

ARBITRATION DECISION NO.:

25

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation
District 1
Hancock County Garage

DATE OF ARBITRATION:

No Hearing
Brief Date: April 10, 1987

DATE OF DECISION:

June 5, 1987

GRIEVANT:

David L. Coffman

OCB GRIEVANCE NO.:

10-86-D1

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

Daniel L. Smith

FOR THE EMPLOYER:

N. Eugene Brundige

KEY WORDS:

Seniority
Break in Service
Reinstatement

ARTICLES:

Article 16-Seniority
 §16.01-Definition
 §16.02-Continuous
Service

FACTS:

Grievant and one other employee were Equipment Operator 1s. A job opening was posted for

an Equipment Operator 2. Grievant and the other employee were among seven who bid on the position. The position was awarded to the other employee on the basis of seniority. The other employee's initial hire date was prior to that of the Grievant but the other employee had resigned and had been reinstated. The total time out of service was four months and nineteen days. Grievant's initial (and only) hire date was sixty three days after the other employee's initial hire date.

EMPLOYER'S POSITION:

The contract provisions are subject to the laws of the State of Ohio (Section 1.02). Management reads section 124.32(B) of the Ohio Revised Code and Section 123:1-47-01(72) of the Ohio Administrative Code together to permit retention of seniority over the four month period. The OAC Section defines "break in service" and does not include separation which confers right to reinstatement. Management finds the right to reinstatement in ORC 124.32(B)'s provision that a "party may, with the consent of the director, be reinstated within one year". Management argues that this right to reinstatement continues the employee's seniority.

UNION'S POSITION:

Contract Section 11.01(A) and OAC 123:1-47-01(13) describe a break in service as a separation of more than thirty days. The OAC Section also lists two exceptions to this 30 day rule. The first is for authorized leaves of absence and the second is for separations which carry with them the right to reinstatement. Neither of the two exceptions apply here. The Director may reinstate an employee, but the employee does not have the right to reinstatement.

ARBITRATOR'S OPINION:

The opinion tracks closely the Union's position. Both the contract and Ohio Administrative Code define seniority as the time of uninterrupted service. Breaks in service of more than 30 days are included for seniority only if the break is for an authorized leave of absence or the separation carries with it the right to reinstatement. The other employee's break in service was the result of a resignation, not an authorized leave of absence. The separation did not carry with it the right to reinstatement. Management relied on Ohio Revised Code Section 124.32(B) which states that a "party, with the consent of the director, may be reinstated within one year from the date of such separation." This is not a right to reinstatement as envisioned by the language of OAC Section 123:1-47-01(13). "Right" requires mandatory language; "may" is merely permissive. The other employee's four month break in service should not have been considered for seniority. Grievant should have been awarded the position.

AWARD:

Retroactive promotion with backpay from the date the other employee was promoted.

TEXT OF THE OPINION:

**IN THE MATTER OF THE
ARBITRATION
BETWEEN**

Ohio Department of Transportation

and

AFSCME/OCSEA, Local 11

Grievance No.:

10-86-D1

Grievant:

David L. Coffman

Brief Date:

April 10, 1987

For ODOT:

N. Eugene Brundige

For OCSEA:

Daniel L. Smith

No hearing was held on this grievance. The parties agreed to submit the matter on briefs only.

The Issue

The parties agreed that the issue for determination by the Arbitrator is "DID THE EMPLOYER PROPERLY CALCULATE THE SENIORITY OF DAVID L. COFFMAN, GRIEVANT, AND CHARLES W. ELLINWOOD, JR., IN AWARDDING THE POSITION OF EQUIPMENT OPERATOR II, POSITION CONTROL NUMBER 3310.0, TO CHARLES W. ELLINWOOD, JR.? IF NOT, WHAT SHALL THE REMEDY BE?"

Contract Provisions:

1.02 Ohio Laws and Regulations. The provisions of this agreement are subject to the laws of the State of Ohio, the administrative regulations and directives of the Ohio Department of Transportation, and the rules and regulations of the Department of Administrative Services.

11.01 Definition. Seniority means the total length of uninterrupted service in a position or succession of positions within the employ of the Employer. The following situations do not constitute a break in service and therefore do count towards an employee's total length of uninterrupted service:

- A. Any separation of service lasting thirty (30) days or less.
- B. Authorized leave of absence from which the employee returns.
- C. Vacation.
- D. Sick Leave.
- E. Disability Leave.
- F. Military Leave, including National Guard duty.
- G. Layoff followed by recall within a period of one (1) calendar year.

Ohio Civil Service Laws and Rules:

§124.32 Transfers; reinstatements

(B) Any person holding an office or position under the classified service who has been separated from the service without delinquency or misconduct on his party may, with the consent of the director, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department; provided, if such separation is due to injury or physical disability, such person shall be reinstated to the same office or similar position he held at the time of his separation, within thirty days after written application for reinstatement and after passing a physical examination made by a licensed physician designated by the public employees retirement board, showing that he has recovered from such disability, provided further that such application for reinstatement be filed within three years from the date of separation, and further provided that such application shall not be filed after the date of service eligibility retirement.

Ohio Administrative Code Sections:

§123:1-47-01

(13) "Break in service" -- Means an employee has had a separation from service of thirty-one days or more. An authorized leave of absence, granted pursuant to rule 123:1-34-01 of the Administrative Code, or any separation from service which carries with it the right to reinstatement, shall not constitute a break in service, provided the employee is reinstated within the allowable time. The time the employee is separated shall not be counted towards the calculation of retention points for continuous service.

(72) "Reinstatement" -- Means the act of returning a person to state service, following a period of separation for a leave of absence, retaining seniority and status.

