective Bargaining Agreement, dated 2003-2006, effective July 1, 2003, retroactively.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article 60.08 – Seniority Step Increase

An additional step of five percent (5%) shall be paid to all Troopers with ten (10) years seniority. Except that during the period from July 1, 2003, through June 30, 2005, there shall be no advancement to step 6 of pay range 11 for troopers who attain 10 years seniority. No retroactive movement shall occur for the two (2) years that have been skipped. Effective

July 1, 2005, any trooper with ten (10) years of qualifying seniority shall advance to step 6 of pay range 11.

Article 36 – Seniority

36.01 Definition. Seniority shall be defined as the total length of continuous service in a permanent full-time position or succession of positions with the Employer. Continuous services also will not be interrupted if the employee was on approved leave of absence or if the employee is reemployed within two (2) years from the date of a layoff.

36.02 Identical Hire Dates.

36.03 Termination of Seniority. Seniority shall terminate when the employee:

1. Quits, resigns, or is otherwise separated from the Patrol for more than one (1) year;
2. Retires;
3. Is discharged;
4. Fails to timely return without permission from:
 - a. leave of absence;
 - b. recall after layoff; or
 - c. sick leave.
5. Is on layoff for a period of time equivalent to the employee's accumulated time in service seniority or twenty-four (24) months, whichever occurs last.

Section 60.05

An Employee shall receive a step increase upon satisfactory completion of the probationary period. Effective the pay period including July 1, 2003, there shall be no non-probationary step movements. Step movement shall resume the pay period including July 1, 2005. No retroactive movement shall occur for the two (2) years that have been skipped.

ARTICLE 62 - LONGEVITY PAY

Beginning on the first day of the pay period within which an employee completes five (5) years of total state service, each employee will receive an automatic salary adjustment equivalent to one-half percent (1/2%) times the number of years service times the first step of the pay rate of the employee's

classification for a total of twenty (20) years. This amount will be added to the step rate of pay.

Longevity adjustments are based solely on length of service excluding any service time earned between July 1, 2003, and June 30, 2005, inclusive. The granting of longevity adjustments shall not be affected by promotion, demotion, or other changes in classification held by the employee. Effective April 28, 1986, only service with state agencies, i.e., agencies whose employees are paid by the Auditor of State, will be counted for the purposes of computing longevity for new employees in the bargaining unit.

POSITION OF THE UNION

In the current Collective Bargaining Agreement, the parties negotiated a pay freeze, prohibiting non-probationary step movements, effective July 1, 2003, to June 30, 2005.

Also within that Agreement is a provision providing Highway Patrol troopers with a seniority step at ten (10) years of service. The Union states that troopers who attained ten (10) years of service during the two-year freeze, did not move a step in accordance with the Collective Bargaining Agreement. However, after the freeze ended, the troopers with ten (10) years of service did not obtain their step increase as agreed upon in the Collective Bargaining Agreement, Article 60.08, which states, "Effective July 1, 2005, any trooper with ten (10) years of qualifying seniority shall advance to step 6 of pay range 11."

The Union refers to Article 62 – Longevity, which states in part, "Longevity adjustments are based solely on length of service excluding any service time earned between July 1, 2003, and June 30, 2005, inclusive." The Union argues that this Article is proof of the intent to freeze longevity pay only, and not the intent to freeze the accumulation of seniority. The Union contends that nowhere in the Collective Bargaining Agreement was seniority frozen. Article 36 of the relevant Collective Bargaining Agreement states in part, "Seniority shall be defined as the total length of continuous

service in a permanent full-time position or succession of positions with the Employer.” The Union believes that if the Employer wanted to freeze seniority, it would have done so as it did for longevity.

The Union argues that the Employer’s refusal to advance troopers with ten (10) years seniority to Step 6 of Pay Range 11 is in violation of the Collective Bargaining Agreement. As an illustration of the continuing contract violation, the Union points to Joint Exhibits 6 and 7, wherein both troopers are members of the 127th Academy Class and who graduated on November 15, 1995. They each attained ten (10) years seniority on November 15, 2005, yet only one (1) trooper is receiving a longevity adjustment.

