ARBITRATION DECISION NO.:
360

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Industrial Commission

DATE OF ARBITRATION:
June 7, 1991

DATE OF DECISION:
July 7, 1991

GRIEVANT:
Charlene Shockley

OCB GRIEVANCE NO.:
17-00-(88-02-04)-0008-01-09

ARBITRATOR:
Jonathan Drotning

FOR THE UNION:
Bruce Wynngard

FOR THE EMPLOYER:
William Johnson

KEY WORDS:
Issue
Transfer
Resignation and Rehire
Arbitrability

ARTICLES:
Article 17-Promotions and
Transfers
§17.04-Bidding
§17.07-Transfers
Article 25-Grievance Procedure
§25.02-Steps
Article 36-Wages
§36.02-Step Movement

FACTS:
The grievant was first employed as a Technical Typist with the Rehabilitation Services Commission and was compensated at Step 6 of Pay Range 24. She worked for this agency for approximately eleven and one-half years. Later the grievant wanted to go to work for the Industrial Commission in the Bureau of

Disability Determination and was started at a lower pay range. She requested a transfer, but was forced to resign and be rehired. The grievant's former position paid 8.65/hr while the new position only paid 7.33/hr. The grievant did retain all other benefits such as longevity, seniority and vacation leave. Her health and dental insurance was also carried over when she moved to the new agency. The issue is whether the grievant should remain in the same pay range as would be associated with a lateral transfer or whether the grievant should be treated as a new hire and receive less pay for that position.

The employer argued that the grievance was not arbitrable because it was untimely filed. The grievant did not file within ten days after her final probationary performance evaluation. The Union argued that the grievance was not untimely because the event that made the grievant aware of the employer's violation was the receipt of her paycheck. The Union also argued a theory of continuing violation. The grievant did wait to grieve her pay range until she was no longer a probationary employee on the advice of her steward, who stated that her new agency might dismiss her before the end of her probationary period if she grieved this issue.

EMPLOYER'S POSITION:

First, the grievance is not arbitrable. The grievant failed to file a grievance within ten days of her final probationary evaluation. Even if the grievance is arbitrable the grievance should be denied. There is no evidence that the grievant was transferred. The fact that benefits were transferred from one agency and department to another do not require the employer to pay the same wage rate. The Industrial Commission considered the grievant to be a new hire. Article 17 of the Agreement defines a promotion as moving to a higher pay range and a lateral transfer as a movement to a different position in the same pay range. The Agreement does not specify that an employee moving from one agency to another within the State must be paid at the same step within the same pay range. The employing agencies did not transfer the grievant, rather she was hired for a vacant position.

UNION'S POSITION:

The grievant was transferred to another position. Her old agency would not transfer her, and forced her to resign before taking the new position. All her benefits remained intact and were transferred, which evidences the fact that she was transferred and not a new hire. The only reason the grievant did not grieve initially is because her steward advised her to wait until after her probationary period. She was told by someone in the department, "You ought to be lucky you have a job." The fact that the grievant received the transferred benefits that no other employee received points towards the fact she was a transfer, not a new hire. Union employees do not lose their benefits or their step increases when they move from one State agency to another.

ARBITRATOR'S OPINION:

The arbitrator basically adopted the reasoning of the State except that he did decide the grievance was arbitrable. It is unclear on what basis the arbitrator found the grievance to be arbitrable. The arbitrator states, "In short, (the grievant) relied on her steward's advice and her decision to wait out her probationary period before grieving allows the grievance [to be heard] on its merits." It can be argued that he found the continuing violation argument persuasive.

