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ARBITRATION PURSUANT TO COLLECTIVE BARGAINING AGREEMENT
BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11

and

**STATE OF OHIO
BUREAU OF WORKERS COMPENSATION**

Grievance No. 34-21-20101103-0162-01-09

Grievants: Edward Rancher, Robert Long, and Lori Thomas

**ARBITRATOR'S
OPINION AND AWARD**

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, Ohio Civil Service Employees Association, AFSCME Local 11 ("the Union") and State of Ohio Bureau of Workers Compensation ("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. The Parties chose to submit this matter to the Arbitrator by means of stipulations and briefs, which were submitted June 29, 2012.

APPEARANCES:

On behalf of the Union:

JENNIE LEWIS, OCSEA Staff Representative.

On behalf of the State:

AIMEE SZCZERBACKI, OCB Policy Analyst.

STIPULATED ISSUE

Did the State violate Article 28 and/or Article 2 of the Agreement by denying current BWC employees service credit for time they were employed by a public retirement system for purposes of vacation accrual? If so, what shall the remedy be?

RELEVANT STIPULATED FACT

...The grievance is limited to whether Mr. Rancher's, Mr. Long's, and Ms. Thomas' prior employment with a public retirement system is employment with the state or a political subdivision of the state....

RELEVANT SECTIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

. . .

ARTICLE 2 – NON-DISCRIMINATION

2.01 – Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status. Except for rules governing nepotism, neither party shall discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and take action to eliminate sexual harassment in accordance with Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended).

The Employer may also undertake reasonable accommodation to fulfill or ensure compliance with the Americans with Disabilities Act of 1990 (ADA) and corresponding provisions of Chapter 412 of the Ohio Revised Code. Prior to establishing reasonable accommodation which adversely affects rights established under this Agreement, the Employer will discuss the matter with a Union representative designated by the Executive Director.

The Employer shall not solicit bargaining unit employees to make political contributions or to support any political candidate, party or issue.

2.02 – Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed or coerced in the exercise of rights granted by this Agreement, nor shall reassignments be made for these purposes.

2.03 – Equal Employment Opportunity/Affirmative Action

The Employer and the Union agree to work jointly to implement positive and aggressive equal employment opportunity/affirmative action programs to prevent discrimination and to ensure equal employment opportunity in the application of this Agreement.

The Agencies covered by this Agreement will provide the Union with copies of equal employment opportunity/affirmative action plans and programs upon request. Progress toward equal employment opportunity/affirmative action goals should also be an appropriate subject for Labor/Management Committees.

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ARTICLE 28 – VACATIONS

28.01 – Rate of Accrual

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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.

An employee who has retired in accordance with the provisions of any retirement plan offered by the State and who is employed by the State or any political subdivision of the State on or after June 24, 1987, shall not have his/her prior service with the State or any political subdivision of the State counted for the purpose of computing vacation leave.

The accrual rate for any employee who is currently receiving a higher rate of vacation accrual will not be retroactively adjusted. All previously accrued vacation will remain to the employee's credit.

...

ARTICLE 29 – SICK LEAVE

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29.05 – Carry-Over and Conversion

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Employees hired after July 1, 1986, who have previous service with political subdivisions of the State may use sick leave accrued with such prior Employers but shall not be permitted to convert such sick leave to cash.

...

...

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RELEVANT SECTION OF THE OHIO REVISED CODE

9.44 Prior public service counted in computing vacation leave.

(A) Except as otherwise provided in this Section, a person employed, other than as an elective officer, by the state or any political subdivision of the state, earning vacation credits currently, is entitled to have the employee's prior service with any of these employers counted as service with the state or any political subdivision of the state, for the purpose of computing the amount of the employee's vacation leave. The anniversary date of employment for the purpose of computing the amount of the employee's vacation leave, unless deferred pursuant to the appropriate law, ordinance, or regulation, is the anniversary date of such prior service.

(B) To determine prior service for the purpose of computing the amount of vacation leave for a person initially employed on or after July 5, 1987, by:

(1) A municipal corporation, the person shall have only prior service within that municipal corporation counted;

(2) A township, the person shall have only prior service with a township counted.

(C) An employee who has retired in accordance with the provisions of any retirement plan offered by the state and who is employed by the state or any political subdivision of the state on or after June 24, 1987, shall not have prior service with the state, any political subdivision of the state, or a regional council of government established in accordance with Chapter 167. Of the Revised Code counted for the purpose of computing vacation leave.

