ARBITRATION DECISION NO.:
426a

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

EMPLOYER:
Bureau of Employment Services

DATE OF ARBITRATION:
November 3, 1992
Conference

DATE OF DECISION:
November 4, 1992

GRIEVANT:
Leonard Groboske
Rae Jacobozzi
Jessie McClain

OCB GRIEVANCE NO.:
11-02-(91-08-16)-0104-01-09
11-02-(91-08-02)-0103-01-09
11-02-(91-08-29)-0107-01-09

ARBITRATOR:
Anna Smith

FOR THE UNION:
Bruce Wyngaard
John Porter

FOR THE EMPLOYER:
Janice Viau
Deborah Connolly

KEY WORDS:
Clarification of Arbitrator's
Award
Seniority
Intermittent, Temporary, Seasonal
and Interim Employees
Layoff - Remedy

ARTICLES:
Article 6-Probationary Employees
§6.02-Conversion of
Temporary, Intermittent, Interim
or Seasonal Employees

Article 16-Seniority
§16.02-Continuous Service
Article 18-Layoffs
§18.01-Layoffs

FACTS:

As a result of Arbitrator Smith's opinion in the Groboske, Jacobozzi and McClain award (#426) several questions were left unanswered. In the original award Arbitrator Smith held that employees who had been laid off and who had then accepted non-permanent employment (i.e. intermittent, temporary, seasonal, or interim service) prior to the expiration of their reemployment rights, had not experienced a break in seniority. The layoffs for Groboske, Jacobozzi and McClain had occurred prior to the first contract between the parties.

It appeared to both the union and management that because of the change in language in Article 6.02 of the 1989 agreement that there were unresolved questions about how the arbitrator's award could be interpreted. Therefore, the parties jointly met with the arbitrator and submitted two questions to be answered:

1. How is the award to be applied in light of the provisions of Article 6, Section 6.02 of the 1989-91 Agreement?

2. In this case are the parties limited to the remedy of reinstatement of the grievants to their former positions?

ARBITRATOR'S OPINION:

The arbitrator first restated her conclusion expressed in Arbitration decision #426 that employees who ware laid off and came back to work in an intermittent, temporary, seasonal, or interim status did not suffer a break in seniority because they were reemployed. The arbitrator further stated that this remained true up until July 1, 1989. As of July 1, 1989 employees who became permanent on or after July 1, 1989 no longer received seniority credit for their non-permanent time.

Arbitrator Smith further stated that employees who worked in a non-permanent status prior to July 1, 1989 and became permanent employees after July 1, 1989 do not earn seniority for their non-permanent employment. Therefore, they are incapable of being reemployed with no break in service because the provisions of Article 6.02 are more specific and they control the definition of seniority under Article 16.02. Thus an employee who is laid off can only be reemployed after July 1, 1989 if he/she is reemployed to a permanent bargaining unit position, as opposed to a non permanent position (intermittent, seasonal, temporary, or interim). The arbitrator summarized these principles in the following scenarios:

1. After July 1, 1989, any employee who experiences a continuous period of non-permanent service prior to a permanent appointment will not earn seniority for time served in the non-permanent status. (Section 6.02)

2. After July 1, 1989, an employee can only be reemployed or rehired (per Section 16.02, Paragraph 5) to a bargaining unit position - a permanent position capable of accruing state seniority as defined by Section 16.01.

3. Therefore, after July 1, 1989, employees who are laid off and who obtain non-permanent positions are not considered reemployed or rehired under Section 16.02. Unless the employee is actually recalled, reemployed or rehired to a bargaining unit position (per 16.02), the non-permanent appointment is considered to be a new appointment.

4. Employees who were laid off and who were rehired into non-permanent positions within the applicable period of recall rights, but prior to July 1, 1989, will be considered as reemployed or rehired for purposes of continuous service and seniority.

5. Those employees who established reemployment through non-permanent appointments prior to July 1, 1989, did not experience a break in service and continued to earn seniority and service credits while on layoff. Such seniority shall be at full credit and not "pay period by pay period."

