

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Public Safety
State Highway Patrol

-and-

THE FRATERNAL ORDER OF POLICE
Ohio Labor Council, Inc.
State Unit I

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* Case Number I JD 2-86
* OCB Number ~~86-5~~ 86-26
* Patrol Number 2034
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* Decision Issued
* May 4, 1987
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APPEARANCES

FOR THE STATE

Captain J. M. Demaree
Lt. D. L. Anderson

Personnel Officer
Management Representative

FOR THE FOP

Paul L. Cox
Edward F. Baker
Larry K. Phillips

Executive Director
Staff Representative
Grievant

ISSUE: Article 36, Section 36.01 -- Whether the Patrol properly
included service as Cadet Dispatcher in seniority calculations.

Jonathan Dworkin, Arbitrator
16828 Chagrin Boulevard
Shaker Heights, Ohio 44120

SUMMARY OF DISPUTE;
THE ISSUE

The Collective Bargaining Agreement between the Fraternal Order of Police (Ohio Labor Council, Inc.) and the Ohio State Highway Patrol, Article 36, Section 36.01, defines "Seniority" as, "the total length of continuous service in a permanent full-time position or succession of positions with the Employer." An employee's seniority carries certain benefits and privileges. Most notably, the greater an individual's length of continuous service, the more likely s/he is to obtain choice vacation picks, shift preferences, vacancy bids. Accordingly, the way in which seniority is calculated influences a State Trooper's working conditions.

This dispute illustrates how factors used to determine seniority can enhance or diminish entitlements. Grievant is a State Trooper with six years' continuous service. Recently, his position on the seniority list was reduced below that of another employee; as a result, he lost his shift preference. Before April 28, 1986 when the new Agreement became effective, Grievant's position on the list was ahead of the other employee's. Subsequently, the Patrol interpreted Article 36, Section 36.01 as a mandate to calculate all full-time continuous service into seniority, and this led to inclusion of the other employee's three years as a Cadet Dispatcher in his service accumulation. Grievant joined the Patrol as a Trooper;

he had no previous employment as a Cadet Dispatcher. The addition of three years to the other Trooper's seniority caused an exchange of positions, and Grievant was the loser.

The FOP grieved, contending Cadet Dispatchers are not "permanent, full-time" employees and, therefore, crediting their service to Trooper seniority violates both the language and intent of the Seniority Clause of the Agreement. The Patrol disagreed, noting that the Cadet Dispatcher Classification is designed as a training program for Troopers. Almost without exception, members of the Classification become State Troopers upon completing the program. Every Cadet Dispatcher works full-time and is regarded as a permanent employee. The Patrol maintains that these facts dispose of the grievance -- that there was no contractual option other than to include Cadet-Dispatcher service in seniority.

The grievance remained at issue and the FOP appealed to arbitration. It was heard in Columbus, Ohio on December 12, 1986. At the outset, the parties agreed that the submission to arbitration was procedurally correct. The stipulated issue was:

Is the Patrol's "Cadet Dispatcher" position a "permanent full-time position" within the meaning of Article 36, Section 36.01 of the Collective Bargaining Agreement of the parties, so that a bargaining unit member's time in that position may be included in the total length of continuous service? If not, what shall the remedy be?

Arbitral authority to resolve the issue is subject to the following jurisdictional limitations outlined in Article 20, Section 20.07 of the Agreement:

6. Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

When the hearing concluded, the Representatives of the parties obtained additional time for briefs.

THE FOP'S POSITION

In order to understand the FOP's arguments, it is important to recognize that the current Agreement represents the first collective-bargaining undertaking by the parties. Previously, the labor-management relationship was governed by civil service statutes and regulations. Years of functioning under civil-service concepts strongly influenced attitudes and perceptions of the negotiators. According to the FOP, one of the terms in Article 36, Section 36.01, "permanent . . . position," was defined by Ohio law. Reference to Ohio Revised Code §§123:1-47-01(A)(67)&(80); 124.26;

124.271; and 124.30 discloses a clear distinction between "permanent" and "provisional" employees. Permanent employees obtain their positions by successfully passing examinations. Provisional employees are appointed without examinations. Provisional employees can become permanent without exams, but only after they serve in their classifications two years. Ohio Revised Code §124.271 provides in part:

Any employee in the classified service of the state . . . who is appointed provisionally . . . and who remains in provisional status in the same classification for a period of two years of continuous service, during which period no competitive examination is held, becomes a permanent appointee in the classified service at the conclusion of such two year period.