THE GRIEVANCE

Statement of Facts:

Employees who have provided BWC/DAS documentation of prior state service are being denied credit for that service for the purpose of vacation accrual. DAS is indicating that "retirement systems are not political subdivisions" and "does not qualify as service time for the State." In each of these cases, the employee has paid into PERS and received service credit for that time.

Remedy sought:

Approve prior service credit for the purpose of vacation accrual. Make grievant whole.

POSITIONS OF THE PARTIES

Union Position

ORC Section 1.60 defines a state agency as "every organized body, office, or agency established by the laws of the state for the exercise of any function of state government." The retirement systems were established by statute (Chapters 145, 3307, and 3309) to perform a function established by statute – disbursement of retirement funds and benefits to specific individuals. The retirement systems exercise statutory powers and a responsibilities on a statewide basis for the benefit of current and former employees of Ohio governmental agencies. The boards of trustees who oversee these retirement systems are also established by statute.

The Grievants left service with retirement systems to work for BWC. The Grievants were permitted to transfer unused sick leave accruals from their employment with the retirement systems to BWC pursuant to ORC Section 124.38 – Sick Leave, which provides in pertinent part:

> An employee who transfers from one public agency to another shall be credited with the unused balance of the employee's accumulated sick leave up to the maximum of the sick leave accumulation permitted in the public agency to which the employee transfers.

As set out by OAG Opinion No. 93-071:

> the dictionary defines "agency" as an administrative division of government with specific functions." Webster's New World

> Dictionary 25 (2d college ed. 1978). Cf., e.g., R.C. 1.60 (as used in R.C. Title 1 (state government), except as otherwise provided in that title, "state agency" means "every organized body, office, or agency established by the laws of the state for the exercise of any function of state government"). "Instrumentality" is defined similarly as "[a] subsidiary branch, as of a government, by means of which functions or policies are carried out." The American Heritage Dictionary 667 (2d college ed. 1985).

That OAG Opinion states the Ohio Highway Patrol Retirement System is an "agency" of the State for purposes of the Age Discrimination in Employment Act:

> It is likely that the Highway Patrol System qualifies as an "agency" or "instrumentality" of the State of Ohio for purposes of § 630(b)'s definition of "employer." The ADEA does not separately define the terms "agency" and "instrumentality" as used in § 630(b)....
>
> ...HPRS is a creation of the General Assembly that exercises its statutory powers and responsibilities on a statewide basis for the benefit of current and former employees of the State Highway Patrol. The provisions of R.C. Chapter 5505...further demonstrate that HPRS exercises those powers and responsibilities as an agency or instrumentality of state government. Cf., e.g., In re Ford, 3 Ohio App., 3 Ohio App.3d 416, 419...(Franklin County 1982) (the State Teachers Retirement System, see R.C. Chapter 3307, is a state agency that exercises statewide jurisdiction and authority); Fair v. School Employees Retirement System, 44 Ohio App.2d 115, 119...(Franklin County 1975) (the School Employees Retirement Board, see R.C. 3309.04, is an instrumentality of the state that exercises its powers and duties throughout the state). It follows, therefore, that HPRS is an "agency" or "instrumentality" of the State of Ohio for purposes of 29 U.S.C. § 630(b), and thus is an "employer" as defined in that section.

A public agency of the state is a "political subdivision." Retirement systems are public agencies for the purpose of transferring sick leave. The

term “political subdivision” is used in various contexts throughout the Revised Code and in several OAG Opinions. “It is possible for an entity to be a political subdivision for one purpose and not for another.” (OAG Opinion No. 92-061 at 2-254, quoted in OAG Opinion No. 04-014.) In Greene County Agricultural Society v. Liming, et al., 89 Ohio St.3d 551 (2000), the Ohio Supreme Court held a county agricultural society was a political subdivision for the purpose of tort liability.

Pursuant to Article 28.01 of the Parties’ Agreement, the Grievants each submitted proper and sufficient documentation to establish they had previous worked for retirement systems. Mr. Rancher and Mr. Long were denied the vacation credit they sought. Ms. Thomas received the credit, but subsequently, it was revoked. Pursuant to Article 28.01, the employment served by each Grievant at the retirement systems should be credit for the purpose of vacation accrual.

State Position

Public retirement systems are not considered “the state” under ORC Section 9.44. Even without a definition of “the state” in the Agreement or in ORC Section 9.44, the structure of the retirement systems presents evidence that the systems should not be considered “the state” in these contexts.

