

OPINION AND AWARD

In the Matter of Arbitration

Between

The Ohio State Troopers Association

And

State of Ohio, Department of Public Safety
Division of Highway Patrol

Case Designation:

OCB#: OST-2016-05003-0

Date of Hearing: April 24, 2018

Date of Briefs: May 18, 2018

Date of Award: June 22, 2018

APPEARANCES

For the Union

Elaine N. Silveira, Esq., OSTA Advocate

Jeremy Mendenhall, OSTA President

For the Employer

Cullen Jackson, Esq., OCB Advocate

Lt. Jacob Pyles, Second Chair

An arbitration hearing was conducted on Tuesday, April 24, 2018, at the Ohio State Troopers Association Office in Gahanna, Ohio.

The parties agreed that the sole issue before the Arbitrator is the matter of arbitrability of a class grievance pertaining to retroactive pay increases.

At the hearing, the parties submitted the collective bargaining agreement effective 2015-2018 as Joint Exhibit 1 (J1) and the grievance trail as Joint Exhibit 2 (J2). The Employer submitted the Lieutenant Classification Specification as Employer Exhibit 1 (E1), a Lieutenant Promotions List for the period of July 1, 2015 thru September 29, 2016 as Employer Exhibit 2 (E2), Ground Rules for the State of Ohio and OSTA 2015-2018 negotiations as Employer Exhibit 3 (E3), and Ohio Revised Code Chapter 4117 as Employer Exhibit 4 (E4). The Union submitted a letter from Dan Guttman, Chief Negotiator for the State

of Ohio to Herschel Sigall, General Counsel for OSTA dated June 18, 2015 as Union Exhibit 1 (U1) and a letter of intent between the State of Ohio and OSTA signed 6/15/16 as Union Exhibit 2 (U2).

Both parties timely submitted post hearing briefs. All materials were reviewed and considered by the Arbitrator in reaching this decision.

The parties agreed that the matter was properly before the Arbitrator for determination.

RELEVANT CONTRACT PROVISION:

Negotiated agreement between Ohio State Troopers Association, Inc. and The State of Ohio effective 2015-2018.

ARTICLE 5 – UNION RECOGNITION AND SECURITY

5.01 Bargaining Unit

The Employer hereby recognizes the Ohio State Troopers Association, Inc., as the sole and exclusive bargaining agent for the purpose of collective bargaining on all matters pertaining to wages, hours, terms and other conditions of employment for employees in the bargaining unit. The bargaining unit for which this recognition is accorded is defined in the Certification issued by the State Employment Relations Board on November 9, 2006 (Case No. 06-REP-03-0042 & 06-REP-03-0043). This Agreement includes all permanently appointed full and part-time employees employed in the Department of Public Safety, Division of the Ohio Highway Patrol in classifications and positions listed in Article 60.05 of this Agreement. The Employer shall notify the Employee Organization of any changes in the classification plan, sixty (60) days prior to the effective date of the change or as soon as the changes become known to the Employer whichever occurs first.

ARTICLE 20 – GRIEVANCE PROCEDURE

20.01 Purpose

The Employer and the Union recognize that in the interest of harmonious relations, a procedure is necessary whereby employees can be assured of prompt impartial and fair processing of their grievances. The procedure shall be available to all bargaining unit employees and no reprisals shall be taken against an employee initiating or participating in the grievance procedure. The grievance procedure shall be the exclusive method of resolving both contractual and disciplinary grievances.

20.02 Definitions

1. A grievance is an alleged violation, misinterpretation of misapplication of a specific article(s) or section(s) of this Agreement.
2. Disciplinary Grievance refers to a grievance involving a reprimand, suspension, removal or reduction in pay and/or position.
3. Day, as used in this Article, means calendar day. The days and times shall be computed by excluding the first and including the last day. For the initial filing of a grievance, when the last day falls on Saturday, Sunday or legal holiday, the initial filing may be initiated on the next succeeding day which is not a Saturday, Sunday or legal holiday.
4. A Union Representative is a Steward or staff representative.

20.03 Prohibitions

The Union shall not attempt to process as grievances matters which do not constitute an alleged violation of this Agreement.

Initial probationary employees shall not have access to the disciplinary grievance procedure.

20.05 Grievant

A grievance may be filed in the electronic grievance system by any bargaining unit member who believes himself/herself to be aggrieved by a specific violation of this Agreement.

When a group of bargaining unit members desires to file a grievance involving an alleged violation which affects more than one member in the same manner, the grievance may be filed by the Union provided that at least one member so effected is indicated in the grievance at the time of filing. Grievances so initiated shall be designated Class Grievances. The Union shall have the right to file grievances of a non-disciplinary nature.