The Union states that it does not dispute the fact that there was a step freeze in place from July 1, 2003, to June 30, 2005. The Union’s dispute is over the Employer’s refusal to give step increases now that the freeze is over. The Union believes that effective July 1, 2005, when the two-year freeze was over, troopers with ten (10) years of seniority should be allowed to advance to Step 6 of Pay Range 11, as stated in the current Collective Bargaining Agreement, and those troopers should be given retroactive payment. The Union also believes that the troopers who advanced to Step 6, two (2) years later, should also be given retroactive payment.

POSITION OF THE EMPLOYER

In December of 2003, the Employer entered into a Collective Bargaining Agreement with the Union, effective retroactively to July 1, 2003. As part of those negotiations, the parties agreed to a freeze on all non-probationary step movements for two (2) years, as stated in Article 60.08 as follows, “An additional step of five percent (5%) shall be paid to all Troopers with ten (10) years seniority. Except that during the period

from July 1, 2003, through June 30, 2005, there shall be no advancement to step 6 of pay range 11 for troopers who attain ten (10) years seniority. No retroactive movement shall occur for the two (2) years that have been skipped. Effective July 1, 2005, any trooper with ten (10) years of qualifying seniority shall advance to step 6 of pay range 11.”

In accordance with the above language, the Employer argues that the agreed upon two-year freeze in step indicators does not qualify employees to earn longevity, because longevity had been frozen. Service time would continue for purposes other than step indicators, and the step freeze was not intended to take service time away from the employees.

The Employer states that the freeze was a two (2) year catch-up period, intended to freeze all step increases, for all state employees, for a set period of time. Therefore, it will take an additional two (2) years for many employees to obtain certain step increases, compared to other employees who were hired after July 1, 2005, with normal step movements to resume beginning with the pay period ending July 9, 2005.

The Employer points to Joint Exhibit 5 wherein thirty-six (36) troopers (graduates of the 11/12/93 academy class) were not properly advanced after being in a trooper classification for twelve (12) years. Adjustments were made to their pay, but they had to be in the trooper classification for twelve (12) years to obtain the additional five percent (5%) increase. Whereas, a trooper hired in early 1993, before the step increase freeze, would achieve that increase upon being in the trooper classification for ten (10) years.

The Employer further argues that in order to receive the five percent (5%) increase, the trooper must have qualifying seniority, which does not include the period from July 1, 2003, through June 30, 2005. In some cases it may take an additional two (2) years for

many employees to obtain certain step increases, including those hired after July 1, 2005. The Employer argues that any service, during this two-year period, is not considered qualified seniority time, pursuant to Article 60.08. The qualifying seniority language was added to Article 60.08 in the Collective Bargaining Agreement, dated 2003-2006, to account for an additional five percent (5%) step increase at the end of the two-year freeze.

The Employer made reference to identical provisions in other state contracts belonging to the OCSEA, SEIU/1199, SCOPE, OEA/NEA, and FOP/OLC, Inc., contending that a step freeze was implemented statewide to help avert a state-wide economic crisis.

OPINION AND AWARD

The Union has advanced the view that the language in question is “plain and clear” and therefore unambiguous.

Most arbitrators hold that an ambiguity exists when plausible arguments can be made for competing interpretations of a contractual provision.

Arbitrator Rhonda Rivera, wrote:

“If the Arbitrator concludes that two reasonable meanings are possible, then she may weigh evidence of uncommon meanings and of intent.”¹

(see also e.g., *Armstrong Rubber Co.*, 17 LA 741 ,744 (Gorder 1952) and *Allis-Chalmers Corp.*, 71 LA 378 -379).

That is certainly true in this case when one considers the wording of Section 60.08 in conjunction with other sections that will be discussed below. This is a classic case of ambiguous contract language.

¹ In re: OHIO DEPARTMENT OF NATURAL RESOURCES and FRATERNAL ORDER OF POLICE OF OHIO, INC., OHIO LABOR COUNCIL INC. UNIT 2, (90 LA 1049)

There is no question the parties froze step increases during the two (2) year freeze period. There is also no question that the parties froze longevity.

The question is whether the parties agreed to freeze seniority as it applies to this specific step movement during the two (2) year period as well.

If this application of seniority was frozen then the two (2) year period of time would be tolled and progress toward acquiring the step 6, pay range 11 rate would resume after the freeze was over.

