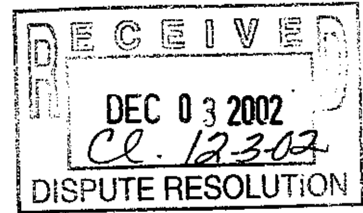
#813



In the Matter of Arbitration

Between

OCSEA/AFSCME Local 11

and

The State of Ohio, Department of Jobs and Family Services

Case Number: (01-06-01)-0058-01-09
16-11-~~01601-0058~~

Before: Harry Graham

APPEARANCES: For OCSEA/AFSCME Local 11:

Herman Whitter
OCSEA/AFSCME Local 11
390 Worthington Rd.
Westerville, OH. 43082-8331

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. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this matter was closed at the conclusion of oral argument in Westerville, OH. on November 5, 2002.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

> Has the Employer violated Article 7, Section 7.10, Temporary Working Level Pay Supplements? If so, what shall the remedy be?

BACKGROUND: The parties agree on the events giving rise to this proceeding. There is in the Agreement language, Article 7, Section 7.10, which permits the Employer to temporarily assign employees to vacant positions. The Agreement specifies such assignments are not to exceed 120 days unless mutually agreed upon by the parties. People so assigned receive a pay supplement if their temporary assignment is to a classification with a higher pay range and lasts more than four work days. On occasion the State assigns employees to positions outside of the bargaining unit. People in such positions are appropriately paid. When assigning to positions outside the bargaining unit the State has from time-to-time kept people in those positions for longer than 120 days. A grievance protesting this practice was filed. It was processed through the grievance procedure of the parties. As set forth below, they do not agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE UNION: When the parties signed their initial Agreement it was silent on the matter of working out of classification. When the Employer desired that to occur, it was governed by the provisions of the Ohio Administrative Code, Section 123:1-37-07. To June 30, 1991 the Code provided that when an employee was temporarily assigned to a position with a higher pay range the employee was to receive pay at

the classification base of the higher level position or five percent above their current base rate of compensation. That was to take effect after two weeks but not to last for more than ten weeks. The Code came to be modified. As presently in effect, temporary working level pay under the Code is "approximately four percent above the employee's current base rate of compensation." It can last for "not more than two years as a result of a vacancy."

The parties initially addressed Temporary Working Level in the 1989-91 Agreement. Then found in Article 13, the provisions of the Agreement with respect to Temporary Working Level changed over time. With the 2000-03 Agreement Temporary Working Level was moved to Article 7, Section 7.10 of the Agreement. It currently provides that "All temporary working level assignments used to fill a vacant position during the posting and selection process shall not exceed one-hundred twenty (120) days unless mutually agreed to by the parties." On occasion the State is placing people who are members of the bargaining unit in positions not included in the Unit. When it does so many of the attributes of bargaining unit membership remain with the person so-assigned. For instance, people continue to have their Union dues checked-off and remitted to the Union. Should they have a grievance the Union represents them. However, when the

State places people in a non-bargaining unit position on occasion it leaves them there for more than 120 days. It does so under the provisions of the Code which permits people not covered by the Agreement to remain in a temporary working level assignment for up to two years. The Union points to the language of the Agreement which provides that a person may not be in a Temporary Working Level assignment for more than 120 days unless mutually agreed upon. The Agreement is clear: 120 days is 120 days, it is not two years. Further, the parties did not make any distinction between a bargaining unit and an non-bargaining unit position. The Agreement refers to a "vacant position."

When people have been put into Temporary Working Level positions outside the bargaining unit the Employer has consistently applied the entire Agreement to them save one provision, the 120 limitation in Section 7.10. People in such positions have the two year limitation of the Code applied to them. That cannot occur in the opinion of the Union. One provision of the Agreement, the 120 day limitation, is not being applied. The Employe cannot rely upon the Code due to Section 44.01 of the Agreement according to the Union. That Section provides that if there is any conflict between "State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement...this

Agreement shall take precedence and supersede all conflicting State laws." That language clearly provides that Section 7.10 must take precedence over the Code the Union insists. Thus, the grievance should be granted and a "cease and desist" order directed to the State it contends.

POSITION OF THE EMPLOYER: The Employer asserts this dispute is not arbitrable. That is due to the fact that the positions at issue are out of the bargaining unit. People assume a Temporary Working Level position that may be either in or out of the bargaining unit. This dispute is concerned solely with non-bargaining unit positions. As the State urges the matter be considered, the Agreement reaches only positions within the bargaining unit. Hence, the dispute cannot be considered on its merits according to the Employer.

This proceeding is much ado about nothing in the State's opinion. People who assume exempt Temporary Working Level positions receive all protections of the Agreement. They may grieve and the Union will represent them. Their Union dues are checked-off and remitted to the Union. They receive a four percent (4.0%) pay supplement while they are in a Temporary Working Level position. No complaint is justified according to the Employer.

When people are not in bargaining unit positions as a result of assuming a Temporary Working Level position the

provisions of the Ohio Administrative Code govern in the opinion of the State. Section 123;1-37-07 B provides that non-bargaining unit TWL positions may be filled for two years. That is what the State is doing and that is what is permitted by the Agreement.

When this issue first arose an informal survey was made of the practice of the largest departments in State government on this issue. They were uniformly interpreting the Agreement as urged by the State. They have been doing so in this fashion since the Temporary Working Level language came into the Agreement. In essence, there has been created a past practice which must serve to control this dispute the State asserts. It urges the grievance be denied.

DISCUSSION: The grievance is arbitrable. In its claim that the grievance cannot be reached by an arbitrator the State in essence is asserting that the 120 limitation be read out of the Agreement for non-bargaining unit positions. Nowhere in the Agreement is such an exemption found. The Agreement at Section 7:10 references a time limit for TWL positions, 120 days. It is that time limit that must be interpreted. As it is found in the Agreement, the dispute is arbitrable.

The State advances an interesting, and unpersuasive, interpretation of the Agreement in this dispute. It claims that the phrase in Section 7.10, "All temporary working level

assignments used to fill a vacant position during the posting and selection process shall not exceed one-hundred twenty (120) days unless mutually agreed to be the parties" does not mean what it says. Note the language in the operative sentence, "all" TWL assignments "shall not exceed one-hundred twenty days...." That language is not hard to understand. The State agreed that "all" TWL assignments were not to exceed 120 days. There is no exception for TWL assignments to non-bargaining unit positions.

That various State agencies are operating as the State considers to be correctly does not change the language of the Agreement. The State in the proverbial phrase, "clearly and unambiguously" bound itself to a TWL of no more than 120 days absent mutual agreement for "all" positions.

Section 44.01 of the Agreement provides that in the event of conflict between "State statutes, administrative rules, regulations or directives" the Agreement is to take precedence and supersede such conflicting statutes, etc. The parties took pains to ensure the primacy of the Agreement over such regulations as are found in the Administrative Code. Were the State to prevail in this situation the explicit time limitation of 120 days for a TWL found in the Agreement would be null when the State moves a bargaining unit employee to an exempt position. Obviously that cannot

occur.

AWARD: The grievance is sustained. The Employer is to immediately cease and desist from working bargaining unit members in exempt position for more than 120 days without securing the mutual agreement called for in Section 7:10 of the Agreement.

Signed and dated this 20th day of November, 2002 at Solon, OH.

Harry Graham
Arbitrator