Although the public retirement systems are statutorily created, they are not statutorily considered to be a state agency, board or commission, and are not created to exercise governmental functions. Rather, public retirement systems are created by statute for the purpose of administering the public retirement funds. (ORC Sections 145.04, 145.091, 3307.04, 3307.03, and 3309.04.) The administration of each fund and management of each system is vested in the board of each system. The members of each board are responsible to the fund and the system alone.

In OAG Opinion No. 04-014, the Attorney General concluded in the context of ORC Section 9.24:

> The members of the boards of the systems are expressly designated as trustees of the funds in each system and expressly charged with the duty to administer the funds "solely in the interest of the participants and beneficiaries; for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the system."

At p. 18, quoting OAG Opinion No. 96-032, at 2-126 (citations omitted). This same argument can be applied to an interpretation of ORC Section 9.44. The retirement systems are not the State; the Board of each system is not exercising a state governmental function and is not acting on behalf of the State. Thus, the employees of the boards of each system also are not in the

service of the State, but are working to administer the funds on behalf of the participants.

In In re Ford, 3 Ohio App.3d 416 (1982), the court held that although STRS may be a public agency, or state agency in the general sense, STRS employees were not "in the service of the state" for purposes of ORC Section 124.01. Although the court did refer to the retirement systems as public or state agencies, the court concluded STRS employment was not state service under ORC Section 124.01 because employees are compensated with STRS funds, not State funds.

In OAG Opinion Nos. 04-014 and 96-032, even though the retirement systems may have been considered public agencies or instrumentalities of the State, the Attorney General ultimately concluded public retirement systems do not exercise any governmental function on behalf of the State, and therefore are not considered state agencies or the State. ORC Section 9.44 expressly requires the employee's prior employment must be with the "State." Even though the Union may contend the retirement systems have been considered instrumentalities of the State or public agencies, that is not the specific language of ORC Section 9.44.

The fact that retirement systems employees are permitted to contribute to the funds as members of the retirement systems also does not mean these

employees are in the service of the State. The ability to contribute comes solely from the retirement system statutes. Each chapter of the Code establishing each retirement system also establishes the definition of "employee" for purposes of eligibility. ORC Section 145.01(A)(1) defines "public employee" as including any "person holding an office, not elective, under the...state retirement board...." ORC Section 3309.01(B)(3) defines employee to include "any person, not a faculty member, employed in any school or college or other institution wholly controlled and managed, and wholly or partly supported by the...board of trustees, or other managing body of which shall accept the requirements and obligations of this chapter." The Grievants were permitted to participate in the retirement systems because they fit the definition of public employees under the statutes, not because they were in the service of the State.

Nor are public retirement systems considered a "political subdivision of the state" under ORC Section 9.44. Neither the Agreement nor ORC Section 9.44 provides a definition of "political subdivision." The Ohio Supreme Court, however, has adopted the definition of political subdivision contained in OAG Opinion No. 72-35: "A political subdivision is a limited geographical area of the State, within which a public agency is authorized to exercise some governmental function." Ohio Historical Society v. SERB, 66 Ohio St.3d 466.

To be a political subdivision, the entity must exercise some governmental function in a limited geographical area that is smaller than the State itself. The retirement systems do not exercise their functions in a limited geographical area; the retirement systems act on behalf of contributors that span the entire State.

Green County Agricultural Society v. Liming, et al. 89 Ohio St.3d 551 (2000) is distinguishable from the facts of this case because it involved a county agricultural society. Similarly, OAG Opinion No. 93-031 is inapposite because it involved a public library district. Both a county agricultural society and a public library district function in limited geographical areas smaller than the State.

Moreover, the State has not violated Article 2 of the Agreement because the Grievants' status as prior employees of public retirement systems does not put them in a protected class under Article 2.01.

Additionally, the fact that employees who have previously been employed with retirement systems are permitted to transfer sick leave balances from the retirement systems to State employment is not evidence that this prior employment should be counted under ORC Section 9.44. OAC 123:1-32-10(A)(1) provides:

> ...An employee who transfers from one public agency to another, shall be credited with the unused balance of the accumulated sick

> leave credit up to the maximum sick leave accumulation permitted in the public agency to which the employee transfers....

