

<b>In the Matter of Arbitration between</b>	:	
	:	<b>Grievance DNR-2022-06503-02</b>
<b>The State of Ohio,</b>	:	<b>(Re: Natural Resource Officer</b>
	:	<b>Cadet Promotions)</b>
<b>Unit 2 Association,</b>	:	
	:	
<b>Employee Organization,</b>	:	<b>Sarah Cole, Arbitrator</b>
	:	
<b>v.</b>	:	
	:	<b><u>OPINION AND ORDER</u></b>
	:	
<b>The State of Ohio,</b>	:	
	:	
<b>Employer.</b>	:	

**For Public Employer:**

Andrew Shuman  
Labor Relations Administrator  
Office of Collective Bargaining  
4200 Surface Road  
Columbus, Ohio 43228

**For Employee Organization:**

Kimberly Rutowski, Esq.  
Jeffery Gray, Esq.  
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30 Garfield Place, Suite 915  
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## **STATEMENT OF THE ISSUE**

Did the Employer violate Articles 7.01, 7.03, 31.05,<sup>1</sup> and 55.03? If so, what shall the remedy be?

## **PROCEDURAL POSTURE**

The State of Ohio (“Employer”) and the State of Ohio, Unit 2 Association (“Union” or “Ohio Unit 2”) (collectively, the “Parties”) entered into a Collective Bargaining Agreement (“CBA”) effective September 22, 2021, to June 30, 2024.<sup>2</sup> On October 30, 2022, the Union filed a grievance against the Employer, contending that the Employer violated the CBA when it refused to promote a Natural Resources Officer Cadet to Natural Resources Officer prior to the start of the field training program.<sup>3</sup> The grievance proceeded through the grievance steps of the CBA and came before Arbitrator Sarah Cole on April 5, 2023. The Employer objected to arbitrability at the arbitration hearing.

## **STATEMENT OF THE FACTS**

Ohio Unit 2 represents employees in the Parks and Watercrafts division of the Ohio Department of Natural Resources (“ODNR”). General ODNR policies govern these employees but the division also maintains its own policies, requirements, and restrictions for their incoming cadet classes.

The Employer treats Natural Resource Officer Cadets with an existing OPOTA certification and Cadets who do not have an OPOTA certification identically, except for the type of training the Cadets receive after the initial two-week departmental academy. Both OPOTA certified and non-certified Cadets are required to attend an initial two-week Natural Resource

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<sup>1</sup> Because the Union did not address the violation of this article in its brief, the Arbitrator concludes that the Union waived this claim.

<sup>2</sup> Joint Exhibit 1.

<sup>3</sup> Joint Exhibit 2.

Officer (“NRO”) training at the Ohio State Highway Patrol academy. This course covers officer water survival, taser certification, and an overview of departmental policies.

After the completion of the initial two-week academy, the cadets are separated into OPOTA certified and non-certified groups. Cadets that are OPOTA certified are assigned to patrol parks and waterways under the supervision of a Field Training Officer (“FTO”). OPOTA certified cadets work a standard 40-hour workweek. All Cadets in the field are responsible for maintaining their physical fitness and are required to pass a final fitness test, at the 50<sup>th</sup> percentile, with the academy Cadets. OPOTA certified Cadets are issued their service handgun, taser, shotgun, ASP, and pepper spray. They are required to wear their service uniform.

In contrast, non-certified Cadets attend the OPOTA academy. OPOTA academy Cadets have a unique training schedule. While at the academy, the Cadets engage in physical training and other activities. They typically work more than 40 hours per week. As a result, non-certified Cadets earn overtime pay or compensatory time. Cadets without OPOTA certification are not issued weapons or uniforms. Instead, Cadets in the OPOTA academy wear polos with navy dress pants. Non-certified Cadets do not issue citations or conduct policing activities.

After the Cadets receive their OPOTA certification from the academy and pass their final exams, the hiring group is reunited for the completion of further departmental training. After completion of this final training, Cadets are commissioned as Probationary NRO’s (“PNRO”) and are placed into the field and assigned an FTO.

The training track for NROs states that upon selection as an NRO, the following training is mandatory: (1) the completion of the Ohio Peace Officer Basic Training Program, (2) the NRO pre-service training, (3) the Field Training Program, and (4) the Officer Water Survival course.<sup>4</sup>

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<sup>4</sup> Union Exhibit 16.