On the merits the arbitrator denied the Union's claims. The transfer of benefits is not a reason to conclude that the employer must also be paid at the same wage rate she was paid at her previous job. The Industrial Commission considered the grievant to be a new hire. She had a 120 day probationary period and would move up a step after the completion of the probationary period in accordance with Section 36.02 of the Agreement. Section 36.02 deals with newly hired and promoted employees; it does not deal with employees who are transferred. There is no evidence to suggest that the grievant was transferred.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING
STATE OF OHIO

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFSCME

ARBITRATION AWARD

HEARING DATE:
June 7, 1991
GRIEVANCE:
17-00-020488-08-01-09

ARBITRATOR:
John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on June 7, 1991 at the OCSEA offices, 1680 Watermark Drive, Columbus, Ohio. Appearing for the Union were: Bruce Wynngard, Mike Temple, Marianne Steger, and the grievant, Charlene Shockley. Appearing for the Employer were: William Johnson, Paul Kirschner, Sue Newell, and John Adams.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 6/7/91. The discussion and award are based solely on the record described above.

II. ISSUE

The parties Jointly stipulated the following:

1. Was the grievance timely filed?

2. If so, did the Industrial Commission of Ohio violate the collective bargaining agreement by employing the grievant at Step 1 of Pay Range 25?

If so, what shall the remedy be?

III. STIPULATIONS

The parties Jointly stipulated the facts as noted below which were signed by both the parties.

1. The Grievant, Charlene Shockley, was employed by the Rehabilitation Services Commission (RSC) as a Technical Typist on December 1, 1980.

2. At the time of her employment, the Grievant was compensated at Step 1 of Pay Range 24 ($7.33/hour).
3. The Grievant was receiving a longevity supplement at the time of her resignation from the RSC.

4. The Grievant's Initial probationary period at the Industrial Commission ended on December 28, 1987.

5. The Grievant acknowledged receipt of her Final Probationary Performance Evaluation on January 12, 1988.

6. The Grievant filed her grievance on January 29, 1988.

The parties also stipulated documents Identified as Joint Exhibits #1, #2 (A-H), #3, #4, #5, #6, #7, and Joint Exhibits #10 (A-G). Item 11 Is a stipulation which states that:

“Upon her new position, Ms. Shockley kept her sick time, personal time, vacation time, and years of service as noted In Joint Exhibit #11.”

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. ARBITRABILITY

1. TESTIMONY AND EVIDENCE

The parties submitted Opening Statements on arbitrability, but there was no testimony or evidence on that question.

2. ARGUMENT

a. EMPLOYER

The Employer cites Article 25.02, Step 1 which states that grievances be presented not later than ten working days from the date the grievant became or should have become aware of the occurrence that the grievance should not exceed a total of thirty days after the event. In this case, the grievant was employed by the Ohio Rehabilitation Service in June of 1987 as a Technical Typist in step 6 of pay range 25.

The Industrial Commission of Ohio, a separate state agency, posted a vacancy notice and the grievant submitted an application because her former employer, the RSC, was going to relocate from Cincinnati to Columbus. The Grievant was hired for the position by the Industrial Commission.

The Employer notes the grievant resigned her former job on 8/28/87 and began her new employment on 8/31/87. The grievant's pay rate at the time she resigned was $8.65/hr. including a longevity step and she began her new employment with the Industrial Commission at $7.33/hr.

The Employer notes the grievant attended orientation and was notified of her new wage rate on 9/25/87 and her initial probationary period ended on 12/28/87 and her final evaluation was on 1/12/88.

The Union, notes the Employer, grieved on 1/29/88 which was five months after the effective date of the new wage rate and, therefore, the grievance is untimely.

The Employer argues that the grievant should have been aware of her new wage rate at the time of her employment.

The Employer goes on to say that even if one gives the grievant the benefit of the doubt because she

hesitated grieving during her probationary period, that period ended on 12/18/87 and she signed her final performance evaluation on 1/12/88 but she did not grievance until 1/29/88, five months after her date of employment and one could assume 17 days after receiving her final probationary performance evaluation.

The Employer claims that the Contract states that there is a ten day time limit and that the date of the occurrence was 8/31/87. Therefore, the Employer asserts that the Arbitrator should enforce and respect the Agreement and it cites an arbitral award (see Modine Manufacturing).

