In the Matter of the Arbitration between	)	
	)	
OHIO PATROLMEN'S BENEVOLENT	)	
ASSOCIATION	)	FMCS No. 170131-00829-6
	)	Vacation Credit Accrual
and	)	
	)	Grievant: Cale Lewis
ATHENS COUNTY COMMISSIONERS	)	
	)	

BEFORE : Mark Lurie, Arbitrator

APPEARANCES

Ohio PBA : Mark Volcheck, Esq.
Athens County Commissioner : Jeffrey A. Stankunas, Esq.

This is a grievance arbitration decision issued pursuant to the collective bargaining agreement effective January 1, 2016 through December 31, 2018 (the "CBA") between the Athens, Ohio County Commissioners (the "County" or the "Department") and the Ohio Patrolmen's Benevolent Association (the "Union" or the "PBA") representing the Department's Full-Time Dispatchers of law enforcement and emergency service personnel ("Dispatchers.").

Upon due notice, the parties appeared at the prescribed arbitration hearing time and place: June 19, 2017 at 9:00 a.m. at the Athens County 911 Conference Room, 13 West Washington Street, Athens, Ohio 45701, where they presented their respective positions and the evidence in support of those positions. The advocates furnished written closing arguments that the Arbitrator received and exchanged by email attachment on August 16, 2017, as of which date the hearing was declared closed.

All bold font emphases in this decision are by the Arbitrator.

BACKGROUND

CBA Article 25.1 states that bargaining unit members will accrue vacation leave at increasing rates as their "years of service" increase.[1] The issue in this case is whether the parties intended for those years of service to be measured by the years employed by the State of Ohio and its subdivisions generally ("*State employment years*") or by the years employed by the Department alone.

Under Section 9.44 of the Ohio Revised Code ("*ORC 9.44*"), a public employee "is entitled" to credit for *State employment years*.[2] However, under CBA Article 34.1, the *ORC 9.44 State employment years* entitlement "shall not apply" unless the CBA "expressly" provides otherwise:

> *Article 34 - APPLICATION OF CIVIL SERVICE*
>
> *Section 34.1.* ***Except as may be expressly provided for in this agreement, Sections 9.44… shall not apply to employees within the bargaining unit****. Standing orders and policies where such order or policy does not conflict with an express provision of this agreement shall continue to apply to bargaining unit employees….*[3]

Nothing in the CBA "expressly provides" that *ORC 9.44* applies to this bargaining unit.

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1 CBA Article 25 - *VACATIONS*

Section 25.1. Vacation Crediting. All full-time employees will be entitled to vacation leave with pay as follows.

Years of Service	Biweekly Rate	Annual Rate
After one year	3.1 hours	80 hours - 2 weeks
Seven or more years	4.6 hours	120 hours - 3 weeks
Thirteen or more years	6.2 hours	160 hours - 4 weeks
Twenty or more years	7.7 hours	200 hours - 5 weeks

Thus, a Dispatcher who has worked for the County for 20 years earns 7.7 hours of vacation time per pay period.

2 Ohio Revised Code, Chapter 9: Miscellaneous

9.44 Prior public service counted in computing vacation leave.

(A) Except as otherwise provided in this section, **a person employed**, other than as an elective officer, **by the state or any political subdivision of the state, earning vacation credits currently, is entitled to have the employee's prior service with any of these employers counted** as service with the state or any political subdivision of the state, **for the purpose of computing the amount of the employee's vacation leave.** The anniversary date of employment for the purpose of computing the amount of the employee's vacation leave, unless deferred pursuant to the appropriate law, ordinance, or regulation, is the anniversary date of such prior service…

3 Here is the full text of Article 34.1:

Article 34 - APPLICATION OF CIVIL SERVICE

Section 34.1. **Except as may be expressly provided for in this agreement, Sections 9.44,** 124.01 through 124.387, 124.39 - 124.56, 325.19, and 4111.03 of the Ohio Revised Code, the Ohio Administrative Code Chapters 123 and 124, and any other civil service provisions related to a matter generally addressed within this agreement, **shall not apply to employees within the bargaining unit. Standing orders and policies where such order or policy does not conflict with an express provision of this agreement shall continue to apply to bargaining unit employees**. Further, Section 124.388 and 124.57 ORG shall continue to apply to bargaining unit employees.

CBA Article 34.4 states that "…the following contract articles… specifically supersede and/or prevail over those subjects described in the Ohio Revised Code… Contract Article 25, Vacations … Supercedes/ Prevails over ORC 9.44, 325.19…".

