

BACKGROUND

This matter was heard on August 9, 1989 at the Office of Collective Bargaining in Columbus, Ohio before Patricia Thomas Bittel, a permanent umpire mutually selected by the parties in accordance with Article XX, Section 20.08 of the parties' collective bargaining agreement. Grievant testified on behalf of the Union; Lt. Anderson of the Labor Relations Unit in Personnel testified on behalf of Management.

Grievant is a trooper with the Ohio State Highway Patrol. He was interested in transferring to the Motor Vehicle Inspection (MVI) Team, a specialty position in Ashland, Ohio. In August of 1988, he learned a less senior trooper had transferred into the position without its having been posted. Grievant had not requested a transfer to the position because it was not posted; he states his understanding was that transfer requests for specialty positions must be responsive to individual postings.

The 1986-88 contract between the parties was their first collective bargaining agreement. Article XXX, Section 30.01 regarding transfers was written by a Fact-Finder and incorporated into the contract in 1986. The provision states as follows:

"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.

There have been two cadet classes to graduate under the applicable contract language. Prior to graduation of the 1987 cadet class, Management issued an interoffice memo entitled "116th Cadet Graduation and Cadet Assignments" which stated in pertinent part:

"On April 1, 1987, the Division's 116th Academy Class will convene with 66 cadet trainees scheduled to attend. This Class is scheduled to graduate from the Academy on September 18, 1987. * * *

In order to accommodate transfer requests from sworn members of the Division within bargaining unit #1. The [sic] Division and the FOP/OLC, Inc. have agreed to the following procedures concerning transfers and assignments:

1. All sworn uniformed members who are interested in a transfer as a result of the graduating class must submit a new HP71,2 to Personnel on or before August 7, 1987. Transfer requests dated prior to April 6, 1987, will not be considered. * * *

3. Graduating cadets will not be given priority in assignments

4. Given the size of the graduating class, some posts will not have openings

5. Transfers will become effective on December 14, 1987, upon completion of the 16th Post Graduate Training.

Honoring transfers and assigning members of a graduating class is a complex task. * * *

In response to this memo, a large number of transfer requests were filed by bargaining unit members desiring transfers. Some of these requests were from members desiring specialty positions, that is, positions dedicated to the

2 Transfer requesst.

performance of specialized tasks. Graduating cadets are not qualified for any of the specialty positions. Management handled transfers into and out of these specialty positions together with other transfer requests in 1987.

In 1988, transfers were handled in much the same way. An interoffice memo was again sent out. The language of that memo was virtually identical to that of the 1987 memo, except for paragraph #1: "1. All sworn uniformed members who are interested in a transfer as a result of the graduating class must have an HP71 (transfer request) on file in Personnel on or before July 25, 1988." Grievant's signature on a copy of this memo indicates he read it. As before, specialty positions were handled with the requests for other positions as part of a single transfer processing operation.

The issue before the Arbitrator has been stipulated by the parties: "Did the transfer of Trooper R. A. Bright violate Article 30 of the collective bargaining agreement? If so, what shall the remedy be?"

POSITION OF THE UNION

The contract is clear, states the Union; it requires transfers to be posted and the employee has no obligation to bid on a position unless it is posted.

In the Union's view, Grievant was misled by Management into thinking general transfer requests for specialty

positions would not be granted. It contends Grievant sent in a 1982 request for transfer to the Scale Team, a specialty position involving the weighing of trucks. Grievant described the request as 'general' and said he updated it several times.

According to Grievant, in May of 1987 Management sent him a copy of his Scale Team transfer request with a cover letter stating his request was moot because it was for a specialty position, and there was no opening to bid on at the time. Grievant explained he understood this to mean specialty positions are filled only by bids responsive to posting, and not by general requests. He said he no longer had the letter in his possession.

In reliance on this letter, Grievant stated he did not send in a request for the Ashland MVI position. He said he understood the 1988 memo to address the question of members having priority over cadets to transfer. Because cadets are by definition excluded from consideration for specialty positions, Grievant claims he understood the 1988 memo to apply only to non-specialty positions -- an interpretation which accorded with his description of the May 1987 letter from Management.

Referring to Management's documentation, the Union notes Trooper Bright was transferred into the Ashland MVI position pursuant to a general transfer request while Trooper Campbell's request for the same position was denied because it post-dated Bright's. Lt. Anderson admitted the

contract calls for ties in seniority to be broken by reference to certain test scores and makes no reference to request dates as a tie-breaker.

In the Union's view, Management's implementation of the 'open period' has been full of discrepancies. Even though the 1988 memo changed the 1987 procedure to allow old requests to be valid, Grievant's request was not considered, argues the Union; Management failed to list Grievant as one of the troopers whose request was denied in 1988. Further, says the Union, Management's 1988 position on old requests directly contravenes the statement in the 1987 memo that "Transfer requests dated prior to April 6, 1987, will not be considered," argued the Union. It finds Management's approach to transfers rife with incongruity and contradiction, fully explaining any confusion Grievant may have had and lending credibility to his interpretation of the applicable procedure.

Agreement on an 'open period' for transfers was restricted to situations arising from the placement of a graduating class of cadets, claims the Union, and does not apply to specialty positions. At no time did the Union even discuss transfers to specialty positions with Management, it says; rather, all discussions focussed on the issue of cadet class assignment.