The Employer also cites arbitral precedent on pages 3 and 4 of its opening statement. The Employer claims that the grievance was filed in untimely fashion and one could say that either five months late or at least 17 days late. For all these reasons, the Employer asks that this grievance not be considered arbitrable.

b. UNION

The Union asserts that the State's claim that the grievance is untimely is flawed in a number of respects. The Union argues that the event that gave rise to this grievance was the paycheck the grievant received on or about 1/29/88.

Moreover, the Union asserts that it is not asking the Employer to compensate the grievant from the date of the transfer but from the date of this grievance.

The Union cites a number of arbitral awards supporting its position that the breach of contract is a continuing and recurring incident. The Union also argues that Article 36.02 was violated each time the grievant received her pay check.

Moreover, the Union cites Arbitrator Harry Dworkin who stated that the Contract did not set forth in precise terms the circumstances under which the grievance arose and thus it was a continuing issue.

The Union cites other arbitral decisions in its brief and it goes on to cite Arbitrator Eischen in which he stated that a repetitive and continuous violation should be given the same status as if the current violation were occurring for the first time.

The Union goes on to say that if the Employer successfully argues its timeliness case, there would be a perpetual error and the employee will never be paid In accordance with the Contract.

Article 25 of the Contract, continues the Union, contains no definition of "occurrence giving rise to the grievance".

In this case, the grievant was in probationary status and the employee and the Union notes that employees in such status can be removed without the traditional due process rights granted to non-probationary employees. In this case, the grievant testified that this fact concerned her and, therefore, she felt compelled to wait until she completed her probation period to challenge Management's actions and that challenge was timely, argues the Union.

B. MERITS

1. UNION

a. TESTIMONY AND EVIDENCE

The Union called Marianne Steger who testified she was Assistant to the Executive Director of OCSEA and that she acts in the absence of the Executive Director. Steger testified that she was involved in the discussions in 1987 which dealt with seniority.

Steger testified that Russell Murray, the former Executive Director of OCSEA, wrote a letter to Edward Seidler, the Deputy Director in the Office of Collective Bargaining, in 1987 and she went on to say that she and a Mrs. Griffin actually wrote that letter.

Steger said that the term "no breaks in service" means that one can go from one State agency to another without a break in service even if one had to wait two days before accepting the other position.

Steger testified that the Agency stated that an employee should quit his/her former agency before he/she starts work in another State agency. Thus, Steger one could transfer from one agency to another.

Steger testified she could not recall discussing a break in service and she went on to say that a break in

service could affect longevity, seniority, vacations, etc.

The Union called John Adams who testified he interviewed Ms. Shockley to fill a vacancy and he recommended that she be hired. He said he did not inform her of her benefits.

Adams said he has been transferred from agency A to agency B and lost no benefits.

He said he told Shockley about vacation accrual, personal leave, sick leave, etc. With regard to steps, Adams said he told Shockley that she should discuss that issue with the supervisor. Adams said he thought he discussed the dental benefits with her.

Ms. Charlene Shockley testified she began her job with the State approximately eleven and one-half years ago and that she worked for the Rehabilitation Service Commission and then the Bureau of Disability Determination in the Industrial Commission and these were internal transfers. As a result, Shockley said she lost no benefits.

In 1987, Shockley learned that the Rehabilitation Service Commission was moving to Columbus and, therefore, she looked around for alternatives and was told by a doctor in her former agency to contact the Industrial Commission; specifically the Medical Section. She said she called the appropriate person and filled out an application and applied for a transfer.

Shockley said that she left her former job on a Friday and started her new job on a Monday. She said she was asked to resign from her former position and she did so as noted in Joint Exhibit #5. She said she was told she had to write a letter of resignation, although she was also told it would not affect her status in any way.

Shockley went on to say that she was told she would begin her job on August 31st and she also indicated that her health and dental insurance would carry over. This also included, said Shockley, sick time, personal time, vacation time, and years of service.

Shockley said that while beginning her new job as a probationary employee, a Union steward told her she could grieve her new salary but she also could be fired since she was in probation status.

Shockley said she talked to Sue Newell about pay and someone said to her, "You ought to be lucky to have a job". Two days later, Mr. John Adams told her that she appeared to be a bit a rough at the orientation hearing.