20.08 Arbitration

5. Limitations of the Umpire

Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration.

The umpire shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the umpire impose on either party a limitation or obligation not specifically required by the language of this Agreement.

ARTICLE 60 – WAGES

60.05 Pay Range Assignments for Unit Classifications

Unit classifications are assigned to the following pay ranges:

52531	CAD Specialist	08
52451	Highway Patrol Communications Technician	08
52461	Highway Patrol Dispatcher	08
52471	Highway Patrol Electronic Technician 1	09
52472	Highway Patrol Electronic Technician 2	11
54273	Highway Patrol Electronic Technician 3	12
26711	Highway Patrol Trooper	11
26713	Highway Patrol Sergeant	13

ARTICLE 70 – DURATION

This Agreement shall become effective on September 29, 2016 and shall terminate at 11:59PM on June 30, 2018.

BACKGROUND

In accordance with ORC Section 4117, the Ohio State Troopers Association filed a notice to negotiate a successor agreement to their contract with the State of Ohio, which was due to expire on June 30, 2015. On June 18, 2015 the parties agreed to delay the start of negotiations until autumn 2015 and to continue the current contract *status quo* until a successor agreement was reached. The parties further agreed that any wage increase in the successor agreement would be retroactive. In the due course of negotiations, the parties did ultimately reach a negotiated settlement for a successor agreement from 2015-2018. The agreement included a general wage increase of 2.5% effective July 1, 2015 and another 2.5% increase effective July 1, 2016. The negotiated tentative agreement was ratified by the parties and the resulting contract was effective September 29, 2016.

Retroactive payment for the bargaining unit increases of July 1, 2015 and July 1, 2016 was paid on the November 25, 2016 paycheck. Employees of the Highway Patrol who had been members of Bargaining Unit 15 (Sergeants) but had promoted out of the bargaining unit to the exempt classification of Lieutenant, between July 1, 2015 and September 29, 2016, did not receive any retroactive payment for the hours worked while still members of the bargaining unit. A grievance was filed by the Union on behalf of this class of employees on December 12, 2016. The grievance was denied at step 2 of the grievance procedure based on the procedural objection that the grievants were all exempt employees as of the effective date of the 2015-2018 contract and therefore the Union was without standing to represent the identified class of employees. The grievance was appealed to arbitration.

POSITION OF THE UNION

For the Union, the question is a simple one; is the relevant time period for grievance purposes the period spent in the bargaining unit or the period at the time the grievance is filed? The answer hinges on the Union's statutory responsibility to represent employees during the time period that they are members of the bargaining unit. In the instant case, the fact is that there is a pay increase that covers the time period when these grievants were members of the bargaining unit; therefore it is logical that they should receive the increased pay for the time that coincides with their being in the bargaining unit regardless of their status today as exempt employees. The Employer's action denies these individuals income from the period of time when they were bargaining unit employees and thus the Union is not only within its right to represent this group of former bargaining unit employees, but has a responsibility and duty to represent them.

The Union goes on to argue that if the Employer's position is taken at face value and these employees are denied the opportunity to press their claim because they were not in the bargaining unit at the time the grievance was filed, then the opposite position must be true. Therefore once in the bargaining unit a member would be able to file a grievance over actions the Employer took prior to the employee becoming a bargaining unit member. Clearly this is not a position the Employer would endorse. It has always been understood that an employee's grievance rights attach to the period of time when the employee is a bargaining unit member. This being the case, the Union is well within its rights to process a grievance pertaining to an action that affects the period of time when the grievants were

members of the bargaining unit. The ORC Section 4117 guarantees the right of these employees to be exclusively represented by the OSTA for the time they were in the bargaining unit and up to the point at which they promoted into exempt positions. On these grounds the grievance must be found to be arbitrable.

POSITION OF THE EMPLOYER

For the Employer the question of arbitrability is twofold. First, the Union must prove that it has standing to represent individuals who were exempt from the bargaining unit at the time the new collective bargaining agreement went into effect on September 29, 2016. Second, the Union must prove that the underlying issue can be heard through the contractual grievance procedure.

