

CP 3/21/02

REVIEW

MAR 21 2002

#789

GRIEVANCE COORDINATOR

 *
 In the Matter of Arbitration *
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 Between * Case Number:
 *
 OCSEA/AFSCME Local 11 * 17-00-(99-09-10)-0020-01-04
 and *
 * Before: Harry Graham
 The State of Ohio, Industrial *
 Commission *
 *

APPEARANCES: For OCSEA/AFSCME Local 11:

Herman Whitter
 OCSEA/AFSCME Local 11
 390 Worthington Rd.
 Westerville, OH. 43082

For The State of Ohio:

Michael Duco
 Office of Collective Bargaining
 100 East Broad St., 18th Floor
 Columbus, OH. 43215

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham on February 28, 2002. At that hearing the parties were provided complete opportunity to present evidence and testimony. The record in this proceeding was closed at the conclusion of oral argument.

ISSUES: At the hearing the parties agreed upon the issues in dispute between them. Those issues are:

Did the Employer violate Article 17 of the 1997-2000 Collective Bargaining Agreement when it promoted Mike Scholl to a Staff Hearing Officer position based on seniority? If so, what shall the remedy be?

and

Can the Union challenge Mr. Scholl's seniority?

and

What is Mike Scholl's proper seniority date?

BACKGROUND: Many of the events surrounding this dispute are uncontroverted. In the Spring of 1996 the Industrial Commission of Ohio had a vacancy for the position of Staff Hearing Officer. A number of people applied for the vacant position including the Grievant, Mark Holko. Mr. Holko was working at the Industrial Commission as a District Hearing Officer when the Staff Hearing Officer position became available. Had he secured it, it would have represented a promotion for him. A number of other people bid on the vacant position in addition to Mr. Holko. Included among them was Michael Scholl who was working at that time as a Benefits Manager 1 in the Department of Administrative Services. Both Mr. Holko and Mr. Scholl are attorneys and no question arose concerning their qualifications for the Staff Hearing Officer vacancy. Mr. Scholl was selected from the pool of applicants to fill the position. It was the opinion of the Industrial Commission that he was the senior bidder. That opinion was disputed by the Grievant. A grievance protesting the selection of Mr. Scholl was filed. It was processed through the procedure of the parties without resolution and they

agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE UNION: According to the Union the Grievant, Mark Holko, was erroneously passed over in favor of the successful applicant, Michael Scholl. The Employer asserted it selected the senior bidder whom it considered to be Mr. Scholl. The Industrial Commission erred in making that determination in the Union's view. That is because Mr. Scholl "resigned" from the Department of Administrative Services (DAS) upon securing the position at the Industrial Commission. Article 16, Section 16.01 of the 1997-2002 Agreement provides in relevant part:

Except as provided under section 16.02, continuous service will be interrupted only by resignation, discharge for just cause, disability separation, failure to return from a leave of absence or failure to respond to a recall from layoff.

There is copious evidence that Mr. Scholl resigned his position with DAS. Joint Exhibit 8B in this proceeding is a Personnel Action Form from the Department of Administrative Services. Dated 5/21/96 it shows that Mr. Scholl resigned "for another job." The "Effective Date" is shown to be 04/15/96. This is reiterated by a letter dated May 21, 1996 from Cathy Swanick of the Office of Employee Services of DAS. (Jt. Ex. 9) That letter, from Ms. Swanick to Mr. Scholl, confirmed the understanding of DAS "that effective April 15,

1996 you (Mr. Scholl) resigned from your position of Benefits Manager 1 with the State of Ohio, Department of Administrative Services, Division of Human Resources." The documentation of the State, created by the State, records Mr. Scholl's resignation from DAS. When he resigned his service was broken under the terms of Section 16.01 of the 1997-2002 Agreement.

In the ordinary course of events the State would have considered the Personnel Action Form and Ms. Swanick's letter to constitute evidence that he had a break in service. Had it done so, he would have lacked seniority to secure the position at the Industrial Commission. In fact, the State did not consider that documentation as definitive evidence of Mr. Scholl's break in service. Officials asked him if he had indeed resigned. He indicated he had not. The State accepted his word on that fact. That acceptance is unique in the annals of the Union. When disputes arise over seniority dates the State insists that its records govern the outcome. In this situation Mr. Scholl asserted he had not resigned and the State accepted his word on the matter. The Union asserts his statement was self-serving. Further, upon receipt of Ms. Swanick's letter Mr. Scholl did not act to correct it. That he did not do so indicates that her understanding that he resigned was accurate the Union asserts.

There is other evidence that Mr. Scholl resigned his employment with the State. Joint Exhibit 7B is a State of Ohio Payroll Disbursement Journal for the Department of Administrative Services. Dated May 25, 1996 it shows that Mr. Scholl had cashed out the various leave balances in his account. All available evidence shows that Mr. Scholl resigned his position with the Department of Administrative Services. When confronted with such evidence in the past the State has insisted it be accepted as constituting the accurate and binding record of service. Nothing less can occur in this situation according to the Union. Accepting the evidence of Mr. Scholl's record as accurate, his resignation from DAS renders him junior to Mr. Holko. Thus, the latter must be awarded the position of Staff Hearing Officer at the Industrial Commission with associated back pay the Union contends.