Facts:

The Ohio Department of Transportation (ODOT) District 1 on February 12, 1986 posted a position of Equipment Operator II at the Hancock County Garage. Seven employees bid on the job. Among them was the Grievant who was an Equipment Operator I. Mr. Charles W. Ellinwood, Jr. another Equipment Operator I, was also among the bidders. Mr. Ellinwood was selected on the basis of seniority. The Grievant claimed that, under the contract, the selection was improper because the Grievant was senior to Ellinwood.

Ellinwood was hired July 19, 1976. Mr. Ellinwood resigned May 22, 1979. He was reinstated October 10, 1979. The time period from resignation to reinstatement was approximately four months and 19 days.

The Grievant was hired September 20, 1976. His service has been continuous since that day.

Mr. Ellinwood was hired 63 days prior to the Grievant. Without the resignation and subsequent reinstatement, Mr. Ellinwood would clearly be senior to the Grievant. The issue before the Arbitrator is the effect of the four months and 19 days on Mr. Ellinwood's seniority.

§11.02 defines seniority as the total length of uninterrupted service. Using this definition without more, the Grievant's uninterrupted service is longer than Ellinwood's. However, §11.01 specifically excludes certain interruptions of service from being considered as breaks-in-service. Section A states that "any separation of service- lasting thirty (30) days or less is not a break-in-service. Thus, if any employee were to be separated for thirty days or less then, for purposes of calculating seniority, the time period separated would be ignored. Mr. Ellinwood, however, was separated for over thirty days. His service was interrupted for that period. Under the words of the

contract, he did not have uninterrupted service between July 19, 1976 and the date in question. Moreover, the contract makes no specific exception for this type of interruption.

Section 11.02 defines seniority and makes certain explicit and definite exceptions. Silence about a particular situation should not be construed to include the situation among the explicit exceptions to the rule. Rather, silence on such an issue includes that situation within the general rule.

Therefore, under the words of §11.02, the Grievant is senior to Ellinwood.

However, under Section 1:02 the contract is specifically made subject to "the laws of the State of Ohio, the administrative regulations and directives of the Ohio Department of Transportation, and the rules and regulations of the Department of Administrative Services."

Where one document is made subject to another document, the rules of construction require the interpreter to, whenever possible and reasonable, construe the documents to reach a consistent result.

Mr. Ellinwood was reinstated under 124.32(B) of the Ohio Civil Service Laws. The applicable language is as follows:

"Any person holding an office or position under the classified service who has been separated from the service without delinquency or misconduct on his part may, with the consent of the director, be reinstated within one year from the date of such separation to a vacancy in the same or similar office or position in the same department" (emphasis added).

Since Mr. Ellinwood's separation was less than one (1) year, this section was applicable to him, and he was reinstated.

Section 124.32(B) does not spell out the effect of such a reinstatement on the issue before us.

Sections (13) and (72) of the Ohio Administrative Code §123:1-47-01 are relevant.

Section (72) defines "reinstatement" as the "act of returning a person to state service, following a period of separation or a leave of absence, retaining seniority and status."

This Code section standing alone could be interpreted to mean that Ellinwood's break-in-service of 4 months and 19 days was rendered irrelevant for purposes of seniority because he was reinstated under §124.32(B). Such a construction would be inconsistent with the contract.

However, Section (13) of the same Administrative Code speaks to the same issue more directly and more specifically. Between two statements of equal weight, i.e., two definitions found in the Code, the more specific is to be preferred over the general as a matter of construction. Moreover, a construction of the Code consistent with the Law and the contract is to be preferred over an inconsistent construction.

Section (13) defines "Break-in-Service." The contract in §11.02 defined certain specific interruptions as not breaks-in-service. §11.02(A) defined separations of thirty (30) days or less as not breaks-in-service. Section (13) defines an interruption of service of thirty-one (31) days or more as a break-in-service. Thus, the contract and section (13) are perfectly consistent, indeed complementary. In addition, Section (13) creates two exceptions where interruptions which are 31 days or longer are not to be treated as breaks-in-service. The first exception is not relevant here. Section (13) provides that any separation from service (greater, than 31 days) which carries the right of reinstatement shall not constitute a break-in-service. This exception is not inconsistent with the contract but creates another explicit exception. Since the contract is explicitly subject to this Code, the exception is added to those in §11.02 of the contract. The last sentence of Section (13) applies to breaks-in-service which are 31 days or longer and which are not specially excepted by the previous sentence. Thus, any break-in-service of thirty-one days or longer would not be counted toward seniority.

Was Mr. Ellinwood's 4 month 19 day interruption of service removed from the "break-in-

service" category by Section (13)? The Arbitrator concludes that it was not. Section (13) excludes separations longer than 31 days only if that separation "carries with it the right to reinstatement" (emphasis added). Section 124.32(B) under which Mr. Ellinwood was reinstated uses language that is clearly discretionary, i.e., "may" and "with the consent of the director".

Some words have over time been clearly fixed in meaning when used in statutes, codes, regulation, and contracts. Regardless of common or popular misuse, the drafter of such documents is presumed to know and intend correct usage. "May" confers no right. In construing a document, one always construes the document against the drafter or proponent. As between the Union and ODOT, the Law must be construed against the state agency.

Mr. Ellinwood did not have a "right" to reinstatement. Therefore, his 4 month, 19 day hiatus was a break-in-service which was not excepted by Section (13) of 123:1-47-01. The Grievant therefore was senior to Mr. Ellinwood.

Decision:

Grievance sustained. The Grievant shall be promoted retroactively to the position of Equipment Operator II with back pay from March 31, 1986.

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Date: June 5, 1987

Rhonda R. Rivera, Arbitrator