The Union contends because the Grievants' unused sick leave balance transferred to the State, their prior service credit requests should have been granted as well. This claim is without merit. Had the Parties intended for the outcomes to be the same, they would have relied on the language in OAC 123-1-32-10, and not the language in ORC Section 9.44.

The language in ORC Section 9.44 which allows credit for prior service is extremely specific. The service must be with the State or a political subdivision of the State. Conversely, the OAC language is not as specific; the transfer can be from any other public agency to another. The standards are different. The only applicable standard in this case is the more specific provision of ORC Section 9.44. Furthermore, the Legislature knew the meaning of the terms it was using when it enacted ORC Section 9.44. Had it intended the law to mean something other than the "State," it would have written the law differently.

OPINION

The facts are undisputed. The three Grievants' prior service with state retirement boards is not being credited at their current jobs at BWC toward calculation of vacation accrual. The issue of whether the State's refusal to provide such credit violates the Agreement is heavily disputed.

The only question for the Arbitrator is whether employment at a state retirement board is considered "service with the State" "or any political subdivision of the State," which, pursuant to Article 28, is a prerequisite for having prior service credited for purposes of vacation accrual.[1] Neither Article 28 nor the rest of the Agreement defines "service with the State" or "political subdivision of the State." Likewise, ORC Section 9.44, which is referenced in Article 28, does not define employment "by the state or any political subdivision of the state." Nor is there any case law, administrative regulations, or Attorney General Opinions interpreting ORC Section 9.44.

While it is tempting to dive into the myriad of other case law, Attorney General Opinions, Ohio Administrative Code sections, and other ORC sections cited by the Parties to support their opposing positions, first the Arbitrator must determine whether the meaning of the Agreement can be established from the language of the Agreement itself. And indeed, it can.

[1] Though the stipulated issue also references Section 2 of the Agreement, the Parties have focused their arguments on Article 28.

A fundamental standard of collective bargaining contract interpretation is that the contract is to be reviewed as a "whole." The Common Law of the Workplace – The Views of Arbitrators refers to this contract interpretation rule as "whole document" interpretation:

> Arbitrators make an effort to avoid interpreting contractual terms in isolation from the rest of an agreement, unless the parties manifest a contrary intention. As Harry Shulman observed, "[T]he interpretation which is most compatible with the agreement as a whole is to be preferred over one which creates anomaly." *Reason, Contract, and Law in Labor Relations,* 68 Harv. L. Rev. 999, 1018 (1955).

(2nd Ed., BNA/NAA) (2005) at p. 80. In this "whole document" context, how the Parties interpret Article 29 – Sick Leave – is highly relevant in determining how Article 28 – Vacations – is to be applied.

Article 29.05 provides in pertinent part:

> Employees hired after July 1, 1986, who have previous service with political subdivisions of the State may use sick leave accrued with such prior Employers but shall not be permitted to convert such sick leave to cash.

State retirement systems employees who transfer to the BWC (and other State agencies) are, pursuant to Article 29, credited with unused sick leave from their state retirement systems employment. Thus, even though Article 29 uses the terminology "political subdivisions," (which case law in another context establishes as an entity geographically smaller than the State[2]), the State is

[2] In Ohio Historical Society v. SERB, 66 Ohio St.3d 466, 478 (1993), the Ohio Supreme Court held:

crediting State employees with sick leave from prior service at state retirement systems boards.

For the State to then claim that Article 28 does not permit service credit from state retirement board employment because that prior employment was not with a "political subdivision of the State" (as that term is defined in case law from another context) is inconsistent and in violation of the "whole document" rule of contract interpretation.

If there were record evidence the Parties intended different results from the use of the "political subdivisions" terminology in Articles 28 and 29, the Arbitrator would find differently. There is no such evidence, however, which compels the Arbitrator to read the language of Articles 28 and 29 consistently.

In the absence of specific definitions…case law and Attorney General opinions provide a general definition: "A political subdivision is a limited geographical area of the State, within which a public agency is authorized to exercise some governmental function." 1972 Ohio Atty.Gen.Ops. No. 72-035.

AWARD

For the reasons stated above, the grievance is granted.

The Grievants are to be made whole by being credited with their prior service at state retirement systems for the purpose of Article 28 vacation accrual. Such credit shall be retroactive to the date the Grievants would have received such credit had the State interpreted Article 28 consistent with Article 29.

The Arbitrator retains jurisdiction until and through October 8, 2012 for purposes of facilitating remedy only.

August 9, 2012

Susan Grody Ruben
Arbitrator