The Union does not have standing to represent this class of employees because none of the employees were members of the bargaining unit when the cause of action arose, which was the effective date of the contract – September 29, 2016. From July 1, 2015 to the effective date of the newly ratified contract, September 29, 2016, each and every member of the class of employees the Union seeks to represent voluntarily promoted out of Bargaining Unit 15 and into the exempt classification of Lieutenant. Both statutorily and contractually OSTA is only the exclusive representative for employees of the Ohio State Highway Patrol in designated bargaining units which are comprised of specified classifications. The classification of Lieutenant is not among the bargaining unit classifications; therefore the OSTA cannot represent these employees. Furthermore, there was no cause of action for the Union to rely upon for its grievance until the contract became effective on September 29, 2016. Until its effective date, all negotiated provisions and benefits were only tentative agreements and not binding on either party. No bargaining unit member could rely on any tentatively agreed benefit prior to the ratification of the entire tentative agreement by both the Union membership and the Ohio State Controlling Board. Likewise, any bargaining unit member who voluntarily left the bargaining unit prior to the ratification of the tentative agreement and effective date of the new contract forfeited any tentative benefits. It is undisputed that all bargaining unit members as of the effective date of the contract received their retroactive pay increases. It is also undisputed that the members of this class of grievants had all voluntarily promoted out of the bargaining unit and were serving as exempt employees prior to the effective date of the contract.

The contractual grievance procedure is not available to individuals who are not members of the bargaining unit at the time the cause of action arises. The language of Article 20.01 states that “The [grievance] procedure shall be available to all bargaining unit employees...” None of the individuals in the class of grievants was a bargaining unit member on the date the cause of action arose; therefore they cannot avail themselves of the procedure. The same contract section [Article 20.01] goes on to say “the grievance procedure shall be the exclusive method of resolving both contractual and disciplinary grievances.” The Union has failed to show any such alleged violation. The Union has acknowledged that the Employer followed the contractual language by virtue of the fact that all bargaining unit members, at the time the contract went into effect, received the retroactive wage increase. The relevant contract language is in Article 60.02 and reads in relevant part, “[e]mployees in bargaining unit 15 shall be paid in accordance with the following pay schedule effective with the pay period which includes July 1, 2015...

July 1, 2016... [and] July 1, 2017.” This language addresses current bargaining unit members as of the effective date of the contract – September 29, 2016. To read this language as the Union proposes would mean that any employee who was ever in the bargaining unit would be entitled to a pay raise whether that individual resigned, transferred, promoted or retired.

The grievance must be found not arbitrable because the Union does not have standing to bring the grievance on behalf of employees, none of whom are members of the bargaining unit on the date of the cause of action; and because the grievance procedure is not the proper forum for non-bargaining unit employees to bring a claim.

DISCUSSION

The issue before the arbitrator is strictly one of arbitrability. In their respective briefs both parties describe the threshold question as pertaining to whether the Union, and the named class of employees, have standing to file a grievance. The Union’s position is that grievance rights extend to a former bargaining unit employee in circumstances where the alleged contract violation affects the period of time the employee was a bargaining unit member. The Employer’s position is that grievance rights derive from the employee’s status as a bargaining unit member at the time the alleged contract violation occurs.

The contract language pertaining to this question is found in Article 20.05 “[a] grievance may be filed in the electronic grievance system by any **bargaining unit member** (emphasis added) who believes himself/herself to be aggrieved by a specific violation of this Agreement.” The contract Article goes on to provide for the filing of a class grievance “[w]hen a group of **bargaining unit members** (emphasis added) desires to file a grievance involving an alleged violation which affects more than one member in the same manner, the grievance may be filed by the Union provided that at least one member so effected is indicated in the grievance at the time of filing. Grievances so initiated shall be designated Class Grievances. The Union shall have the right to file grievances of a non-disciplinary nature.” Further on in Article 20.07 the contract provides that grievances shall be filed “within 20 calendar days of the date on which the grievant knew or reasonably should have known of the event giving rise to the grievance.”

The general aim of contract interpretation is to determine the intention of the parties. The contract language of the grievance procedure is unambiguous therefore the clear meaning of the provision must be supported. The intent of the parties is to provide a grievance procedure to bargaining unit members only. Furthermore, the date of the alleged violation is monumentally important in determining both who can file a grievance and when a grievance can be filed. An alleged violation develops during the course of contract administration and only then (or within 20 days) can a bargaining unit employee file a grievance. By the plain reading of the contract language, anyone who is not a bargaining unit member when the specific alleged violation occurs does not have access to the contractual grievance procedure.

