

SUSAN GRODY RUBEN, Esq.
Labor Arbitrator and Mediator
30799 Pinetree Road, No. 226
Cleveland, OH 44124

**IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES**

In the Matter of

**OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, AFSCME Local 11
AFL-CIO**

and

**OHIO DEPARTMENT OF
TAXATION**

**Grievant: Louis H. Byers
Grievance 30-04-20100503-0035-01-14**

**ARBITRATOR'S
OPINION AND AWARD**

This Arbitration arises pursuant to the collective bargaining agreement (“the Agreement”) between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION (“the Union”) and the STATE OF OHIO (“the State”), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be final and binding pursuant to the Agreement.

Hearing was held March 25, 2011. The Parties had full opportunity to present evidence and argument.

APPEARANCES:

On behalf of the Union:

**JOHN PORTER, Associate General Counsel, OCSEA,
390 Worthington Road, Westerville, Ohio 43082.**

On behalf of the State:

**ASHLEY HUGHES, Labor Counsel, OCB, 100 East
Broad Street, 14th Floor, Columbus, Ohio 43215.**

ISSUE

**Did the State violate the Agreement when it granted the Grievant
Ohio National Guard prior service credit retroactive to only April
25, 2010? If so, what shall the remedy be?**

**RELEVANT PORTIONS OF THE PARTIES' COLLECTIVE BARGAINING
AGREEMENT**

April 15, 2009 – February 29, 2012

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ARTICLE 25 – GRIEVANCE PROCEDURE

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25.02 – Grievance Steps

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Step One – Immediate Supervisor

**...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 not to exceed a total of thirty (30) days
after the event....**

...

...

ARTICLE 28 – VACATIONS

28.01 – Rate of Accrual

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[Length of State Service/Accrual Rate Schedule]

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Effective July 1, 2010, employees who provide valid documentation to their Agency's Human Resources department shall receive credit for prior service with the State, the Ohio National Guard, or any political subdivision of the State for purposes of computing vacation leave in accordance with ORC 9.44. This new rate shall take effect starting the pay period immediately following the pay period that includes the date that the Department of Administrative Services processes and approves their request. Time spent concurrently with the Ohio National Guard and a State Agency or political subdivision shall not count double.

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ARTICLE 36 – WAGES

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36.07 – 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 of service times the first step of the pay rate of the employee's classification up to a total of twenty (20) years. This amount will be added to the step rate of pay.

...

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FACTS

The Grievant was hired by the Department of Taxation effective January 4, 1999. Prior to that time, the Grievant had served six years in the Ohio National Guard.

On June 21, 2001, Arbitrator Graham issued an Award in Case No. 27-32-000310-0245-01-03 ("the Graham Award"). The five grievants in that case¹ sought State service credit for their Ohio National Guard service pursuant to ORC § 9.44, which provided:

A full time employee who was a member of the Ohio National Guard serving on duty one (1) weekend per month and two (2) weeks out of every year is entitled to one (1) year prior service credit for each

¹ The Grievant was not among the five grievants in that case.

year of service for the purpose of computing the amount of his vacation leave pursuant to RC 121.161, OAG 81-066.²

Arbitrator Graham awarded the five grievants State service credit “based on the initial date of enlistment in the National Guard....[A]djustments in vacation and longevity pay...retroactive to 30 days prior to the date of filing of the grievance per Article 25, Section 25.02.” Arbitrator Graham further provided, “The Office of Collective Bargaining is to promptly notify all State agencies of this decision.”³ OCB made that notification.

Pursuant to a subsequent class action grievance filed by the Union which was granted by the Ohio Department of Administrative Services,⁴ the State informed the Union and all State agencies:

...Employees of the bargaining unit will be granted service credit for time spent in the Ohio National Guard in accordance with 9.44 and OAG 81-066 as follows:

- Fulltime employees who were members of the Ohio National Guard serving on duty one weekend per month and two weeks out of every year are entitled to one (1) year prior service credit for each year of service for the purpose of computing the amount of vacation leave and lo[n]gevity.
- All adjustments will be made prospectively.
- The effective date of such adjustments will be the first day of the pay period following approval of service credit by the director of administrative services.
- Adjustments will be made upon the submission of proof of prior service and approval of the prior service credit by the employee.
- No employee, other than an employee who submits proof of prior service within ninety (90) days after the date of the employee’s hiring, will receive retroactive accrual or longevity adjustment for the period prior to the director’s approval of prior service credit.

Employees must submit a signed letter of request containing the following information:

- Full name
- Social Security number
- Date of enlistment or entry into the Ohio National Guard

² As quoted in the Graham Award.

³ Arbitrator Graham expressly specified, “This award is limited to the five (5) grievants....”

⁴ Case No. 02-10-20010625-0074-01-00.

- Service history – organization component – ARNG or AMG, unit(s) assigned
- Date of assignment(s)
- Total prior service claimed (years, months and days)⁵

On or about April 25, 2010, the Grievant became aware his Ohio National Guard service could be converted to State service credit. As soon as he became aware of this benefit, he submitted a written request to obtain it.⁶ The State granted the credit effective April 25, 2010.⁷

The Union filed the instant grievance on or about May 3, 2010. In it, the Grievant stated:

On 4/26/10 I was informed that I was able to claim service credit for prior employment (Ohio National Guard 6 years) all the way back to the date I was hired.

