

ARBITRATION AWARD SUMMARY

OCB Award Number: 282

OCB Grievance Number: G87-1529 Bruce M. Waters

Union: FOP

Department: OSH P

Arbitrator: Jonathan Dworkin

Management Advocate: Capt. John Demaree

Union Advocate: Paul Cox

Arbitration Date: 11-13-87

Decision Date: 5-26-89

Decision: Denied

CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Public Safety
Ohio Highway Patrol

-and-

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

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* OCB Number 87-1529
* Patrol Number 225
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* Decision Issued
* May 26, 1989
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APPEARANCES

FOR THE STATE

Captain J. M. Demaree
Sergeant Richard G. Corbin
Lieutenant J. R. Hedlesten

Patrol Advocate
Labor Relations Representative
Aviation Section Commander

FOR THE FOP

Paul L. Cox
Edward F. Baker
Trooper Bruce M. Waters

Attorney for the FOP
Staff Representative
Grievant

ISSUE: Articles 2, 5, 7, and 30: Claim that vacancy filled by lateral transfer of a Sergeant should have been posted for Bargaining Unit bids.

Jonathan Dworkin, Arbitrator
P.O. Box 236 - 9461 Vermilion Road
Amherst, Ohio 44001

SUMMARY OF DISPUTE

The grievance protests the way in which the Ohio Highway Patrol filled an Aviation Section vacancy. Before April, 1987, the workforce assigned to state-wide flight patrols consisted of five Sergeants and five Troopers. Adoption of the first (and only) Collective Bargaining Agreement in 1986 resulted in recognition of a Unit of Troopers and other classifications; Sergeants were excluded. The Aviation Section remained unchanged. Its composition of Sergeants and Troopers continued to include five of each.

A Sergeant retired from the Aviation Section on April 17, 1987, creating a vacancy. The Patrol filled the opening by laterally transferring another Sergeant, and this grievance resulted. It was initiated primarily on behalf of a Trooper who is a highly qualified airplane pilot -- perhaps better qualified than the Sergeant who took the vacancy. If the opening had been posted for bids, Grievant and possibly other members of the Bargaining Unit would have applied. One of them undoubtedly would have been the successful candidate.

Article 30, §30.01 of the Agreement pertains to transfers and establishes a bidding-selection procedure based on ability and seniority. It provides:

§30.01 Transfers

Members of the bargaining unit will be transferred as provided below:

Should the Employer desire to fill a position by transfer, the position will be posted at all Highway Patrol facilities for a period of seven (7) calendar days. All personnel in the affected classification shall have the right to bid on the position. Selection of the person to be transferred shall be based upon ability and seniority. If no bid is received, the most junior employee shall be transferred.

The grievance claims that bypassing the bidding process and transferring an exempt employee violated §30.01. In addition, it charges that Article 2 (preservation of past practices) and Article 7 (non-discrimination) were violated as well. The discrimination charge relates to the fact that Grievant had an active request for transfer to the Aviation Section on file since October, 1981. He maintains that the Patrol's refusal to consider him for the vacancy solely because of his status as a nonexempt employee was contrary to the following language in Article 7:

Neither party will discriminate for or against any member of the bargaining unit . . . for the purpose of evading the spirit of this Agreement

As to remedy, the grievance demands that §30.01 be applied to this and all future vacancies in the Aviation Section. The immedi-

ate relief requested is an award directing the Patrol to vacate the transfer and post the job for bids.

The grievance was denied by the State. It remained unresolved throughout the preliminary levels of the grievance procedure, and the Union appealed to arbitration. A hearing convened in Columbus, Ohio on November 13, 1987. At the outset, the parties agreed that the matter was properly advanced through each Step and there were no procedural challenges to arbitrability. However, the State did challenge substantive arbitrability. It pointed out that the position had been vacated by a Sergeant. It was a supervisory job to be filled at Management's discretion. In his opening statement, the Advocate for the Employer highlighted the argument:

The position in question is that of Highway Patrol Sergeant. Sergeants are not members of the bargaining unit, therefore, the position in question is not subject to the grievance procedure.

The language in Article 30, dealing with transfers was crafted by the Fact Finder, Dr. Harry Graham. The intent of this section was to prevent the Employer from imposing its will upon employees by transferring them against their wishes. Secondary in intent was to insure equity in filling transfers, which is provided by the "seniority and ability" language. Article 30 applies to "members of the bargaining unit" only.