On redirect, Shockley said she knew her wage rate on August 27th, but since she had already resigned her former position and accepted her new employment, she felt she could not do much about her wage change.

Shockley, on recall, said that in her orientation, there were other persons who had transferred from other agencies and she identified one from ODOT.

The Union also cross examined Ms. Sue Newell who testified there is no written policy on transfers. However, she went on to say that the agency does do transfers under Civil Service rules. She said Shockley applied under Article 17 and that 17.07 is the State policy on transfers and employees may be considered.

Newell went on to say that Shockley submitted a bid. Newell was asked how one distinguishes between a transfer versus a new hire on the bid and she said there is nothing on the application form to indicate such differences.

Newell said that Shockley moved to pay range 25 from pay range 25 at a lower unit. She acknowledged that Article 17.07 does not speak to probationary periods.

Newell was asked if employee A moves from agency A to your state agency, is it a transfer? and she said No. Newell went on to say she could not think of any transfers from one agency to another agency in the same pay range.

Newell was asked whether the process for a new hire was the same for an employee coming to her state agency from another state agency and she responded by saying that if she interviewed another employee for a state agency, then they would have to make a decision whether that employee would be viewed as a transfer.

Newell said that Shockley's performance evaluations were available. Newell was asked whether she reviewed Shockley's evaluations and then decided whether Shockley should be considered a transfer or a new hire and she said she did not make that decision.

b. ARGUMENT

The Union points out that Ms. Shockley was not a new hire. She was a transfer under Article 17.04(e) of the Collective Bargaining Agreement. The Agreement, argues the Union, has no form for off-the-street applications. The Union goes on to say that Grievant Shockley received vacation, personal leave, etc. and that no other new employee enjoyed such benefits. Thus, Shockley was a transfer; not a new hire. The Union goes on to say that if individuals go from one agency to another, they do not lose benefits.

The Union goes on to say that Ms. Steger interpreted Union Exhibit #1 which is the letter to Mr. Seidler from Mr. Murray accurately; that is, employees do not lose their step increases when they move from one state agency to another.

2. MANAGEMENT

a. TESTIMONY AND EVIDENCE

Management called Mr. John Adams who testified he never threatened Shockley and he never told her not to file a grievance. He said he did tell her to check on the issue of whether she was a new hire or a transfer.

Adams said that Ms. Shockley is a good worker.

Ms. Sue Newell, Assistant Manager of Human Resources in Labor Relations, testified she was involved in the orientation of Ms. Shockley. She said that she told Shockley that the agency did not accept transfers and the latter was upset. She testified she did not say to the Grievant that she was lucky that she got hired.

Newell said that she told Adams that Shockley was a new hire.

Newell said that she follows the agency policy in which open jobs are posted and then she reviews applications both internal and external and obviously, Shockley was considered an internal applicant.

Newell said that Adams recommended the hire, etc.

Newell said that Shockley did not file for a position under Section 17.04 of the Contract (see Joint Exhibit 11). She went on to say that Shockley bid pursuant to Article 17.04.

Newell said that agency does not transfer employees simply because there would be no probationary period. She acknowledged that Shockley had no break in service. She said she was aware of item 1 on Union Exhibit #1, the letter to Seidler from Murray. She said the only thing that changed was the rate of pay for Shockley.

On redirect, Newell said that there is nothing in the Contract that prohibits viewing Shockley as a new hire.

Management also cross examined witnesses called by the Union. Mr. John Adams, a Management employee, testified that he did not know whether the grievant requested a transfer. He said he did not tell her she would be transferred.

Shockley, on cross, testified that she knew her new wage rate on August 27th. She said she did not recall if she asked Adams if she was to be transferred and she did not tell him she wanted to be transferred.

Shockley said she asked Adams whether her vacation, etc. would be carried over and he said the answer was yes.

Shockley, on cross, testified she did not grieve because she had talked to a steward and he said not to grieve until after she had completed her probationary period. She acknowledged that Management did not tell her not to grieve.

Shockley acknowledged that her October rating indicated she had a poor attitude.