In early 2022, the Employer posted a call for Natural Resources Officer Cadet applicants within the Division of Parks & Watercraft. The posting included an exhaustive list of the possible locations the Cadets would be stationed—after successful completion of training.<sup>5</sup> The posting also included a description of the training and responsibilities of the Cadet along with the benefits associated with the NRO position if the Cadet were to successfully complete the training. The posting stated that NRO Cadets will “spend time assisting commissioned officers with various law enforcement tasks such as patrolling assigned areas, assisting with arrests & investigations, conducting safety inspections on recreational vessels, and presenting public information & education programs.”<sup>6</sup> The posting stated, in all caps, that it invited applicants who were either OPOTA commissioned or non-commissioned. The posting also stated that NRO Cadets will attend an in-residence training academy for approximately 6 months where [the Cadet] will be trained on general law enforcement such as criminal laws, civil laws, laws of evidence, methods of arrest, search & seizure, investigative skills, handling of prisoners, court conduct, patrolling & enforcement techniques.<sup>7</sup>

In addition, the posting stated that NROs will perform, “law enforcement tasks such as patrolling and enforcing laws on state waterways, state parks, state forests and scenic river and natural preserves.”<sup>8</sup> After graduation, the NRO Cadets are promoted to NROs with an annual salary ranging from \$54,974 to \$70,096.<sup>9</sup>

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<sup>5</sup> Joint Exhibit 15, at p. 15-4.

<sup>6</sup> *Id.* at 15-3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

The Grievant, McCaulla, applied for the NRO Cadet position and was hired on July 18, 2022, as a part of Hiring Group 4. Hiring Group 4 also included Zachary Joseph, Robert Borsh, and Leah Nairn. The Grievant was the only Cadet with an OPOTA certification at the time of hire.

After the Cadets were hired, they attended a two-week initial NRO academy.<sup>10</sup> During that initial training, the Cadets were certified in tasters, officer water survival, and were instructed on departmental policies. After completion of the initial training, Cadets Joseph, Borsh, and Nairn were assigned to the Ohio State Highway Patrol Academy in Franklin County. The Grievant was assigned to Lake Loramie, Shelby County, for field training.

During field training, the Grievant was issued (1) a field training manual, (2) blank vessel safety check forms, (3) blank traffic citation forms, (4) a 2016 police cruiser, (5) keys to department-wide watercraft, and (6) alarm codes for Buck Creek and Lake Loramie State Parks. The other Cadets in his hiring group did not receive these items. Unlike the other Cadets, the Grievant was permitted to wear his protective vest, holster, handcuffs, and department issued non-lethal weapons immediately upon his arrival at Lake Loramie. He was permitted to wear his service weapon upon completion of firearms qualification on August 31, 2022. He was not, however, permitted to complete his rifle qualifications at the August 31, 2022 firearms qualification.

Throughout this period, the Grievant's FTOs, Lieutenants Siler and Heasley, supervised his daily activities. These activities included: patrolling, issuing citations, teaching courses and engaging in criminal investigations. On one occasion, he drove alone in his marked cruiser from Lake Loramie to the ODNR Central Office in Columbus and back, without a rifle.<sup>11</sup>

The Grievant also maintained his physical fitness, so that he would be prepared to take the physical fitness test, a required part of his pre-service training. A Union representative, Shaun

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<sup>10</sup> Joint Exhibit 4, at p. 4-1, 4-16, 4-31, and 4-31.

<sup>11</sup> *Id.* at 13-51.

Lentini, suggested to the Grievant that he ask his supervisor if he could take the physical fitness test earlier than October 19, 2022. Mr. Lentini believed that the Grievant could be promoted to PNRO more quickly if he passed the test. The Grievant's supervisor did not permit him to test early, stating that he wanted to keep Grievant on the same track as the other Cadets.

After the OPOTA Cadets passed their final exams, the Grievant rejoined them at Dillon Park to complete pre-service training. All members of Hiring Group 4 received their commissions as Probationary NROs on March 14, 2023. Afterwards, the OPOTA Cadets were issued citation books, vessel safety check forms, FTO manuals, and began receiving DORs.

I. Is this Grievance Arbitrable?

The Employer contends that this grievance was not timely filed and is therefore not arbitrable. The grievance procedure in the Parties' CBA states:

An employee having a grievance shall file a grievance in the electronic grievance system within twenty (20) days of the day on which the grievant knew or reasonably should have had knowledge of the event giving rise to the grievance. Grievances filed beyond the twenty (20) day time limit will not be honored.<sup>12</sup>

Here, Mr. Lentini, the Grievant's union representative, filed the grievance on behalf of the Grievant on October 30, 2022. The Employer contends that the grievance was either late or premature. According to the Employer, the grievance should have been filed within twenty days of the Grievant's placement in field training, which occurred on August 29, 2022. Alternatively, the Employer contends that the grievance was filed prematurely, as the grievance could not materialize until the Grievant passed the physical fitness test at the 50<sup>th</sup> percentile on January 4, 2023, because passing the fitness test was a requirement of promotion.

The grievance is arbitrable. Testimony established that the Grievant did not believe he could be promoted until he passed his physical fitness test at 50%. The Grievant testified that he reached

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<sup>12</sup> Joint Exhibit 1, at p. 40.

out to his supervisor to determine whether he could be promoted if he passed the test at 50%, and his supervisor stated that he would not be permitted to pass the test until his fellow cadets were permitted to pass the test. Then, on October 19, 2022, the Grievant took another fitness test, passed at the 50<sup>th</sup> percentile level, and was not promoted. The grievance was filed on October 30, 2022, within 20 days of this event. Thus, this claim is arbitrable.

