

ARBITRATION DECISION NO.:

215

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Employment Services

DATE OF ARBITRATION:

October 30, 1989

DATE OF DECISION:

December 11, 1989

GRIEVANT:

Michael Garrett
Nathan Blackwell

OCB GRIEVANCE NO.:

G-87-0733

ARBITRATOR:

Linda Klein

FOR THE UNION:

John Porter

FOR THE EMPLOYER:

Meril Price

KEY WORDS:

Service Credit
Seniority
Lay Off
Arbitrability
Longevity Pay
Vacation Accrual

ARTICLES:

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

FACTS:

The grievants were employees of OBES who were each laid off for approximately 11 months in

1982. At the time of the arbitration one grievant was still employed by OBES while the other grievant had been fired. The approximate 11 month period for which each grievant had been laid off was not credited by the State towards length of service for the purpose of computing longevity and vacation accruals. At the time that the employees were laid off there was no collective bargaining agreement to govern how their period of lay off should be computed. The relevant Ohio Civil Service laws and regulations prohibited lay off time from being counted towards service credit for the computation of longevity and vacation accrual. Effective July 1, 1986 the parties were governed by a collective bargaining agreement between OCSEA Local 11 and the State of Ohio. In that collective bargaining agreement seniority was defined in Article 16 section 1 and the five events which interrupt continuous service were set forth in Article 16.02. The issue in front of the Arbitrator concerned whether or not the failure of the State to count the 11 months that the employees had been laid off towards service credit for the purpose of vacation accrual and longevity pay was proper under the contract.

EMPLOYER'S POSITION:

The State first argued that the grievance was not arbitrable. Management stated that the Arbitrator does not have the authority to go back to 1982 and correct the computation of service credit for employees. The state further argued that since there was not a collective bargaining agreement in effect at that time, the Civil Service law and regulations control the outcome of this case and that under the Civil Service rules the time the employees were laid off cannot be counted toward service credit for vacation accrual and longevity pay.

The State also argued that the grievance was not arbitrable because it was not filed until November 1986, which was four months after the contract went into effect. The grievance, to be arbitrable under the contract, should have been filed within 10 days of July 1, 1986, the effective date of the contract.

The State maintained that under the 1986 contract, vacation accrual and longevity pay are based on the length of state service not seniority. The importance of this argument is that time counted towards length of service must be time spent in an active pay status, which does not include the time that an employee was on lay off status.

UNION'S POSITION:

The Union argued that the issue of seniority and accrual of service credits during a period of lay off are governed by Article 16 of the 1986 contract. The Union also maintained that the grievance is arbitrable and it was timely filed. The Union stated that the grievance was not filed until November of 1986 because the dates of seniority for all OBES employees were incorrect when the contract went into effect. There was an agreement between the State and the Union to wait before filing grievances over seniority until the seniority dates could be corrected. The Union also argued that the Grievants' state service was not broken by any of the five events set forth in Article 16.02 of the contract. Therefore, the Union asked that the 11 month period of lay off for the Grievants be counted towards determining vacation accrual and longevity pay. The Union also asked the Arbitrator to retain jurisdiction of the case until the amounts due are properly calculated and paid to the Grievants.

ARBITRATOR'S OPINION:

The Arbitrator found that the grievance was arbitrable. At step 4 the Office of Collective Bargaining responded that the 1986 contract covered the issue of the retroactive adjustments of the Grievants' seniority to include their period of lay off in 1982 and the State in fact adjusted the Grievants' seniority to reflect the 11 months of lay off. However, in the step 4 response the State denied the grievance as it pertained to counting the time when the Grievants were laid off towards

service credit. The Arbitrator found that the fact that the State responded to the grievance on the issues of seniority and service credit, signified recognition that the issues were addressed in the 1986 agreement. Also, in the step 4 response the state did not allege that there was a timeliness problem with the filing of the grievance. The Arbitrator also found that the grievance was timely because, even though it was not filed by July 10, 1986, it was filed as soon the Grievants became aware that their seniority dates were incorrect. The Arbitrator further found that the contract language that "seniority is an employees' total length of service in a permanent position or succession of positions within the employ of the State, dating back to the last date of hire" signified that seniority dates can be adjusted retroactively. Further, the Arbitrator stated that seniority benefits exists by virtue of the contract and seniority rights may be modified in successive contracts. There was also a side letter between the Office of Collective Bargaining and the Union dated May 26, 1987 which established that the parties agreed that both seniority and service credits were encompassed by the 1986 contract. The Arbitrator also said that the employees lay off in 1982 did not constitute a break in service as defined in Article 16.02 of the contract. The Arbitrator held that, as defined in the contract, the term seniority encompasses length of service, and vacation accrual and longevity pay are based on length of service, therefore, the 11 month period of lay off should have been credited to the Grievants for purposes of computing vacation accrual and longevity pay.

AWARD:

The remedy in this case is that the Grievants are entitled to have their vacation accrual and longevity pay computed in accordance with Articles 28.01 and 36.06 in a manner which includes the 11 month period of lay off. Also, the Arbitrator retained jurisdiction of this grievance until the amounts due the two Grievants are calculated and paid.