The FOP contends that Cadet Dispatchers are provisional, not permanent; they are appointed without competitive examinations.

The FOP argues that its negotiating team and the State's implicitly accepted the statutory definition of "permanent position." The seniority provision was thoroughly considered at the bargaining table. Proposals were met with counter-proposals. But the first sentence of Article 36, Section 36.01, which sets forth the factors determinative of seniority, was not discussed. Minutes of negotiating sessions record no comment by either party on the subject. The definition ultimately agreed upon mirrored the FOP's initial language. The FOP maintains that its negotiators knew what their

proposal meant. There was nothing obscure or ambiguous about it; the State's negotiators were also aware of the meaning. Both parties understood from their experience with civil service that an appointment without an examination is not permanent; it is provisional. The FOP argues that after the Agreement was in place the Patrol unilaterally changed the commonly understood definition by lumping permanent employment with provisional in its seniority calculations. In the Unit's judgment, this constituted a clear departure from the State's contractual commitment, and the grievance should be sustained. The remedy requested is a directive requiring the Patrol to reform the seniority list.

THE PATROL'S POSITION

The Cadet Dispatcher position has been part of the State Highway Patrol for thirty years. It is a unique job and its title may be something of a misnomer. Cadet Dispatchers are actually in training to become Troopers. They constitute a reservoir of underage Trooper candidates who serve up to three years and then immediately transfer into Cadet training without breaks in service. State law provides that individuals younger than twenty-one are ineligible for training as Troopers, but eighteen-year-olds can be hired as Cadet Dispatchers and receive three years' advance experience for Cadet Trooper training. Providing such experience has

always been the underlying purpose of the Cadet Dispatcher Classification. Incumbents work full time and, according to the Patrol, are considered to be permanent employees from the moment they are hired. The Patrol maintains that the State and the Bargaining Unit alike historically recognized that, despite the fact that appointments are without competitive examinations, Cadet Dispatchers are full-time and permanent.

With regard to handling communications, the work of Cadet Dispatchers is fundamentally indistinguishable from that of Highway Patrol Radio Dispatchers. However, a comparison of job descriptions discloses some profound differences. In general, Radio Dispatchers receive and transmit radio communications, operate the telecommunications computer system, maintain logs, and greet visitors. Cadet Dispatchers do all of that and, in addition, the following functions are added to their Classification:

FUNCTION: Under close supervision from highway patrol lieutenant, participates in law enforcement activities designed to provide training and experience . . .

<u>RANK</u>	<u>% OF TIME</u>	<u>JOB DUTIES</u>
1	37-43	Participates in law enforcement activities designed to provide training & experience (e.g., traffic enforcement, motor vehicle & aircraft accident investigations, criminal investigations, patrolling techniques, rules of evidence and court procedures, driver license & vehicle registration enforcement).

The Patrol concludes that the Cadet Dispatchers are permanent employees hired into a promotional track. This has been the understanding over the entire thirty years the Classification has existed. Although civil service examinations are not given Cadet Dispatchers, the Ohio Department of Administrative Services has always regarded the position as both full-time and permanent. This fact is verified by Personnel Action Forms which the Patrol introduced into evidence.

In its post-hearing brief, the Patrol alleges that FOP negotiators knew of this background and were fully aware of the likelihood that Cadet-Dispatcher experience would be calculated into seniority once the Agreement became effective. Despite that knowledge, the FOP bargaining team did nothing to circumscribe the plain, jointly recognized meaning of "permanent full-time position" in Article 36, Section 36.02. The Patrol charges that the Bargaining

Unit is now attempting to amend the Agreement in arbitration.

These arguments were expressed in the brief as follows:

It should be pointed out that the Department of Administrative Services does not give civil service tests for the position of Cadet Radio Dispatcher, due to the unique nature of the position. As was previously pointed out, the Cadet Radio Dispatcher position was formulated so that Highway Patrol would have a reserve of qualified candidates who would be eligible to enter future academy classes.