When I was hired I did have prior Ohio National Guard on my application. By law this should have been implemented at the time of hire.

After calculating vacation time and longevity...I was shorted time and money.

I have the calculations, see attached.

PARTIES' POSITIONS

Union's Position

The Grievant should receive service credit back to the date of the Graham Award, June 21, 2001. The State's argument the grievance is not timely pursuant to Article 25.02 exalts form over substance. The deadline for filing a grievance is in the Agreement because in many cases, an issue may become stale if it isn't handled expeditiously. This is especially true when the Parties are dealing with a disciplinary issue where there may be facts in dispute. There are no disputed facts in this case.

⁵ Excerpts from July 27, 2001 letter from ODAS Chief of Operations.

⁶ The record indicates the Grievant did not initially submit the appropriate form; he submitted the appropriate form on May 4, 2010.

⁷ April 25, 2010 was the first day of the pay period including May 4, 2010.

The sole disagreement is over how far back the Grievant should receive adjusted vacation accrual and longevity pay. The State is depriving the Grievant of vacation accruals and longevity pay which he earned based on his Ohio National Guard service. The Grievant listed his Ohio National Guard service on his job application. The State should not be permitted to put the onus on employees to apply to receive something granted in 2001 in the Graham Award. The Union requests the Arbitrator to retain jurisdiction until the vacation accrual and longevity pay are calculated and agreed to by the Parties.

State's Position

The grievance is untimely. The Grievant reasonably should have become aware he was eligible for additional State service credit when the Graham Award was issued -- June 21, 2001. The instant grievance was filed May 3, 2010, approximately nine years after the Graham Award was issued.

Even if the Grievant was unaware of his eligibility in 2001, he reasonably should have become aware of his eligibility when the Union published an article on the subject in 2007 in the Union newsletter. Operating off this date makes the grievance untimely by approximately three years.

Finally, the Grievant reasonably should have become aware he was eligible for additional State service credit when the current Agreement went into effect, April 16, 2009. Operating off this date makes the grievance untimely by approximately one year.

The grievance also lacks merit. The Graham Award expressly limited any retroactivity to the five grievants in that case. Moreover, that retroactivity was limited to 30 days pursuant to Article 25.02.

Furthermore, State service credit for Ohio National Guard service is not automatically granted to employees. An employee must submit proof of Ohio

National Guard Service and have that proof approved by the State before service credit is granted.

The Agreement is silent regarding retroactivity, thus the law controls. ORC § 124.134 states:

Credit for prior service, including an increased vacation accrual rate and longevity supplement, shall take effect during the first pay period that begins immediately following the date the director of administrative services approves granting credit for that prior service. No employee, other than an employee who submits proof of prior service within ninety days after the date of the employee's hiring, shall receive any amount of vacation leave for the period prior to the date of the director's approval of the grant of credit for prior service.

It is implicit in this language that the employee must take an affirmative step to submit proof of prior service in order to receive credit.

The State has no obligation in the Agreement or in the ORC to notify employees of their Ohio National Guard service credit eligibility. The Graham Award stated OCB will notify State agencies of the decision. The State and the Union agreed the State would notify its agencies, and the Union would notify its members.

Notwithstanding the grievance's lack of merit, if the Arbitrator finds she has authority to grant service credit retroactivity, the remedy would be limited back to April 23, 2010, ten days before the grievance was filed -- two additional days to what the State already has credited the Grievant.

Additionally, the Graham Award limited retroactivity to 30 days. The Grievant should not be entitled to more retroactivity than was given the original grievants. Thus, at most, the Grievant is limited to 22 additional days of retroactivity, for a total of 30 days before he filed his grievance.

OPINION

The Arbitrator's authority comes from the Parties' Agreement. She can neither add provisions nor subtract provisions from that Agreement.

The Parties agreed in Section 25.02 that "all grievances" must be filed within certain time periods. The Agreement does not limit this deadline to disciplinary cases and/or cases with disputed facts. Thus, the instant grievance, as are all grievances, is subject to the deadlines of Section 25.02. Accordingly, if the Arbitrator were to award any additional retroactivity to the Grievant's vacation accrual and longevity pay, it would be limited to 22 additional days pursuant to Section 25.02.⁸

The Graham Award was expressly limited to the five grievants in that case, and limited retroactivity to 30 days. Thus, the Graham Award does not provide automatic additional service credit to the Grievant.

The Agreement does not require the State to identify and seek requests for service credit from employees who served in the Ohio National Guard. Accordingly, the Arbitrator cannot impose that obligation upon the State.

Section 28.01 puts employees on notice they must provide documentation in order to receive credit for Ohio National Guard service. As soon as the Grievant provided documentation, he was credited for his Ohio National Guard service.

While the Arbitrator understands the Grievant's frustration about his untapped additional service credit, the Arbitrator must adhere to the Parties' Agreement.

⁸ I.e., Section 25.02 provides if an employee becomes aware of a grievance more than 10 days after the event occurred, the employee can file that grievance 10 days "from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event...." Notwithstanding the "event occurred" arguably in 2001, the State already has credited the Grievant with 8 days of retroactivity. 22 additional days would total 30 days.

AWARD

For the reasons set out above, the grievance is denied.

Dated: May 22, 2011

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator