

# 818

REVIEWED BY  
CL-13-03  
JAN 13 2003

IN THE MATTER OF ARBITRATION

BETWEEN

GRIEVANCE COORDINATOR

STATE OF OHIO – DEPARTMENT OF REHABILITATION & CORRECTION

AND

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION  
AFSCME LOCAL 11, AFL-CIO

AND

DOUGLAS J. SOLLITTO

Case No. 27-20 (010601) 5153-01-03

Date of Hearing: December 20, 2002

Place of Hearing: Columbus, Ohio

**APPEARANCES:**

For the Union:

Advocate: Mark Linder, Esquire

Witnesses:

Robert Goheen

For the Employer:

Advocate: Mike Duco, Esquire

2<sup>nd</sup> Chair: Dave Burrus

For the Grievant:

Advocate: Joseph M. Clark, Esquire

Witnesses:

Douglas J. Sollitto

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: January 10, 2003

## **INTRODUCTION**

The matter before the Arbitrator is the enforcement of a settlement agreement pursuant to the Collective Bargaining Agreement ("CBA") in effect March 1, 2000 through February 28, 2003, between the State of Ohio and the Ohio Civil Service Employees Association AFSCME Local 11, AFL-CIO ("Union/OCSEA") and Douglas J. Sollitto ("Sollitto").

The issue before the Arbitrator is whether the employer violated a settlement agreement when it refused to credit Sollitto with institutional seniority upon transferring to another facility. Sollitto was removed in May of 2001 and during the arbitrable process the Department of Rehabilitation and Correction ("DR&C") and the union enter into a settlement agreement. A provision of the settlement agreement allowed Sollitto to transfer his institutional seniority from one institution to another. The union subsequently maintained that the settlement agreement violated the CBA and intervened in an Unfair Labor Practice ("ULP") proceeding brought by Sollitto against the employer before the State Employment Relations Board ("SERB").

In resolution of the ULP all parties agreed to submit the following issue to arbitration. "Did the employer violate a settlement agreement of grievance number 27-20-010601-5153-01-03 when it refused to credit Mr. Sollitto with institutional seniority? If so, what shall the remedy be?"

## **BACKGROUND**

Sollitto was removed as a correction officer ("CO") in May of 2001 from Mansfield Correctional Institution ("MANCI"). Sollitto believes his removal was due to his popularity and aggressive stance against management while employed at MANCI. Sollitto's removal was properly grieved in accordance with Article 24 of the CBA by the union. Prior to the completion of the arbitration process, the parties entered into a settlement agreement dated December 4, 2001<sup>1</sup> to resolve all issues regarding his removal as well as other pending SERB charges. The

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<sup>1</sup> Sollitto and OCSEA staff representative, James Pagani ("Pagani") executed the settlement agreement on December 6, 2001. The employer representatives signed the settlement agreement on December 7 and December 10, 2001 (JX-2).

settlement agreement allowed Sollitto to transfer to Ohio State Penitentiary ("OSP") and contained the following provision:

"The Grievant shall have no break in service for purposes of state and institution seniority to OSP. The Grievant shall carry his institution seniority to OSP."  
**(Emphasis added).**

On December 12, 2001, Herman Whitter ("Whitter"), Esquire, Director of Dispute Resolution for OCSEA, contacted Michael Duco ("Duco"), Esquire, Manager of Dispute Resolution for the Office of Collective Bargaining ("OCB"), and indicated that Sollitto's institutional seniority from MANCI to OSP could not be transferred due to specific restrictions in the CBA. Article 16.01(B) defines institutional seniority as "...the total seniority credits accrued since the employee's last date of hire or transfer into the specific institution where the employee is currently employed; except that in the Department of Rehabilitation and Correction and the Department of Youth Services transfer of institutional seniority credits into newly activated institutions shall be as follows:

1. Bargaining unit employees who are transferred through the 30<sup>th</sup> day after the first youth or inmate (other than cadre) arrives shall carry with them their institution seniority credits;
2. Bargaining unit employees who are transferred after the 30<sup>th</sup> day from the time the first youth or inmate (other than cadre) arrives shall not be permitted to transfer institution seniority credits."

OCSEA believed that the settlement agreement exceeded the authority of Pagani and modified substantive terms and conditions of the CBA. OCSEA's role as exclusive representative for its' members was undermined due to the importance of this issue. At the hearing, OCSEA further argued that article 43.03 applied in that the appropriate signatures to effectuate a modification of the CBA were absent as well as, Article 25.03 prohibits the enforcement of the settlement agreement due to the language in paragraph 5, to wit-this arbitrator cannot modify the CBA.

Procedurally, OCSEA intervened in the ULP proceeding before SERB to defend its position that failure to grant Sollitto's institutional seniority from MANCI to OSP was proper. Sollitto was represented by Attorney Joseph Clark ("Clark") before SERB and in this matter.