TEXT OF THE OPINION:

**Arbitration Proceedings
Before
Linda DiLeone Klein**

In The Matter of Arbitration
Between

**State of Ohio
Ohio Bureau of
Employment Services**

and

**OCSEA, Local 11
AFSCME, AFL-CIO**

**Grievance No:
G-87-0733**

Grievance of:
Michael Garrett
Nathan Blackwell
Heard:
October 30, 1989

Appearances

For the Employer:
Meril Price

For the Union:
John Porter

Issues

- I. Is the grievance arbitrable?
- II. Did the Employer violate the Collective Bargaining Agreement by failing to count the time the grievants were laid off toward the calculation of the longevity pay supplement and the rate of vacation accrual? If so, what shall the remedy be?

Contract Provisions

Article 16 - Seniority

16.01 - Definition

For purposes of this Agreement, seniority shall be defined as follows:

- A. State seniority - the total length of service in a permanent position or succession of positions within the employ of the State dating back to the last date of hire.

. . .

16.02 - Continuous Service

Continuous Service shall be interrupted only by the following:

- A. Separation because of resignation
- B. Discharge for just cause
- C. Failure to return from leave of absence
- D. Failure to respond to recall from layoff
- E. Disability separation.

OPINION

There is no dispute regarding the facts which precipitated the filing of the instant grievance.

Grievant Michael Garrett was hired as a full time permanent employee on December 14, 1970; he was laid off on January 14, 1982; he was recalled from layoff on December 17, 1982. Grievant Nathan Blackwell was hired as a full time permanent employee on December 13, 1971; he was laid off on January 14, 1982; he was recalled from layoff on December 16, 1982; he resigned on May 26, 1989.

At the time of the grievants' layoff and recall there was no collective bargaining agreement between the State of Ohio and OCSEA. The parties were governed by Civil Service Laws and Rules. Pursuant to Civil Service Laws, the period of time the grievants were on layoff could not be credited by the State toward "length of service" for computation of longevity and vacation accruals; the parties agreed at the hearing that Civil Service Laws prohibited the period of layoff from being accounted toward service credit for longevity pay and vacation accrual.

Effective July 1, 1986, the parties were governed by a Collective Bargaining Agreement. Seniority was defined in Article 16, Section 1, and the five events which would interrupt "continuous service" were set forth in Article 16.02.

According to the Union, when the contract became effective, the State's seniority dates for many employees were incorrect. Also according to the Union, correct seniority dates were not made available until late October or early November 1986. There was unrebutted testimony from the Union to show that an agreement had been reached between the parties whereby grievances on seniority would not be filed until the seniority dates were corrected. Shortly after the grievants became aware of the seniority dates listed by the State, they initiated their grievance and claimed that neither of them had been credited with the eleven months of layoff for seniority and vacation purposes. They asked to be credited with continuous service back to their "last dates of hire" for purposes of seniority, vacation pay and any other appropriate entitlement.

The grievance was processed through the grievance procedure, and at Step 4 Management granted the grievance in part and denied it in part. In its Step 4 response, Management stated that "Seniority was not broken by your layoff and subsequent reinstatement"; the grievants' seniority dates were then adjusted. However, Management also stated that "the period of time between your layoff and reinstatement cannot be used in calculating your service credit." Upon receipt of this response from the Employer, the Union pursued the matter to arbitration. At the hearing, the State took the position that the grievance was not arbitrable.

In 1982, the grievants were laid off and recalled in accordance with Civil Service Laws; there was no collective bargaining agreement in effect when these events occurred. The State contends that any redress for the grievants should have been sought under the rules applicable in 1982. When the grievants returned from layoff, they received pay checks which clearly showed that the eleven month period was not counted in their total years and days of service; the grievants should have been aware that their length of service was eleven months short for at least three and one-half years before the grievance was filed.

Because the Arbitrator's authority is derived from the collective bargaining agreement and because no such agreement was in effect at the time of the layoff and recall, the State maintains that the Arbitrator has no jurisdiction over this matter.

Seniority is a concept which became effective with the July 1, 1986 contract, says Management, but the grievance was not initiated until November 7, 1986; this is well beyond the date the Grievants became aware of the circumstances giving rise to the grievance and well beyond the contractually stipulated period within which grievances must be initiated.

The State takes the position that seniority and service time (length of service) are two separate and distinct concepts. The State cites the May 26, 1987 letter from Mr. Murray to Mr. Seidler to support its claim in this regard. The letter sets forth different situations in which periods of separation from State employment will not constitute a break in service; the letter also notes when

seniority and/or service credits will be earned during the periods of separation. This letter clearly reflects the fact that seniority and service time are different by definition and application, says Management. Furthermore, the letter does not address what shall occur in terms of seniority and service credit when an employee is laid off and recalled in the same year.