Usually arbitrators, in deciding the application of ambiguous language, have the benefit of reviewing bargaining notes and receiving testimony regarding the “give and take” of the bargaining process.

In the instant case, without benefit of such notes or testimony, I must rely exclusively on the documents presented to attempt to glean the meaning.

The Union is correct that the language of the seniority provision was not modified in the same way the longevity language was. I believe the Union is also correct that nothing in the Agreement was intended to freeze seniority as it relates to other applications. The question is whether the word “*qualifying*” excludes seniority earned during the freeze period from application toward the movement into Step 6, Range 11.

The intent of Management is easily discernable based upon the payroll letter and the practice implemented. But this does not help in establishing if bilateral intent was present, which is the only valid tool available to give meaning to ambiguous language.

A review of the Collective Bargaining Agreement for the period 2001–2003 compared to the 2003-2005 Contract shows that the last part of Article 60.08 is a new provision of the Agreement.

If the new clause is read to merely apply seniority to the Step 6, Pay Range 11 movement then the Union's theory might be correct. However, there is an additional troublesome word inserted into the section. That insertion refers to "*qualifying seniority.*"

A review of the Bureau of National Affairs database failed to locate any arbitration cases published in the LA series that list the term "*qualifying seniority.*" Likewise a search of contract clauses across the county failed to identify the use of the term in any others. Thus, no assistance can be found from a comparison to other collective bargaining situations.

The word "*qualifying*" is defined in the **American Heritage Dictionary** as, "*To modify the meaning of (a noun, for example) or to be or become qualified² or to modify, limit, or restrict, as by giving exceptions.*"³

It would seem that the parties intended to modify seniority as it applies to this specific step in some way.

Arbitrators assume that words placed in a collective bargaining agreement are there for a specific purpose.

The Union would have me ignore the word "*qualifying.*" I cannot do that. Words in a collective bargaining agreement have been placed there for a purpose and cannot simply be ignored because they are inconvenient. ***How Arbitration Works, 6th Edition,*** quotes Arbitrator Updergraff in a 1947 case on this same point:

"It is axiomatic in contract construction that an interpretation that tends to nullify or render meaningless any part of the contract should be avoided

³ The American Heritage® Dictionary of the English Language: Fourth Edition. 2000.

because of the general presumption that the parties do not carefully write into a solemnly negotiated agreement words intended to have no effect.⁴

Thus, to seek to determine the meaning of the term “*qualifying seniority*” I turn to some of the usual and customary standards for interpreting contract language.

Noscitur a sociis is a maxim that applies in this case. To give meaning to the term in dispute I must consider the context in which that term is offered.

Article 60.05 describes the intent of the parties regarding step movement in general. The new language contained therein states:

“Effective the pay period including July 1, 2003, there shall be no non-probationary step movements. Step movement shall resume the pay period including July 1, 2005. No retroactive movement shall occur for the two (2) years that have been skipped.”

The new language of Section 60.08, when read in context with the new language of Section 60.05, would lead a reasonable person to conclude that the “*qualifying*” language in 60.08 was meant to incorporate the same concept barring consideration of the two (2) year period for accumulating credit that would lead to the awarding of movement to the Step 6, Range 11 at the end of the freeze period.

A collective bargaining agreement is the product of many different negotiations sessions and periods. Items that are not re-negotiated remain in place in new agreements. Consideration is given to the time in which provisions are added, assuming that those which have been added more recently are given greater deference when ambiguity exists, that do those which remain untouched.

In this Agreement the seniority language in Article 36 has been in place in at least the prior agreement. The new language in Sections 60.05 and 60.08 was just added in the 2003-

⁴ John Deere Tractor Co., 5LA 631 as cited in HOW ARBITRATION WORKS, Elkouri & Elkouri, 6th Edition.

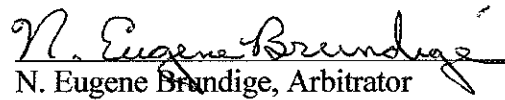
2005 Agreement. Thus, I must assume the newer language bears the greater impact when judging the intent and agreements of the parties.

For the reasons herein stated and based upon the documents presented, I must interpret the Collective Bargaining Agreement to support the view proffered by Management.

AWARD

The grievance is denied.

Issued at London, Ohio on this 31st day of December, 2007


N. Eugene Brundige, Arbitrator