POSITION OF THE EMPLOYER: Contrary to the assertion of the Union, that Mr. Scholl resigned his position with the State which came to make him junior to Mr. Holko, no such resignation occurred the State contends. When asked if he had resigned, Mr. Scholl indicated he had not. Mr. Scholl's account is supported by evidence. When he departed the Department of Administrative Services the Department cashed out his leave balances (Jt. Ex. 7B). He was mailed a check

representing the amount the Department calculated was due him. He returned the check, uncashed, to the Department. That action corroborates his account that he did not resign.

Additional evidence that Mr. Scholl did not resign is provided by Joint Exhibit 7A, his pay stubs from the Industrial Commission. The pays stubs shown in Joint Exhibit 7A represent the first and second pay periods worked by Mr. Scholl at the Industrial Commission. Far from showing that his leave balances were cashed out, as they would be upon resignation, they show that his leave balances were carried over to the Industrial Commission. No resignation is shown by the evidence according to the State.

The Employer does not dispute the contention of the Union that it has consistently asserted that its internal records govern questions of seniority. In this case, the records are contradictory. Some may be interpreted as showing Mr. Scholl resigned. Others show that he did not do so. Coupled with his denial that he resigned and his return of the check representing payment for cashed-out leave balances, the State asserts the more credible view is that Mr. Scholl did not resign. Thus, he was the senior bidder and was properly selected by the Industrial Commission to fill the vacancy for Staff Hearing Officer. Consequently, the grievance must be denied the State contends.

DISCUSSION: The second agreed-upon issue in this dispute concerns whether or not the Union may challenge Mr. Scholl's seniority date and, by implication, the seniority date of other State employees who may call their service records into question. The answer to that question is affirmative. The Agreement does not prohibit the challenge of seniority dates. Further, the Employer cannot take the position that an error should be enshrined in the personnel records of employees if error can be demonstrated. Such a position would be irrational and replete with potential for ratifying errors, to the possible detriment of employees. Absent a prohibition to the contrary in the Agreement the Union may challenge the seniority date of Mr. Scholl.

The record in this dispute is replete with errors. The record-keeping of the State is woeful. If employees cannot rely upon accurate seniority records the entire personnel system of the State is compromised. It requires no stretch of the imagination to foresee serious consequences upon the lives of employees and their families if the State cannot keep accurate records of service. For instance, the potential for improper pension service credit if seniority is inaccurately recorded is obvious.

Sufficient errors in Mr. Scholl's personnel record were demonstrated in this proceeding to call into question the

entire personnel record keeping procedure of the State. For instance, Joint Exhibit 8B shows Mr. Scholl having resigned his position with the Department of Administrative Services to take "another job." That the Department of Administrative Services believed this to be the case is shown by the fact that it sent Mr. Scholl a check for his unused leave balances and sent him a letter on May 21, 1996 confirming its understanding that he had resigned from his position.

The Union bears the burden of proof in this matter. No matter what standard of proof is used, the Union cannot meet it. Initially, Mr. Scholl consistently asserted that he had not resigned. The Union characterizes his testimony as being self-serving. That does not prompt the conclusion it is untrue. Testimony can be true and self-serving as well. Mr. Scholl's testimony is corroborated by the record in this matter. Upon receipt of the check representing payment for his unused leave balances Mr. Scholl did not cash it. He sent it back to the State. Additionally, his leave balances were transferred to the Industrial Commission. Joint Exhibit 7A represents the initial two pay stubs provided Mr. Scholl upon his employment with the Industrial Commission. They show that the Industrial Commission credited him with the leave balances he had accumulated during his prior years of service with the State. Further indicia of the failure of the State

to maintain records accurately in this situation is Joint Exhibit 6. On it is found the code AOI showing Mr. Scholl to be a new hire at the Industrial Commission. Yet, his leave balances were transferred intact from DAS to the Industrial Commission. The deplorable record in this case, which calls into question the ability of the State to accurately keep personnel records of its employees, is sufficient to call into question the assertion of the Union, that Mr. Scholl resigned. Based upon his testimony, his return of the check representing payment for his leave balances and the fact that the Industrial Commission carried his leave balances over from DAS unaltered, I conclude that Mr. Scholl did not resign his employment with the State upon securing the position with the Industrial Commission.

Based upon the preceding discussion Mr. Scholl's seniority credits should continue without reduction or break upon his movement from the Department of Administrative Services to the Industrial Commission.

AWARD: The grievance is denied.

Signed and dated this 18th day of March, 2002 at Solon, OH.


Harry Graham
Arbitrator