PRELIMINARY ARBITRAL CONCLUSIONS
THE ISSUE DEFINED

Arbitrability. The pivotal question is whether or not the opening in the Aviation Section fell within the Bargaining Unit's jurisdiction. If it did, the transfer was improper. If the position was legitimately exempt, however, neither Grievant nor any other represented employee had a claim to it through job bidding. Obviously, §30.01 pertains to work covered by the Agreement, not supervisory or excluded jobs. The language of the provision itself warrants this conclusion. It states that those eligible to bid for transfers are "all personnel in the affected classification." It logically follows that Grievant, despite his abilities, was not entitled to bid for the vacancy if the affected classification was Highway Patrol Sergeant. The Union can prevail only if the Agreement, binding past practice, or mutual understandings confirm that the work of the job belonged to the Bargaining Unit and was covered by the Agreement.

The State's challenge to arbitrability begs this question and presumes the answer. According to Article 20, §20.02, the only disputes which are arbitrable are those stemming from alleged violations of specific contractual language. The Agreement pertains only to classifications over which the Bargaining Unit has obtained rep-

resentational recognition. Transfers and promotions of employees in exempt classifications are not covered by language in the Agreement. Therefore, if the opening did not contemplate Bargaining Unit work, the grievance is non-arbitrable. But such determination will also result in an award denying the grievance. The problem is that the arbitrability issue can be decided only in the bright light of hindsight -- after the other issues and arguments have been examined and resolved. Accordingly, the Arbitrator finds that the dispute over arbitrability is really a diversion which confuses the issue and adds no content to the State's position.

Past Practice. Past Practice might have had a role in this dispute if there were any binding practice with respect to filling vacancies in the Aviation Section. But the party relying on a practice always has the evidentiary responsibility to establish that it exists, and the Union failed to meet that responsibility. While the grievance alleges that Troopers uniformly have been transferred into flight openings and later promoted to Sergeant, the evidence does not support the allegation. None of the Union's witnesses could recall a single instance in which a Trooper was transferred into an Aviation position vacated by a Sergeant. On the other hand, the State produced a significant amount of credible testimony confirming that the policy followed for years has been to transfer Sergeants into Sergeant vacancies.

The record provides no basis for the Arbitrator to consider the Union's past-practice arguments.

Discrimination. In common idiom, the word "discrimination" signifies the grant of an unfair advantage or imposition of an arbitrary disadvantage based on impermissible considerations. That is the meaning ascribed in Article 7 of Agreement which prohibits discrimination against members of the Bargaining Unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, "or for the purpose of evading the spirit of this Agreement." The truer meaning of the word is, "recognition of differences," and in that sense the State did discriminate. It recognized a difference between Bargaining Unit and exempt personnel. The Patrol transferred an exempt employee into the opening because it regarded the position as exempt.

The Patrol's action clearly did not violate Article 7. The decision on how to fill the vacancy was not premised on any invidious or prohibited factors. It was based entirely on Management's perception that the position was excluded from the Bargaining Unit by contract, custom, and because of its job content.

The Arbitrator finds the discrimination claim to be without merit.

The Relevant Issues. In the Arbitrator's judgment, this dispute cannot be adequately examined or decided without reference to Article 5, §5.01, the Recognition Clause of the Agreement. Curiously, neither party referred to this provision, but both presented evidence focusing on it. Section 5.01 states in pertinent part:

§5.01 Bargaining Unit

The Employer hereby recognizes the Fraternal Order of Police, Ohio Labor Council, Inc., as the sole and exclusive bargaining agent . . . for employees in the bargaining unit. The bargaining unit for which this recognition is accorded is defined in the Certification issued by the State Employment Relations Board on September 3, 1985 (Case no. 85-RC-04-3501). This Agreement includes all permanently appointed full and part-time employees employed in the Department of Highway Safety, Division of the Ohio Highway Patrol in classifications and positions listed in Appendix A of this Agreement.

Appendix A, which is located at the back of the Agreement, is a list of job titles without definitions. The list is headed by the classification, "Highway Patrol Trooper."

The real issue is whether the Aviation Section vacancy was that of Highway Patrol Trooper and, therefore, included in the Agreement, or that of Highway Patrol Sergeant, excluded from the Agreement. It bears emphasizing that a position title is more than just a name. It is an aggregation of job components. The compo-

nents which define each classification are known and understood by the parties. Their knowledge of the distinctions between tasks of Troopers and Sergeants predates the Agreement by a great many years. This controversy calls upon the Arbitrator to evaluate the tasks of the vacancy to determine whether it was exempt or nonexempt.

ADDITIONAL FACTS AND CONTENTIONS

The fact that a Sergeant held the job in question before it was vacated creates a presumption favoring the State's contention that the vacancy was exempt. But the presumption is a rebuttable one.