Article 34.1 first appeared in the parties' 2004-2006 collective bargaining agreement. For the ensuing decade, *State employment years* were <u>not</u> credited to bargaining unit members' vacation accrual rates; only their years of employment by the Department were. The meaning of CBA *Section 34.1* was not addressed by either party during their 2014-2016 CBA negotiations.

The CBA circumscribes the Arbitrator's authority:

> *Article 9, Grievance Procedure*
> *Section 9.5, Step 3*
>
> *The arbitrator shall limit his decision to a specific issue outlined in a submission agreement and strictly to the interpretation, application or enforcement of the specific Articles and Sections of this Agreement. The arbitrator shall be without power or authority to make any decision:*
>
> *A Contrary to, inconsistent with, or modifying or varying in any way the terms of this Agreement or applicable law;…*
>
> *C Contrary to, inconsistent with, changing, altering, limiting or modifying any practice, policy, rules or regulations presently or in the future established by the Employer so long as such a practice, policy, rule or regulation does not conflict with the Agreement.*

<u>FACTS</u>

Prior to joining the Department in June 2014, the grievant, Mr. Cale Lewis, worked for Trimble Local Schools, a State subdivision. When hired by the Department, he inquired of Ms. Melissa Fowler-Dixon (an Administrative Assistant for the Athens County Communications Office) as to whether he would be credited for his *State employment years*, and she told him that he would. Ms. Fowler-Dixon testified that she told Mr. Lewis this after having first consulted with Ms. Sally Stump, a staff member at the Athens County Auditor's Office. The County asserts that the information Ms. Stump gave Ms. Fowler-Dixon was mistaken.

Two years later, in October 2016, the Department notified Mr. Lewis that crediting his *State employment years* had been a mistake[4] and then reduced his vacation accrual rate by the amount of those *State employment years*: from 4.6 hours per pay period to 3.1 hours.[5] The Department also adjusted the accrual rates of six additional employees who had been credited with *State employment years* at about the time Mr. Lewis had. The six employees are not named grievants and this grievance is not a class action.[6] On October 25, 2016, the Union grieved the non-crediting of Mr. Lewis's public employment years as a violation of CBA Article 25.1 and of past practice.[7]

The County asserts that the application of *ORC 9.44*'s prior employment credit and the higher accrual rates that ensued between June 2014 and October 2016 were the result of a mistake.[8] Specifically, Ms. Fowler-Dixon testified that when Mr. Lewis was hired as a Full-Time Dispatcher in June 2014, he inquired about credit for his *State employment years*. In response, she – Ms. Folwer-Dixon – called Ms. Sally Stump in the County's Auditor's Office and asked for guidance. Ms. Stump told her to credit him for those *years*. Ms. Folwer-Dixon did so and, thereafter, six additional Full-time Dispatchers requested and were similarly granted credit for their *public employment years*. All six had been employed prior to Mr. Lewis and none had theretofore been credited for their *State employment years*.

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4 County 911 Administrative Assistant Melissa Fowler-Dixon sent Acting 911 Director Aaron Maynard an October 18, 2016 memorandum to that effect. The memorandum also included a statement of the rationale behind that provision. It was that Union employees already receive a vacation accrual rate higher than non-union employees:

weeks of leave	Union years of service	Non-Union years of service
2	1	1
3	7	8
4	13	15
5	20	25

5 The Department permitted Mr. Lewis to keep the vacation time he had accrued at the higher rate between June 2014 and October 2016.

6 The County did not retroactively debit vacation leave that had been credited to these dispatchers by reason of the inclusion of their public employment years in the setting of their accrual rates, but has thereafter applied the revised accrual rates.

7 The remedy requested was the following:

*ADJUSTMENT/REMEDY REQUIRED; Immediately rescind the reversal of vacation accrual rate and **follow past practices**; fully reimburse and reinstate all vacation credit/hours lost as a result of the employer's actions Identified In the attached email; fully reinstate the vacation accrual rate that had been reversed under the terms of the email.*

As noted, Mr. Lewis and the other six employees whose accrual rates were reduced were permitted to retain the vacation days they had accrued between 2014 and October 2016.