The State maintains that under the 1986 contract, the vacation accrual and longevity adjustments are based on length, of State service, not seniority. This signifies that the time counted toward length of service must be time spent in an active pay status. The time spent on layoff was not counted toward vacation accrual and longevity pay in 1982 when the events at issue occurred, says Management; nor was time on layoff counted toward vacation and longevity in 1986. The State submits that the Union is attempting to attain something through arbitration which it was unable to gain during negotiations for the 1986 contract.

The State asks the Arbitrator to find that the within matter is not arbitrable. If, however, the Arbitrator should rule that the issue is in fact arbitrable, the State requests that the grievance be denied on the merits; the "adjustments requested cannot be made pursuant to the Civil Service rules in effect at the time".

The Union maintains that the issues of seniority and the accrual of service credits during a period of layoff are encompassed by Article 16 of 1986 Agreement, consequently, there is no merit to Management's claim that the subject matter of the grievance is not "covered under the four corners" of the contract. The Union maintains that the grievance is arbitrable and that it was timely filed.

The Union asserts that the grievants' State service was not broken by any of the five events set forth in Article 16.02, therefore the grievants are entitled to credit for the eleven month period of layoff for purposes of determining vacation accrual and longevity pay.

The Union asks that the grievance be granted together with the remedy sought; the Union asks that the Arbitrator "retain jurisdiction of the case until the amounts due are properly calculated and paid to the grievants".

After reviewing the evidence and considering the arguments of the parties on the issue of arbitrability, the Arbitrator finds that the grievance is arbitrable.

The grievance raises the question of entitlement to credit for the period of time the grievants were laid off for purposes of seniority, vacation accrual and other appropriate benefits. Article 16 of the 1986 contract defines seniority and sets forth the five events which constitute the interruption of continuous service; because the contract governs the issues raised in the grievance, the Arbitrator finds that the matter is arbitrable.

By its response to the grievance at Step 4, the State acknowledged that the 1986 contract covered the issue of the retroactive adjustment of the grievants' seniority to include their period of layoff in 1982; the State adjusted the grievants' seniority to reflect the eleven months of layoff. The State denied the grievance as it pertained to using the period of time between the grievants' layoff and reinstatement to calculate service credit. The fact that the State responded to the grievance on the issues of seniority and service credit signifies a recognition that the questions raised were addressed in the 1986 Agreement. Furthermore, the State did not mention the issue of timeliness in the Step 4 response. Although the grievance was not filed until approximately four months after the effective date of the contract, it was nevertheless timely because it was initiated as soon as the grievants became aware that their seniority dates were incorrect.

As it pertains to the merits, the Arbitrator finds that the evidence supports the position taken by the Union. Although there was no contract until July 1, 1986, the parties agreed by virtue of the language of Article 16 that an employee's seniority would be his/her "total length of service in a permanent position or succession of positions within the employ of the State dating back to the last date of hire". The contract language signifies that seniority dates can be adjusted retroactively;

Management acknowledged this in its Step 4 response to the instant grievance.

Seniority benefits exist by virtue of the contract and seniority rights may be modified in successive contracts. In this case, the concept of seniority came into being for the parties in 1986 and Article 16 defines seniority and continuous service. The May 26, 1987 letter establishes that the parties agreed that both seniority and service credits were encompassed by the 1986 contract.

Article 16.02 sets forth five circumstances by which an employee's State service shall be interrupted. None of the items are applicable here. The grievants were laid off, but they responded in a timely manner to their recall from layoff. The seniority provision outlines the events which break continuous service; it does not say that seniority benefits are excluded for any reasons other than items A through E. This signifies that in all other circumstances, seniority is not broken and continuous service is not interrupted. In the grievants' case, their continuous service was not interrupted.

If the Employer undertakes to limit seniority rights other than as mutually agreed upon in Article 16.02, such action constitutes a violation of the collective bargaining agreement.

As defined in the contract, the term "seniority" encompasses length of service, and vacation accrual and longevity pay are based upon length of service. By virtue of their seniority and uninterrupted "continuous" service, the eleven month period of layoff should have been credited to the Grievants for purposes of computing vacation accrual and longevity pay.

As a remedy in this case, the grievants are entitled to have their vacation accrual and longevity pay computed in accordance with Articles 28.01 and 36.06 in a manner which includes the eleven month period of layoff. The contract is specific about the rate of vacation accrual and the basis for longevity pay, therefore, the grievants shall be made whole pursuant to the terms of said contract.

Because Mr. Blackwell is retired, he shall receive his additional vacation accrual in cash. Mr. Garrett, however, shall receive additional vacation time. Both grievants shall receive the difference between the longevity supplement they were paid and the amount they would have received had the period of layoff been included.

The Arbitrator shall retain jurisdiction of this matter in the event that difficulties arise between the parties in the implementation of the award.

AWARD

I. The grievance is arbitrable.

II. The grievance is granted and the grievants' vacation accrual and longevity pay shall be adjusted to reflect the inclusion of the eleven month period of layoff.

LINDA DiLEONE KLEIN'

Dated this 11th day of December 1989
Cleveland, Ohio