The parties also requested the arbitrator to determine whether they must reinstate the grievants to their former positions or whether the parties could agree on an alternative remedy. The reason for presenting this question to the arbitrator was that reinstating the grievants to their former positions would require management to move as many as 60 employees who through no fault of their own had been wrongly moved due to management's miscalculations of the grievants, seniority. The arbitrator agreed that the parties could agree to an alternate remedy which would not require the reconstruction of the layoff with a large number of personnel moves.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, A.F.S.C.M.E., AFL/CIO

and

STATE OF OHIO
BUREAU OF EMPLOYMENT SERVICES

MEMORANDUM OF CLARIFICATION
Anna D. Smith, Arbitrator

Case 11-02-910802-0103-01-09
Rae Jacobozzi, Grievant

Case 11-02-910816-0104-01-09
Leonard Groboske, Grievant

Case 11-02-910829-0107-01-09
Jessie McClain, Grievant

Seniority

Conference

Pursuant to an agreement of the parties and the Arbitrator's retained jurisdiction in the above-captioned cases, a conference was held from 10:30 a.m. to 12:00 noon on November 3, 1992, at the offices of the Ohio Civil Service Employees Association, Local 11 AFSCME, AFL-CIO, Columbus, Ohio. Anna D. Smith, Arbitrator, presided. Present for the Union were Bruce Wyngaard, Director of Arbitration, and John Porter, Assistant Director of Arbitration. Present for the State were Janice Viau, Manager of Labor Relations, and Deborah Connolly, Labor Relations officer, both of the Ohio Bureau of Employment Services, and Robert Thornton, Assistant Chief of Operations, Office of Collective Bargaining. The purpose of this meeting was to resolve issues arising in the implementation and application of the Arbitrator's decision in the subject cases.

Issue

The parties jointly submitted the following questions for the Arbitrator's answer in clarification of her March 30, 1992 award:

1. How is the award to be applied in light of the Provisions of Article 6, Section 6.02 of the 1989-91 Agreement?

2. In this case are the parties limited to the remedy of reinstatement of the grievants to their former positions?

Opinion of the Arbitrator

Application of Award in Light of Article 6. Section 6.02

Article 6, Section 6.02 of the negotiated Agreement reads in pertinent part as follows:

"Seasonal, intermittent, temporary, or interim employees who become permanent after July 1, 1989 will begin to earn seniority when they become permanent employees."

Based upon this provision, it seems clear to me that while my conclusion in the opinion and award issued March 30, 1992 applies to the reemployment status (as discussed in Section 16.02) of non-permanent employees hired prior to the inception of a contract between the parties (i.e., prior to July 1, 1986) and to those non-permanent employees hired during the duration of the first contract (i.e., July 1, 1986 through June 30, 1989), it cannot be applied to those non-permanent employees hired after July 1, 1989. This is because non-permanent employees hired after July 1, 1989 are not eligible to earn seniority. They are therefore incapable of being reemployed with no break in service or seniority. The provisions found within Section 6.02, being more specific, must be considered controlling. Accordingly, after July 1, 1989, reemployment (as discussed in section 16.02) can only occur if a laid-off bargaining unit employee is reemployed ("hired") to a permanent bargaining unit position within the mutually agreed upon period of recall/reemployment rights. With this in mind, employees who are laid off and subsequently hired into non-permanent positions after July 1, 1989 are not considered recalled or reemployed even though employees who were laid off and subsequently hired into non-permanent positions prior to July 1, 1989 (and within their period of recall/reemployment rights) are considered to have been recalled or reemployed. These latter employees, recalled prior to July 1, 1989, did not experience a break in service and continued to earn seniority and service credits while on layoff.

The principles established by the March 30, 1992 award and this clarification in light of Section 6.02 may be summarized as follows:

1. After July 1, 1989, any employee who experiences a continuous period of non-permanent service prior to a permanent appointment will not earn seniority for time served in the non-permanent status. (Section 6.02)

2. After July 1, 1989, an employee can only be reemployed or rehired (per Section 16.02, Paragraph 5) to a bargaining unit position - a permanent position capable of accruing state seniority as defined by Section 16.01.

3. Therefore, after July 1, 1989, employees who are laid off and who obtain non-permanent positions are not considered reemployed or rehired under Section 16.02. Unless the employee is actually recalled, reemployed or rehired to a bargaining unit position (per 16.02), the non-permanent appointment is considered to be a new appointment.

4. Employees who were laid off and who were rehired into non-permanent positions within the applicable period of recall rights but prior to July 1, 1989, will be considered as reemployed or rehired for purposes of continuous service and seniority.

5. Those employees who established reemployment through non-permanent appointments prior to July 1, 1989, did not experience a break in service and continued to earn seniority and service credits while on layoff. Such seniority shall be at full credit and not "pay period by pay period."

Remedy

In this case, the parties are not limited to the remedy of reinstatement of the grievants to their former positions. The grievants may be made whole by any other remedy mutually agreed to by the parties.

Anna D. Smith, Ph.D.
Arbitrator

November 4, 1992
Shaker Heights, Ohio