The Union was very much aware of the Cadet Dispatcher position at the time of negotiations and could have limited contractual seniority to bargaining unit members at that time. However, they chose not to do so. They are, in effect, now wanting the Arbitrator to rewrite the contract to exclude the Cadet Radio Dispatcher position from the calculation of seniority.

For the Union to prevail in this matter, it would have been necessary for them to define seniority as a function of length of service in the bargaining unit. Clearly, this was not done.

The Employer has not acted in a capricious, arbitrary or discriminatory manner by including previous Cadet Radio Dispatcher time in the calculation of seniority, nor is management's position unreasonable since Cadet Radio Dispatchers are considered "full-time permanent" employees.

OPINION

The resolution of this controversy rests entirely on defining the contractual word, "permanent." Cadet Dispatchers are unquestionably full-time employees. Their jobs meet both contractual and legal descriptions of full-time employment. Cadet Dispatchers are routinely scheduled to work forty hours per week and not less than eighty hours per pay period. The FOP does not seriously challenge the characterization of the job as full-time; it maintains only that Cadet Dispatchers are provisional rather than permanent.

Normally, contractual language which is clear and unambiguous, will be given its plain, commonly understood meaning. If such interpretation is applied in this case, the grievance will fail because Cadet Dispatchers are permanent employees according to concepts recognized in the labor-management community. Their appointments are for interminate durations. Upon reaching twenty-one years of age, they move immediately into Trooper Cadet training and then to employment as Troopers. They experience no predictable break in service. However, the FOP urges that the word, "permanent" is a term of art -- a word having special and individual significance to these parties. It contends that when it introduced the language of Article 36, Section 36.01, it intended that seniority would be accumulated only by individuals whose jobs meet the statutory description of permanency. The FOP argues it never pro-

posed or agreed to seniority accumulations for provisional employment.

The FOP's position is provocative when viewed only in light of the statutes. "Permanent" is a specific term under State law. Its meaning is somewhat more obscure under law than under dictionary and employment-relations definitions. The FOP does not accept the ordinary meaning as appropriate to its contractual Seniority Clause. It maintains that the statutory distinction between permanent and provisional employees was incorporated into the Agreement and should be observed by the Arbitrator.

The determination of whether Cadet Dispatchers are or are not permanent employees cannot be made entirely from the sterile confines of statutory language. The Patrol's understanding is fostered by thirty years of custom, throughout which Cadet Dispatchers were recognized by the Department of Administrative Services as permanent. Past personnel actions confirm that the Classification has been carved out by the State as permanent even though it is exempt from civil service examinations. The Patrol logically interprets the seniority language of the Agreement from this historical perspective. It had justification for its interpretation in view of the many years of background and custom.

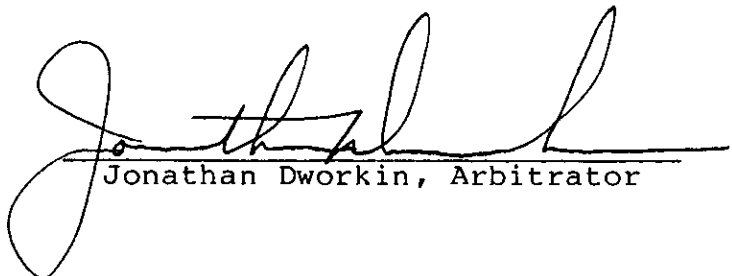
The FOP, through this grievance, attempts to obtain contractual recognition of the statutory differentiation between permanent and provisional employment despite thirty years of official non-

observance of the distinction. Of course, if this was the FOP's goal, its negotiating team had every right to pursue it at the bargaining table. But the negotiators were silent on the subject. They simply adopted the contractual word "permanent" without defining it. The Arbitrator finds that the contractual lack of definition weighs heavily in the Patrol's favor. In interpreting management-labor contracts, arbitral priority is to discover mutual intent. While Ohio law may provide a clue to bargaining intent, it is not dispositive of it. It does not create a presumption immune to contrary evidence and arguments. The long history of regarding Cadet Dispatchers as permanent employees is markedly more persuasive than definitions at law. This background was or should have been the foundation for mutual understanding. Accordingly, employment time in the Cadet Dispatcher Classification was properly credited in seniority calculations. The grievance will be denied.

AWARD

The grievance is denied.

Decision Issued:
May 4, 1987



Jonathan Dworkin, Arbitrator