II. The Employer's Pre-Service Training Requirement Does Not Violate the CBA Provisions 7.01, 7.03, or 55.03

Section 55.03 of the CBA states, in pertinent part, that “[i]n the pay period following successful completion of the Pre-Service Training program, . . . Natural Resource Officer Cadets shall be promoted to . . . Natural Resource Officer . . .” Despite “Pre-Service Training” being a capitalized term, the Parties did not indicate that the CBA defined it. Moreover, the Union conceded at the hearing that the Employer has the authority to modify the Pre-Service Training program. It nonetheless contends that a National Resource Officer Cadet necessarily must have completed the Pre-Service Training program before being put into “service”. And the Union defines “service” as the time when a NRO is assigned to an FTO in the field. Here, that occurred for Grievant, on August 30, 2022.

The Employer counters that a Cadet completes the Pre-Service Training program when the Cadet passes their physical fitness test and completes the final training, which Cadets participate in as a group. In the Grievant's case, that occurred in January 2023 (for the physical exam) and February 2023 (completion of final training). Because the CBA does not mandate promotion to NRO until the Pre-Service Training program is completed, and the Employer has authority to articulate the contents and duration of that program, the Employer's unwillingness to promote the Grievant before the other members of Hiring Group 4 does not violate Section 55.03 of the CBA. That the Grievant engaged in tasks different from other members of the Hiring Group is

immaterial. The posting for the position specifically notes that the Employer may hire both OPOTA-certified and non-OPOTA-certified cadets. Given that the CBA authorizes the Employer to specify and modify the Pre-Service Training program, it is not at all surprising that the Employer may wish to specify a different program for an OPOTA-certified Cadet than for a Cadet who lacks such certification. In any event, as the Union concedes that the Employer has authority to shape the contours of the Pre-Service Training program, the Employer's decision to adopt a dual-prong approach that treats certified Cadets differently is not a CBA violation.

Separately, the Union contends that the Employer must classify a Cadet as a NRO before putting that Cadet into the field, as allowing an officer to work in the field while classified as a Cadet would erode the NRO bargaining unit, thereby violating Articles 7.01 and 7.03. The latter provision states that: "Management shall not attempt to erode the bargaining unit, the rights of bargaining unit employees, or adversely affect the safety of employees." According to the Union, "[i]f NRO cadets are permitted to complete tasks assigned specifically to NROs then the NRO classification loses work." Relatedly, the Union contends that the Employer eroded the NRO bargaining unit when it failed to pay the Grievant at the NRO rate of pay. Both arguments make some sense. Wide-spread use of Cadets to perform NRO work could negatively impact the work available to members of the latter bargaining unit. And if NRO tasks are performed at a lower-than-NRO rate, that creates an economic benefit for the Employer not contemplated under the CBA.

The problem, though, is that the evidence does not show that the Grievant took away any NRO duties even though he engaged in many NRO activities. Unlike other members of the bargaining unit, the Grievant was supervised. Arguably, the Grievant's placement in the field provided more work for the NROs, not less. When the Grievant was in the field, at least two NROs



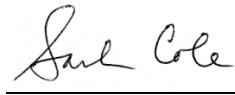
(on different occasions), who were also FTOs, acted as Grievant's supervisor, as the Grievant could not engage in NRO work without supervision. Because Grievant's placement in the field under the Cadet classification did not reduce NRO work available to other NROs, the Union has failed to establish that such a placement eroded, or was an attempt to erode, the bargaining unit.

That same observation also dooms the Union's argument about erosion predicated on the Employer's failure to pay the Grievant at the NRO rate of pay. Because the Grievant required direct supervision from an NRO, the Employer was not obtaining NRO duties at a lower-than-NRO rate. In short, the Grievant's field placement was intended to provide him greater on-the-job training, but only with FTO supervision. Because he was not acting as a NRO, he was not entitled to NRO pay.

Finally, the Union contends that the Employer violated another aspect of Article 7.03. Specifically, that provision also states, in relevant part, that Management shall not "adversely affect the safety of employees". Here, the Union claims the Employer created a safety issue when it refused to qualify and issue the Grievant a patrol rifle. True, the Employer issued the Grievant a handgun and shotgun after he completed firearms qualification on August 31, 2022. But the Union asserts that a rifle provides greater protection to a NRO than do other weapons and that failure to provide the Grievant with a rifle put the Grievant at greater risk. As the Employer notes, however, Grievant's safety was not jeopardized during the timeframe at issue. In addition, other than the one occasion when he rode alone in his marked cruiser as he drove from Lake Loramie to the ODNr Columbus office and back, a FTO always supervised him, and the FTO of course had a rifle. The singular incident in which he drove to Columbus did not result in any harm to the Grievant and is *de minimis*. Because a FTO with a rifle was with the Grievant, the Employer did not adversely impact his safety, and thus did not violate this aspect of Article 7.03.

The grievance is denied.

Date: May 23, 2023

A handwritten signature in cursive script, reading "Sarah Cole", positioned above a horizontal line.

Arbitrator Sarah R. Cole