Since no negotiated provision of the 2015-2018 Contract could be a binding provision until ratified by both parties, any cause of action pertaining to the 2015-2018 Contract must be dated after

the Contract's effective date, which is September 29, 2016. This is a fact set forth by ORC Section 4117, reiterated by mutual agreement in the negotiation ground rules (E3), and memorialized in the Contract language, Article 70, "[t]his Agreement shall become effective on September 29, 2016 and shall terminate at 11:59PM on June 30, 2018." Although the Union's argument focuses solely on the concept of setting forth a "period of time" that is grievable, its actions clearly indicate that the cause of action date is after the effective date of the 2015-2018 Contract. The Union filed its grievance on December 12, 2016 and cites November 25, 2016 as the date the grievance arose (J2). November 25, 2016 is the payday when retroactive pay was disbursed pursuant to the negotiated effective dates of the pay raise. The Employer has agreed that the grievance was timely filed based on the logic that it was the Employer's action of excluding the subject class of employees from the retroactive pay disbursement that aggrieved the employees and triggered the grievance process. By their actions, both parties have accepted November 25, 2016 as the cause of action date. Again, the plain reading of the contract language in Article 20.05 indicates that bargaining unit members who find themselves aggrieved by a specific alleged violation may file a grievance. None of the effected employees were bargaining unit members on the date the alleged violation arose.

In the case at hand, the grievance is filed on behalf of a class of 19 individuals, all of whom were Highway Patrol Sergeants (members of Bargaining Unit 15) and who each voluntarily promoted to the rank of Lieutenant between July 14, 2015 and September 8, 2016. All of the promotion dates for these individuals predate the effective date of the 2015-2018 Contract which was September 29, 2016. As the Employer points out, the promotion dates for this class of grievants are anywhere from 443 to 21 days prior to the effective date of the contract. As the Union points out, 11 of the individuals were promoted prior to the parties even beginning negotiations on the successor agreement. As a result, none of these individuals satisfy the basic contract language requirement that they be bargaining unit members when they became aggrieved by the Employer's specific action. No parallel can be drawn with any disciplinary scenario where a discharged employee files a grievance and is represented by the Union when he/she is no longer a bargaining unit member. Nor would it be right to say that an employee demoted into the bargaining unit from an exempt position could file a grievance over the demotion because he/she is now a member of the bargaining unit. In the first scenario the discharge occurs when the individual is a bargaining unit member so the cause of action date is coupled with bargaining unit status. In the opposite scenario of the demotion, the cause of action date occurs when the individual is exempt from the bargaining unit and therefore cannot be coupled with bargaining unit status and rightly no grievance can be filed.

If the Union's argument were to prevail it would open the door to an unknown, never-ending liability. The crux of the Union's argument is that the period of time that the bargaining unit member spent in the Unit is the grievable timeframe intended by the parties. If this were in fact the case, then any former bargaining unit member would have ongoing grievance rights should that individual become aware of an alleged misinterpretation or misapplication of a contract provision that occurred historically during the period of time he/she was a member of the bargaining unit. One might argue that no such circumstances could arise because there must be a specific cause of action and then liability is limited by the provision that a grievance must be filed within 20 days of that cause of action. But as we see in the

instant case the cause of action, which arose in November 2016 when the former bargaining unit members became aware that they had not been granted retroactive pay adjustments, has created a claim of liability that reaches back as much as 14 months. The variety of circumstances that could arise if grievance rights are not tied to bargaining unit membership coupled with the date of the cause of action would be incalculable. This is not an outcome that would serve the legitimate interests of either the Union or the Employer. Arbitrators are well advised to reject interpretations or applications of contract language that would result in extreme or absurd unintended outcomes.

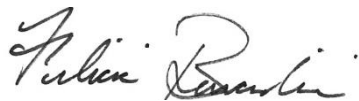
CONCLUSION

Contrary to the Union's assertion that the question to be answered is "what time period is meant to be grievable," the question to be answered is what does the contract say about who can file a grievance and when. The answer is found in the unambiguous language set forth in Article 20 pertaining to the grievance procedure. Article 20.05 directly states that a grievance may be filed by "any **bargaining unit member** (emphasis added) who believes himself/herself to be aggrieved by a specific violation of this Agreement." Furthermore, Article 20.07 states that a grievance shall be filed "within 20 calendar days of the date on which the grievant knew or reasonably should have known of the event giving rise to the grievance." The contract language is clear and thus the intent of the parties is known. The intent of the language is to ensure that grievances are brought by bargaining unit members in the present moment (or shortly thereafter), when knowledge of an alleged violation arises. The two elements cannot be separated – bargaining unit members must have a cause of action in order to file a grievance, and non-bargaining unit member cannot file even if they have a cause of action. As with all arbitrators, I prefer to address cases on their merits, however this threshold question of standing cannot be swept aside.

AWARD

For the reasons herein stated the grievance is not arbitrable.

Respectfully submitted at Columbus, Ohio, June 22, 2018.



Felicia Bernardini, Arbitrator