

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of Arbitration *
Between *
OHIO CIVIL SERVICE *
EMPLOYEES ASSOCIATION *
LOCAL 11, AFSCME, AFL/CIO *

OPINION AND AWARD

Anna DuVal Smith, Arbitrator

Case No. 12-00-20060118-0026-01-13

and *

Patty Porter, Grievant

OHIO ENVIRONMENTAL *
PROTECTION AGENCY *

Vacation

APPEARANCES

For the Ohio Civil Service Employees Association, Local 11 AFSCME:

John Porter, Associate General Counsel
Ohio Civil Service Employees Association, Local 11 AFSCME

For the Ohio Environmental Protection Agency:

Donald N. Starr, Labor Relations Officer
Ohio Department of Health

Michael Duco, Manager of Labor Relations and Dispute Resolution
Ohio Office of Collective Bargaining

I. HEARING

A hearing on this matter was held at 9:15 a.m. on May 16, 2007, at the offices of the Ohio Civil Service Employees Association in Westerville, Ohio, before Anna DuVal Smith, Arbitrator, who was mutually selected by the parties pursuant to the procedures of their collective bargaining agreement. The parties stipulated the matter is properly before the Arbitrator and presented one issue on the merits, which is set forth below. They were given a full opportunity to present written evidence and documentation, to examine and cross-examine witnesses, who were sworn or affirmed, and to argue their respective positions. Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME (the “Union”) were Chapter President Kelvin Jones and the Grievant, Patty Porter. Also present was Patti Howell, Staff Representative. Testifying for the Ohio Environmental Protection Agency (the “Agency”) was Dan Parks, Ohio Department of Administrative Services Human Resources Division, and Michael Duco, Ohio Office of Collective Bargaining. A number of documents were entered into evidence: Joint Exhibits 1-10 and State Exhibit 1. The oral hearing was concluded at 10:35 a.m. Written closing statements were timely filed and exchanged by the Arbitrator on June 6, 2007, whereupon the record was closed. This Opinion and Award is based solely on the record as described herein.

II. STATEMENT OF THE CASE

The facts giving rise to the grievance are not in dispute. Among other state departments and agencies, the Ohio Environmental Protection Agency and OCSEA are parties to a collective bargaining agreement (“CBA”) governing the terms and conditions of employment of full and part-time employees in numerous classifications for the period of 2003-2006. This case concerns whether part-time employees are entitled to a “vacation dump”¹ when they reach five years of service as do full-time employees.

¹A “vacation dump” is a lump sum credit of earned vacation that has not accrued on a biweekly basis by virtue of the fact that accrual rate increases lag increases in earned annual vacation leave by one year.

The issue arose after a full-time Environmental Specialist 2 who had begun working for the Agency on December 4, 2000, voluntarily reduced her hours to 36 per week on February 2, 2002, under a pilot part-time program. The agreement she signed at the time states in pertinent part,

Patty Porter (employee) understands working in a part-time status will affect the benefits established by the OCSEA contract and/or State and Federal laws. The parties understand the effects of part-time employment may change with regards to benefits with negotiation of a new labor agreement as well as passage and/or amending of State and Federal laws. The parties understand it is the employee's responsibility to review the OCSEA contract, state and federal laws and the State Employee Benefits Book for detailed information with regard to benefits available to part-time, permanent employees. A representative from Employee Services may be contacted for clarification of the affected benefits. Outlined below is a list of some of the affected benefits (however, not all-inclusive) which, as a result of part-time status, may change:

Vacation Leave - The accrual is per pay period on a pro-rated basis. (Joint Ex. 3)

In December of that year, the Agency adopted its "Part-Time Employment Policy" superceding the one of 2001. With respect to "Leave Accrual," this policy states:

You will accrue personal leave, sick leave and vacation on a pro-rated basis (i.e., pro-rated according to the number of hours worked during a pay period). (Joint Ex. 9)

When the Grievant completed five years of service during the pay period ending November 26, 2005, she did not receive any lump sum (aka "dump") vacation hours as do full-time employees in their milestone year in order to make up the difference between what accrued and was credited during their fifth year and what was earned upon its completion. Believing she was entitled to such a lump sum pro-rated for her part-time hours, she filed a grievance on December 29, 2005. This grievance was thereafter fully processed to arbitration where it presently resides free of procedural defect, on the stipulated issue of:

Did Management of EPA violate the Collective Bargaining Agreement by failing to give EPA employee Patty Porter a pro-rated vacation dump? If so, what shall the remedy be?

III. APPLICABLE CONTRACT PROVISIONS

ARTICLE 28 - VACATIONS

28.01 - Rate of Accrual

Permanent employees shall be granted vacation leave with pay at regular rate as follows, except that those employees who have less than 80 hours in an active pay status in a pay period shall be credited with a prorated amount of leave according to the following schedule:

Length of State Service	Accrual Rate	
	Hours Earned Per 80 Hours in Active Pay Status Per Pay Period	Annual Amount Per 2080 Hours in Active Pay Status
Less than 1 year	3.1 hours	80 hours (<i>upon completion one year of service</i>)
1 year or more	3.1 hours	80 hours
5 years or more	4.6 hours	120 hours
10 years or more	6.2 hours	160 hours
15 years or more	6.9 hours	180 hours
20 years or more	7.7 hours	200 hours
25 years or more	9.2 hours	240 hours

ARTICLE 44 - MISCELLANEOUS

44.01 - Agreement

To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

44.02 - Operations of Rules and Law

To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to State employees in areas where this Agreement is silent, such benefits shall be determined by those statutes, regulations, rules or directives.