A difficulty in this case is that the line dividing Sergeants and Troopers is often blurred; the distinction is not a clean one. Both classifications conduct accident, complaint, and felony investigations. Both conduct manhunts, make arrests, administer first aid, and are generally responsible for public safety. Both keep records, make reports and, in the Aviation Section, both classifications fly. The main difference is that Sergeants have supervisory and administrative functions not shared by Troopers. They are the first-line supervisors who direct Troopers in the field and serve as intermediary liaisons between Bargaining Unit personnel and higher ranks of Patrol Management.

Ordinarily, there are three Sergeants assigned to a Patrol post -- one each shift. The Aviation Section has five Sergeants, one for each quadrant. Unlike ordinary posts, the Section conducts air patrols by quadrants in all eighty-eight counties of the State of Ohio. The quadrant scheme for state-wide coverage was developed and implemented in 1984. Most of the flying in each quadrant is performed by Troopers, although Sergeants also patrol on a regular basis. In addition to flying, Sergeants handle administrative and supervisory duties in their assigned quadrants.

In reality, the Patrol gave little attention to the functions of the position when it transferred a Sergeant into the Aviation Section opening. It simply followed its custom of filling Sergeant vacancies with Sergeants. The grievance caused Management to re-examine its action, and convinced it that the transfer was sound. If the job had been posted and filled by a Trooper, there would have been no first-line supervisor for the quadrant. Moreover, there would have been no one to handle the volume of administrative functions performed by the retiring Sergeant. The Patrol concluded that the vacancy was a bona fide Sergeant position and that the grievance was ill-founded.

The Union contends that the Aviation Section's ratio of Sergeants to Troopers is artificially skewed -- that in reality most if not all of the jobs occupied by Sergeants are composed of Bar-

gaining Unit functions. The Sergeant classification is top heavy, according to the Union, for reasons having nothing to do with operational needs. The Union charges that "critical administrative functions" of Aviation Sergeants are virtually nonexistent. They consist of clerical "paper shuffling" which absorbs perhaps a half hour per shift. The Union contends that it is absurd to call the Sergeants "supervisors." For the most part, they do the same job as Troopers -- they fly aircraft. The Union insists that the vacancy belonged to the Bargaining Unit and that the State breached its obligation to post and fill it pursuant to Article 30, §30.01.

OPINION

The arguments of both parties were supported by little in the way of concrete, confirming evidence. Neither the State nor the FOP was able to demonstrate convincingly that the job in question was either entirely exempt or entirely nonexempt. Each side argued vehemently and persuasively for adoption of its position, but their arguments produced more heat than light.

The dearth of probative evidence did not result from any flaw in advocacy; it was symptomatic of the job itself. There is no solid definition; no clear line of demarcation. The fact is that the Sergeant and Trooper classifications in the Aviation Section

overlap to a very significant degree. Sergeants do have some light administrative duties over and above those assigned to Troopers. They also have supervisory authority. The Union's evidence convinces the Arbitrator, however, that during most of the hours of any shift the salient distinction between Sergeants and Troopers is more one of rank than anything else.

According to undisputed evidence, there have never been more than five Troopers in the Aviation Section. At times there were more Sergeants than Troopers in the Section, but no witness could point to any period in the last twenty years when the balance favored Troopers. For at least two years before the Agreement was adopted, the number of Troopers equaled the number of Sergeants. This equality was carried forward during the term of the Agreement and was not challenged until the grievance was initiated.

The fact that Sergeants perform functions identical in most respects to those performed by members of the Bargaining Unit does not prove the Union's premise. What it does prove is that some Aviation Section work is shared by both classifications. The shared responsibilities were implicitly recognized when the Agreement was adopted. It was then that the represented and nonrepresented jobs were identified by mutual understandings. The separations were distinguished by the rank of the individual in each position.

In the Aviation Section, there were five Sergeants and five Troopers. The slots held by the Troopers were in the Bargaining

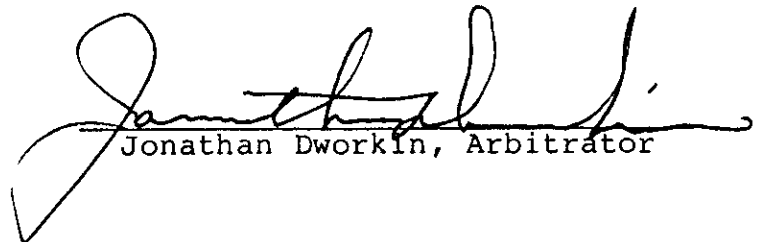
Unit; those held by the Sergeants were not. The Patrol did not violate its contractual obligations by declining to alter the status quo. It was justified in transferring a Sergeant to fill the vacancy created by a retiring Sergeant.

The grievance will be denied.

AWARD

The grievance is denied.

Decision Issued: May 26, 1989


Jonathan Dworkin, Arbitrator