8 Quoting the County Commissioners' Step 2 decision in this grievance (in relevant part):

… no employees received credit for their prior public service [from 2004] until June 2014, when a mistaken belief between 911 and the County Auditor's Office about the CBA led to prior public service being credited to certain bargaining unit members in their vacation accrual rates. When that mistake was discovered in October 2016, it was promptly reviewed and corrected…

Ms. Folwer-Dixon testified that, at the time, she had not been aware of the applicability of CBA Article 34.1 and that she now assumes that Mr. Stump had been unaware of it as well.[9]

THE UNION'S POSITION

CBA Article 25.1 sets the rates at which vacation time is accrued. Those rates are based upon "years of service," a term that is not defined in CBA and could mean either years of service including *State employment years*, or years of service excluding them. The parties' conduct is the best evidence of the meaning that they intended to attribute to "years of service" and, from June 2014 to October 2016, they included *State employment years.*

The County's crediting of *State employment years* was not due to a mistake but rather was the Department's "standing order and policy." The evidence that it was a "standing order and policy was (1) that the crediting of *State employment years* ensued from Administrative Assistant Fowler-Dixon's "due diligence"[10] consultation with the Auditor's Office and (2) that it was paid during two consecutive collective bargaining agreements.

Because the crediting of *State employment years* was a "standing order and policy," CBA Article 34.1 prohibited the County from discontinuing it:

> *Article 34.1 …standing orders and policies where such order or policy does not conflict with an express provision of this agreement shall continue to apply to bargaining unit employees.*

Nothing in Article 25.1 conflicted with the crediting of *State employment years*.

9 Ms. Fowler-Dixon testified that Ms. Stump apparently had not considered that the CBA might preclude the non-applicability of ORC 9.44. Ms. Stump did not testify in this proceeding, and so whether she did or did not contemplate the non-applicability of ORC 9.44 is a matter of Ms. Fowler-Dixon's hearsay testimony. The Arbitrator finds that Ms. Fowler-Dixon's testimony does not, by itself, prove the reason for Ms. Stump's response.

10 The Union's term.

DECISION

ORC 9.44 creates an entitlement to have *State employment years* credited when computing the vacation leave accrual factor. CBA Article 34.1. withholds that entitlement from members of the bargaining unit, "except as may be expressly provided for in this agreement…" No such exception is provided for in the agreement.

The Union has argued that even if the CBA does not contain an express exception to Article 34.1's withholding of the regulatory entitlement, the County's conduct either (1) created a contractually binding past practice that should be given the same effect as an express contractual exception or (2) created a standing order and policy to which the County was bound by reason of CBA Article 34.1.

The Arbitrator finds as follows. As a general principle, a claim that the parties to a cba intended a subject at issue to be governed by other than their written agreement (e.g., by their conduct or past practice) must be proven by the party asserting the claim. If the subject matter is addressed to any degree in the cba, it is presumed that the agreement was intended to be fully dispositive. In this instance, the CBA stated that the entitlement created by *ORC 9.44* would not pertain except if the agreement "expressly provided" otherwise. The inference upon which the Union's claim of past practice is base is just that – an inference – and an inference is not an express provision. The ambiguity of the CBA Article 25.1 term "Years of service" must be resolved by referring to the CBA provision that addresses the subject matter: to wit, CBA Article 34.1's unambiguous denial of the *ORC 9.44* entitlement.

The County had the right to grant to bargaining unit members a *State employment years* entitlement that was contractually independent of the *ORC 9.44* entitlement. But there is no evidence that such an independent basis for vacation crediting was bargained over or memorialized as a contractual promise from the County to the Union. Nor would such a change in working conditions have been permissible without collective bargaining.[11]

As for the Union's claim that the crediting of *State employment years* was a County "standing order" or "policy" rather than a mistake, the Arbitrator finds that the evidence favors a mistake. The hallmarks of standing orders and policies are upper management decisions that are memorialized in written documents and then published. The exchanges between Ms. Fowler-Dixon and Ms. Stump did not evidence the engagement of any upper level management participation in the making of a new policy, nor the publication of same.

11 This becomes obvious if one considers the consequences if, arguendo, instead of increasing the vacation credit rate, the County had unilaterally decreased it.

Nor did the County furnish any new "standing order" or "policy" to the Union, as would have been required by CBA Article 16.3.[12]

AWARD

The grievance is denied.

Mark I. Lurie, Arbitrator August 28, 2017

12 CBA Article 16, Work Rules

Section 16.1.

The Union recognizes that the Employer, in order to carry out its statutory mandates and goals; has the right to promulgate work rules, regulations, policies and procedures consistent with the Employers statutory authority to regulate the personal conduct of employees, and the conduct of the Employers operations, services, programs and business.

Section 16.3.

Except in cases of emergency, such work rules, policies and procedures will be provided lo a Union-designated employee official and posted five (5) days in advance of their effective date.