#1977

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. 15-03-0050926-0137-04-01

THE STATE OF OHIO, HIGHWAY PATROL	:	
The Employer	:	
and	:	OPINION AND AWARD
THE OHIO STATE TROOPERS ASSOCIATION, INC., UNIT 1	:	
The Union	:	

MARVIN J. FELDMAN
Attorney/Arbitrator
1104 The Superior Building
815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216/781-6100

Fax: 216/781-6119

Email: marvfeldmn@aol.com

LICENSED TO PRACTICE LAW IN THE STATE OF OHIO AND COMMONWEALTH OF KENTUCKY

APPEARANCES BY BRIEF

For the Employer:

Kristen Rankin, General Counsel

For the Union:

Elaine Silveira, Assistant General Counsel

I. SUBMISSION

This matter came before this arbitrator by brief and stipulated facts only, the parties having waived hearing in this particular matter. The Opinion and Award was mailed to the parties within thirty days of receipt of the material from the parties. It was upon the arguments and facts presented by stipulation that this Opinion and Award was thereafter rendered.

II. STATEMENT OF FACTS

The facts in this particular matter and the issue resulting have their predicate in Paragraph 60.05 of the 2003-2006 contract of collective bargaining. That same paragraph appears at 60.06 in the subsequent contract for the period of 2006-2009. That language revealed the following:

> "**60.05 Step Movement**
>
> 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. Freezing of step movements shall not affect the performance evaluation schedule. Step increases shall occur annually thereafter if the employee receives an overall "satisfactory" rating on his/her annual performance evaluation. If the employee's performance evaluation is not completed on time, the employee shall not be denied a step increase."

Thereafter, it was found, by virtue of the contractual language stated above, that some bargaining unit people with less seniority received a higher payment of wage than those with a

greater seniority. Several grievances were filed and they were finally merged into one grievance which the union termed a "class action" grievance on behalf of all of the affected members. The exact language of the protest revealed the following:

> "**Grievance Facts** Be specific - Answer Who, What, When, Where and Why
>
> On September 20th, the Union became aware that some less senior Bargaining Unit 1 members were placed in a higher step than those with more seniority, effective July 1, 2005. This issue specifically impacts members of the 138th, 139th and 140th Trooper Classes. It also adversely affects employees in the remaining classifications contained within Bargaining Unit 1."

The remedy requested stated the following:

> "**Requested Remedy**
>
> For Troopers in the 138th & 139th Trooper Classes - Step increase to Step 3, retroactively applied and paid back to the pay period including August 21, 2005. Evaluation schedule to be conducted annually thereafter on or around August 21. For all other classifications within BU 1 - Step increase to the next corresponding step in their respective pay range (if not stepped out), retroactive payment back to the pay period including July 1, 2005. Evaluation schedule to be conducted annually thereafter on or around July 1, 2005."

The union termed the resultant activity as "leapfrogging" and stated in their brief the following language:

"The grievance facts are simple: after July 1, 2005, bargaining unit members with less seniority "leapfrogged" into a higher step than those with more seniority. Within the Trooper classification, the inequity specifically impacted the 138th and 139th classes and within the other classifications, it had broad based impact. The inequitable leapfrogging created a de facto if not de jure reduction in the seniority of the Grievants herein, by reducing the value of their seniority vis a vis less senior members of the bargaining unit. The elevation of pay of less senior employees on the very basis of seniority or length of service to the Employer, violates the provisions of the CBA and flies in the face of the spirit of the CBA."

It might be noted that a fact-finding report concerning these two parties was rendered by Professor Harry Graham (see page 50). Professor Graham, in his write-up, recognized this problem and had the following remarks to make concerning it:

" In the 2003-2006 an anomaly in the pay system occurred. There was a step freeze in the 2003-2006 Agreement. That was lifted on July 1, 2005. As a result, some employees with less seniority were vaulted over employees with more seniority. As the Union relates history, this was neither intended nor foreseen by the parties. There is an inequity that should be rectified according to the Union."

Also noted in that report on pages 53 and 54 is the following language:

" The Union is correct to point to the two-year freeze anomaly. It has resulted in some less senior employees earning more than more senior employees. That is neither expectable nor desirable. That anomaly should be rectified as proposed by the Union."

The union has indicated and stated and argued that seniority is the cornerstone of the collective bargaining agreement and that the resultant pay schedule from the present language found in the contract is contrary to the results normally accorded in any collective bargaining agreement. The employer, on the other hand, indicated and stated and argued that the union was fully cognizant of improprieties that may occur under the terms of the agreement and has been following the terms of the agreement without hindrance ever since prior to execution. Simply put, the employer stated that the union was cognizant of the resultant "leapfrogging" by virtue of the negotiated language perused prior to execution. Thus, argues the employer that the activity is not new but was accepted by the union at the time the contract was entered into. At any rate, those are the facts of the case and it was upon that evidence that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

The general rule is that an arbitrator has no authority to change the terms of the contract, especially when one party or the other who now cries foul, was cognizant of the alleged inappropriate result that the written contract might trigger. In this particular case, it is found that a senior employee is getting paid less than a junior employee. The union does not even seek to rectify this activity on the basis of mistake, but rather says that the resultant activity is contrary to the intended result.

Generally, an arbitrator simply has no authority to change the language of the agreement. If a nonsensical situation occurs by virtue of the inactivity of one party to the other to correct it prior

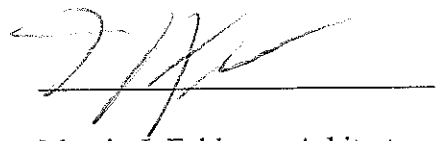
to executing the document, then the arbitrator merely allows the situation to perpetuate. Perhaps, the bargaining unit can bargain away the inappropriate result either now or at the next time there is a round of negotiations. However, the fact of the matter is, that while a junior employee may make more in wage than a senior employee, that is what the parties bargained for. Simply put, I have no authority to change the written terms of the negotiated document.

For whatever reason, the union accepted and is now bound by the language. A prior decision involving another public sector union, ruled upon by Dr. Graham, ordered the similar contract language to be strictly enforced. There is no reason in this matter to modify the contract.

Based upon all of these facts, the arbitrator must deny the grievance.

IV. AWARD

Grievance denied.



Marvin J. Feldman, Arbitrator

Made and entered

this 6th day

of May 2008.