OCSEA, thru witness, Bob Goheen ("Goheen"), Operations Director, emphasized the importance of institutional seniority and compared its significance similarly to wages and benefits. Institutional seniority involves areas such as days off, shifts and work assignments. A recent poignant example involved the closure of Orient Correctional Institution ("Orient"), and whether the employees could transfer their Orient seniority into an existing institution. A statewide referendum of OCSEA members occurred, and by a six (6) to one (1) majority vote it was resolved that Orient employees who transferred into an existing institution would accrue institutional seniority credits beginning the first scheduled work day. In short, transfer of institutional seniority was not allowed. Goheen added that in addition to Article 16.01 restrictions a Memorandum of Understanding ("MOU") executed in 1996 between OCSEA and DR&C controls. (JX9)

The MOU provides specific language for CO's who are promoted to a newly opened facility or COs who transfer from one institution into an existing institution. Paragraph 4 of the MOU forbids the CO from transferring prior institutional seniority from the parent institution into the existing facility. Goheen concluded that during his ten (10) years as Operations Director, he was unaware of any CO who received institutional seniority credit as a transferred employee into an existing facility.

Sollitto on the other hand, submits that the settlement agreement was violently breached when he was stripped of his institutional seniority contrary to paragraph 5 of the settlement agreement. The settlement agreement was negotiated while Sollitto was represented by the OCSEA and Sollitto's agreement to resolve all matters was based upon the information provided to him by Pagani. Simply, Pagani had either the express or implied authority to enter into the settlement agreement and Sollitto relied upon Pagani's experience in resolving his removal settlement. Curiously, the OCSEA and the State of Ohio engages in grievance

settlements that deviate from the CBA, but OCSEA's inability to explain this settlement agreement in light of the Orient transfers should not invalidate Sollitto's settlement agreement. In fact, if Sollitto had knowledge that he was unable to transfer his institutional seniority to OSP, the settlement agreement would not have been executed.

Moreover, despite protestations to the contrary by OCSEA the settlement agreement is non-precedent. Why would Sollitto agree to transfer to another institution (JX-2, paragraph 2) and be prohibited from transferring/promoting/demoting back to MANCI (JX-2, paragraph 6) for ten (10) years if no break in seniority was not part of the deal? The settlement agreement was a compromise facilitated by full participation by the OCSEA and executed in good faith. Sollitto seeks enforcement of the settlement agreement as originally agreed, or if any part of the settlement agreement violates the CBA, return Sollitto to MANCI with his previous institutional seniority restored.

The DR&C thru Duco defers to the OCSEA as the exclusive representative regarding seniority issues, but settlement agreement(s) can be amended by the OCSEA without the consent of the Grievant. Duco opined that Pagani exercised poor judgment and the adverse impact upon the OSP bargaining unit members were real if Sollitto was capable of transferring his institutional seniority to OSP. Article 43.03 is inapplicable herein in that, mid-term bargaining was contemplated not renegotiation. In other words, the formal process to amend the CBA in mid-term is allowed under Article 43.03 and the validity of this settlement agreement does not fall under the ambit of Article 43.03. The employer considers this matter somewhat unusual-but clearly defers to the OCSEA on issues involving seniority under the CBA.

### **ISSUE**

Did the employer violate a settlement agreement of grievance number 27-20-010601-5153-01-03 when it refused to credit Mr. Sollitto with institutional seniority? If so, what shall the remedy be?

**RELEVANT PROVISION OF THE CBA  
ARTICLE 16-SENIORITY**

**Section 16.01-Definition**

**B. "Institutional seniority"**- the total seniority credits accrued since the employee's last date of hire or transfer into the specific institution where the employee is currently employed; except that in the Department of Rehabilitation and Correction and the Department of Youth Services transfer of institutional seniority credits into newly activated institutions shall be as follows:

1. Bargaining unit employees who are transferred through the 30<sup>th</sup> day after the first youth or inmate (other than cadre) arrives shall carry with them their institution seniority credits;
2. Bargaining unit employees who are transferred after the 30<sup>th</sup> day from the time the first youth or inmate (other than cadre) arrives shall not be permitted to transfer institution seniority credits.

**ARTICLE 43-DURATION**

**Section 43.03-Mid-Term Contractual Changes**

The Employer and the Union have the power and authority to enter into amendments of the Agreement during its term constituting an addition, deletion, substitution or modification of this Agreement. Any amendment providing for an addition, deletion, substitution or modification of the Agreement must be in writing and executed by the Executive Director of the Union and the Director of the Department of Administrative Services or designee. Upon its execution, such amendment shall supersede any existing provision of the Agreement in accordance with its term and shall continue in full force and effect for the duration of this Agreement. All other provisions of this Agreement not affected by the amendment shall continue in full force and effect for the term of this Agreement. Memoranda of Understanding, amendments and any other mutually agreed to provisions, during the term of this Agreement, become effective upon the execution by the Deputy Director of the Office of Collective Bargaining and the President of the Union. In the event such Memoranda of Understanding amendments, or any other mutually agreed to provision require ratification by the union's membership, such ratification shall be made within sixty (60) days or such agreements shall be deemed ratified.