Between 1/12/88, Shockley was asked why she waited 17 days and she said she waited for her last pay check. She said her probationary period ended December 30th and she waited for her final probationary evaluation.

Shockley said she had never grieved in the past. She went on to say her concern about not grieving immediately was a result of comments made to her during the orientation.

On recross, Shockley testified that she resigned her old position on August 26th and accepted the new

one on August 27th.

b. ARGUMENT

Management argues that the grievance was filed five months late and that the Union has not proved its case. Shockley resigned her own job and accepted a new one and Article 17.07 is permissive and it does not require employees to accept transfers.

Management also cited Article 36.02 talking about step movement. It goes on to say that Article 36.04 is not relevant and Article 43.02 was not violated.

The Industrial Commission, asserts Management, violated no standards and there is nothing in the Agreement which allows a ruling that Management violated the Contract.

V. DISCUSSION AND AWARD

The initial question is whether the grievance was filed in timely fashion? The Employer cites Article 25.02 which states in part that:

"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."

Charlene Shockley, the grievant, earned $8.65/hr. In her former job which ended on 8/28/87 and she accepted a new job on Monday, 8/31/87 and was paid at the rate of $7.33/hr..

The Employer argues that the grievant waited more than five months and seventeen days before raising a question about her new lower wage rate. The Employer argues that Shockley violated Article 25.02, step 1 of the grievance procedure. The Union asserts that there are a number of arbitral awards supporting its claim that this is a continuing grievance.

That Shockley elected not to grieve on the advice of a steward is not the basis to rule that the grievance was not timely. As the Employer noted she could have grieved during her probationary period but she was given advice by a steward that such a grievance might result in her being fired by the Employer and since she was in probationary status, she could not grieve that termination. For these reasons, Shockley elected to wait until she finished her probationary status before grieving. In short, Shockley relied on her steward's advice and her decision to wait out her probationary period before grieving allows the grievance on merits.

Did the Industrial Commission violate the Agreement when it placed Shockley on step 1 of pay range 25? The Union asserts that Shockley's job change constituted a transfer wherein she maintained all benefits such as vacation, sick time, etc. and she should have been transferred at the step she had attained while working for the Ohio Rehabilitation Services Commission. The Employer asserts that she was a new hire of the Industrial Commission and was not transferred.

Shockley was not transferred to another position by her employer but since the RSC was moving out of Cincinnati, Shockley searched out and obtained a similar position with another State agency. Shockley was not a new State employee but she was a new employee for the Industrial Commission.

According to Civil Service rules, employees for the State maintain certain benefits when they move from job to job, but the Union did not present specific language showing that an employee moving from one state agency to another must always move at the same or greater wage rate. That Shockley kept sick time, personal time, and vacation time earned while working at RSC and these benefits transferred over to her when she changed jobs is not the basis to conclude that she was, in fact, transferred and thus should have been paid the same wage rate she was being paid at her previous RSC job (see Union Exhibit #1).

The Industrial Commission considered Shockley as a new hire and it was generally accepted that she had a 120 day probationary period and presumably after successful completion, she would move a step per Article 36.02 (see Article 7 which deals with newly hired and promoted employees). Although Shockley testified that she "applied for a transfer", there is no documentation to support her claim for a "transfer".

Article 17 of the Contract defines promotions as moving to a higher pay range and a lateral transfer as a

movement to a different position in the same pay range. It does not specify that a lateral transfer from one agency to another agency within the State must be at the same step within the same pay range.

As the Employer argues, there is nothing in the Contract requiring the Industrial Commission to place Shockley at the same step she held while employed at the RSC. The employing agencies did not transfer Shockley rather she applied for a vacant position which was presumably filled according to the specified procedures in the Contract for filling vacant jobs. Shockley was awarded and accepted the new job and resigned her former position. Prior to acceptance, it was up to Shockley to find out the wage rate of the new position.

The Union has not shown that the Contract required the Industrial Commission to place Shockley on the same step of pay range 25 she held at RCS.

The grievance on merits is denied.

John E. Drotning
Arbitrator

July 7, 1991