IV. ARGUMENTS OF THE PARTIES

Argument of the Union

The Union takes the position that the part-time permanent employment policy promulgated by the Agency implies that these employees were to receive all benefits related to length of service exactly like those of full-time employees. Statements such as “you will accrue...vacation on a pro-rated basis (i.e., pro-rated according to the number of hours worked during a pay period)” and “Longevity pay and service credit are calculated the same as full-time employees. Longevity and service credit are based on service time” created the impression that all leave benefits would accrue on a pro-rata basis. Nowhere does the management document outlining the program or the Grievant’s “Settlement Agreement” indicate loss of the vacation dump.

The Union argues that both the CBA and state law support its position. R.C. 124.13 (C) requires that part-time state employees receive vacation leave on a pro-rata basis. Article 28.01 of the CBA states that employees “with less than 80 hours in an active pay status in a pay period

shall be credited with a pro-rated amount of leave according to the following schedule.” The schedule that follows provides for accrual of 4.6 hours per pay period for five years or more of service yielding 120 hours of vacation per year (which amount includes 40 hours lump sum in the first year of the bracket). The Agency’s interpretation ignores the annual entitlement column and leaves employees with questions as to what their benefits are.

The Union submits that its application of the provision is consistent with Attorney General opinions interpreting similar provisions governing county employees who face the same anomaly when they advance to the next higher step of the vacation schedule, namely that an employee earns vacation leave and becomes entitled to it on the basis of years of service completed whereas vacation leave is credited to the employee by accrual throughout the year.

Turning to past practice, the Union points out that the Agency’s witness admitted that even though the system is not programmed to credit employees with a pro-rated portion of the vacation dump when they complete their milestone year, it has been done manually “under special circumstances.” The Agency’s claim of consistency from 1986 forward is therefore refuted. Moreover, it is contractual requirements that drive the system, not the other way around. Additionally, when the Union brought the subject up in the 2003 - 2006 negotiations, the co-chief negotiator for the State acknowledged that some part-time employees did get the dump, but said that if the Union persisted in negotiating on this topic the benefit would cease. If there was an implied mutual agreement, why would the Union have sought to discuss the issue in negotiations? In any event, even though the State claims a consistent application with part-time employees, it has sometimes interpreted the statute and contract to include vacation dumps for part-time employees.

The Union asks that Article 28 be interpreted and applied consistently to credit the Grievant with 36 hours lump sum vacation leave.

Argument of the Agency

The Agency points out that in twenty years of collective bargaining under R.C. 4117 the subject of this grievance has never been presented in the form of a written proposal, nor has it ever been arbitrated. Neither Union nor Management is aware of any instance when the Agency granted the vacation dump to a part-time employee. Moreover, the State's computer system has been programmed at least since 1979 to provide the lump sum only to full-time employees.

The Agency urges the Arbitrator to disregard the Attorney General Opinions admitted as Joint Exhibits 4-6 because they concern only county employees and do not address the specific situation of the instant arbitration, that of a part-time employee. As for the section of the Code governing state employees who are not exempt from collective bargaining (R.C. 124.13) it conflicts with Article 28.01 in that full-time employees do not earn 120 hours of vacation leave per year until they have eight years of service whereas Article 28.01 begins the accrual at five years of service and is silent with respect to lump sums. Therefore, the CBA applies pursuant to Article 44.01.

Finally, the CBA is not silent with respect to vacation leave generally, but says nothing about lump sums. However, the State did provide them to full-time permanent employees prior to 1986 and continued the practice afterwards.

For all these reasons the Agency asks that the grievance be denied.

V. OPINION OF THE ARBITRATOR

Article 28 is clear in that permanent part-time employees earn and are to be credited with paid vacation leave the same as permanent full-time employees but pro-rated for the hours worked. The first sentence of Article 28.01 specifies "shall be credited according to the following schedule." "Shall" means the benefit laid out in "the following schedule" is mandatory. The "following schedule" contains two columns, not one. One of these shows the hours "earned" per 80 hours in a pay period. The Agency has complied with this column. But for part-time employees it has ignored the second column in the milestone years, thus denying

these employees their entitlement to the full pro-rata amount earned in the milestone year. It has thus not followed the schedule in its entirety.

The agreement signed by the Grievant and the Agency's Part-Time Policy do not contradict the CBA. Those documents refer to the accrual per pay period and say nothing about the annual earned amount. While it is true that neither the CBA, the part-time policy, nor the "Settlement Agreement" mention "vacation dump" or "vacation lump sum," this has been the method used for years for other public employees in Ohio (including full-time State employees) in the milestone years wherein pay-period credits do not add up to the total earned entitlement at the completion of the milestone year. The mere fact that there has been a practice of not making similar adjustments for most part-time State employees does not evince a binding past practice. A past practice is binding only when it rests on a mutual agreement. There is no such evidence here. Finally, while the Attorney General opinions on the statute for county employees and the statute for state employees who do not accrue vacation leave under section 124.134 of the Revised Code do not govern here, they do provide a useful context for understanding and reconciling the apparent anomaly between the specified pay-period credits and annual entitlement.

VI. AWARD

Management of EPA violated the Collective Bargaining Agreement by failing to give EPA employee Patty Porter a pro-rated vacation dump. The State is directed to credit her with 36 hours of vacation leave. The Arbitrator retains jurisdiction on the sole matter of remedy for ninety (90) days.



Anna DuVal Smith, Ph.D.
Arbitrator

Cuyahoga County, Ohio
July 25, 2007

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