**ARTICLE 25-GRIEVANCE PROCEDURE**

**Section 25.03-Arbitration Procedures**

The arbitrator shall have no power to add to, subtract from or modify any of the terms of the Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement. **(In part).**

**DISCUSSION AND CONCLUSIONS**

After careful consideration of this matter, including all testimony and evidence of both parties, I find that the employer did not violate the settlement agreement when it refused to

credit prior institutional seniority to Sollitto upon his transfer to OSP from MANCI. My reasons are as follows:

Sollitto was apparently well liked and respected by his fellow union members while employed at MANCI. Sollitto's removal may have been motivated by the employers desire to silence his advocacy on behalf of his fellow union members. The anti-union animus issue is not before me for resolution. The OCSEA was active in grieving Sollitto's removal and moved the matter to arbitration which ultimately resulted in the settlement agreement (JX-2) which became the foundation for an ULP and this arbitration (JX-5). OCSEA and Sollitto parted ways when OCSEA determined that a clause in the settlement agreement violated Article 16.01 (B) and Article 43.03.

The seniority rights contained in Article 16 binds both the employer and the union- regarding the exercise of "administration of the system of employment preferences which pits the interests of each worker against those of all the other." See, Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv. L. Rev. 1532, 1535 (1962).

Sollitto accepts that the settlement agreement violates the language of Article 16.01(B) but rests on the theory that Pagani had the authority to do so and based upon previous settlements that deviated from the CBA this settlement agreement is valid. Sollitto submitted some evidence, but not persuasive, that alleged the CBA was not followed in accordance with the MOU and/or Article 16 at MANCI regarding seniority placement (JX-4). However, Sollitto provided no evidence of past practice where the OCSEA entered into any settlement agreement that allowed a grievant to receive institutional seniority as a transferred employee.

In fact, Pagani was asked by OCSEA to provide previous examples that allowed a CO to carry his/her full institutional seniority to an existing institution as a result of settlement (JX-6). No evidence was offered in this proceeding that suggest that institutional seniority was treated differently in other cases.

The language in Article 16.01(B) is unambiguous and only allows institutional seniority to follow bargaining unit employees into newly activated institutions under certain conditions. I find

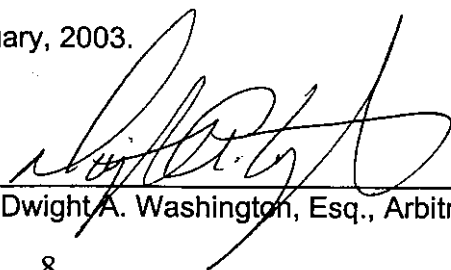
that paragraph 5 of Sollitto's settlement agreement violated Article 16.01(B) of the CBA and no persuasive evidence was offered to mitigate this finding. Pagani had authority to negotiate within the confines of the CBA to effectuate settlements. However, Article 16.01(B) is a clear manifestation that the seniority dates of employees who transfer from one institution to another shall be calculated in a specific matter. The impact upon the other bargaining unit members at OSP cannot be minimized if Sollitto was allowed to leap frog ahead in areas such as shift assignments and days off. See, ARCO Chemical, 102 LA 1051 (Massey, 1994). Considering the significance of the seniority rights provision in the CBA, only OCSEA as the exclusive bargaining representative for all its members could alter Article 16.01 (B)-not Pagani.

The remaining question for resolution is the impact of paragraph 5 upon the settlement agreement as a whole. The practical effect of Whitter's request to Duco (JX-3) was to amend the settlement agreement without Sollitto's agreement. DR&C and OCSEA contended, unrefuted, that a settlement agreement can be amended without the consent of the individual grievant. In fact, the settlement agreement by its terms is valid even if the grievant does not execute the agreement. The grievant's signature"... is only needed to obtain waiver of individual rights" (JX-2, p.2). Therefore, OCSEA with the consent of OCB are the proper parties to amend a settlement agreement, and the correction of paragraph 5 did not invalidate the other terms of the agreement since no waiver of individual rights is at issue.

#### **AWARD**

The settlement agreement in 27-20-010601-5153-01-03 was not violated by the employer when Sollitto's institutional seniority from MANCI was not transferred to OSP. Sollitto shall only received institutional seniority credits at OSP consistent with Article 16.01(B).

Respectfully submitted this 10th day of January, 2003.

  
Dwight A. Washington, Esq., Arbitrator