The Union bolsters these assertions by reference to several documents: the Fact-Finder's Report, which describes the parties as drawing issue solely in terms of establishing

a system for dealing with transfers; the Labor-Management Committee Meeting Notes which in no way address transfers to specialty positions, and the 1987 and 1988 interoffice memos which are both entitled "Cadet Graduation and Cadet Assignment" and which both repeatedly emphasize cadet assignment as their subject matter. Management's assumption (that transfers to specialty could be handled during the open period) was not warranted under the contract procedure, asserts the Union.

While admitting Management has filled specialty jobs without posting and without grievance, the Union points out this was not done by agreement, and no situation arose where a junior person was transferred to a position desired by another more senior officer.

The fundamental purpose of Section 30.01 negotiations with Management was to allow officers to get desirable transfers, contends the Union, claiming that purpose was defeated here. None of the administrative concerns of Management apply to specialty positions, it claims. Many members view specialty positions as particularly desirable, states the Union, emphasizing members should have an opportunity to bid for them. The remedy sought is for the job to be posted and bidding to be reopened.

POSITION OF MANAGEMENT

Management maintains the transfer of Trooper Bright was accomplished in accordance with established past practice. It claims troopers routinely file transfer requests for specialty positions upon the graduation of cadets from the Academy. According to Lt. Anderson, anytime a trooper position becomes open, other than upon graduation of a cadet class, it is posted, and requests to transfer are accepted for fourteen days. Unless there is an unusual manpower problem, ordinary trooper positions are not filled until the class graduates.

It would be unworkable to attempt to post every opening before assignment of the cadet class, claims Management, because each transfer to fill a vacancy would create a new one to be posted. The process could continue indefinitely, precluding assignment of the cadet class. This issue was directly addressed through meetings of the Labor-Management Committee and the open period concept was worked out.

Management produced evidence that during the first year of implementation, 1987, it received 90 requests, 39 of which were granted and 51 of which were denied either because of a lack of seniority or because there was no opening. Of the 51 denials, 21 were for specialty positions, it asserts. No grievances were filed as a result of the 1987 open period, said Anderson.

Management's calculated numbers for 1988 reflect fewer transfer requests, indicating stabilization. According to Management, of the 65 transfer requests received, 31 were granted and 34 were denied. Two of the granted requests were for specialty positions, and 13 of the denied requests were for specialty positions, said Anderson.

Anderson admitted specialty assignments were not specifically addressed in the parties' discussions about an open period. He also admitted the 1987 and 1988 memos made no reference to specialty positions, but spoke exclusively to graduation of the cadet class. Neither party contends letters of intent or contract language exists specifically applicable to the specialty positions.

While not listed in Management's documentation, Grievant's request to join the Scale Team was and is on file, said Anderson. It was first submitted in 1982, and was verified in 1988 when general requests were verified as a group, he said.

Management points out the 'open period' employed in this case has been so successful, it was codified in the new collective bargaining agreement. It claims it has in good faith complied with Article XXX by designating an effective procedure, and classifies Grievant's problem as a failure to understand the 1988 memo advising members to submit a transfer request to the Personnel Section.

The 1987 memo stated "Transfer requests dated prior to April 6, 1987, will not be considered." Anderson admitted

this sentence was either a mistake or was inconsistent with what was done. Even so, Management notes the 1988 interoffice memo clearly stated "All sworn uniformed members who are interested in a transfer as a result of the graduating class must have [a transfer request] on file in Personnel on or before July 25, 1988." Management points out the memo was dated May 2, 1988, giving Grievant almost four months in which to file his request. According to Management, it was Grievant's failure to submit the necessary request that resulted in his not being considered for the position.

In Management's view, there was no real opening in this case; Trooper Eiley, who was in the Massillon MVI position, submitted a request to transfer out of the job. This provided the perfect opportunity for a clean swap with Bright who had already filed a request for MVI-Massillon. Manpower concerns would have prevented acceptance of Grievant's request, argues Management.

Based on his time spent in personnel, Anderson claims no knowledge of any letter to Grievant saying it is not necessary to submit general requests for transfer during the open period.

The requested remedy would serve only to confuse an accepted and understood posting and transfer method, argues Management. It points out Grievant will have an opportunity to bid on open positions during the next open period and perhaps in the interim.

DISCUSSION

A. Contract Language

Article XXX, Section 30.01 quite clearly requires all transfer positions to be posted: "Should the Employer desire to fill a position by transfer, the position will be posted" This language makes no exception at all, not even for transfers during assignment of graduating cadets.

"All personnel in the affected classification shall have the right to bid on the position," states Section 30.01. This language is equally mandatory, reflecting the parties' intent to insure bidding for all positions filled by transfer.

B. Contract Modification

Though the language of Section 30.01 is both clear and mandatory, the parties have effectively bypassed the posting requirement in reliance on the Labor-Management Committee's institution of an open period. Unless the Committee's proposal operated to either supercede or modify the original language of Section 30.01, the open period stands in violation of contract.

Article 2, Effect of Agreement - Past Practice, states as follows: "This Agreement is a final and complete agreement of all negotiated items that are in effect

throughout the term of the Agreement. No verbal statements shall supersede any provisions of this Agreement."

The open period, by definition, exempts Management from posting each individual opening, and as such is in direct conflict with the intent of the parties as expressed in Section 30.01. The parties' representation at hearing -- that an open period was mutually agreed to by them -- is nevertheless a 'verbal statement' within the meaning of Article II.

There is no evidence the parties' understanding about an open period was reduced to writing at the time the instant grievance was filed. The fact that the parties later complied with the requirement of reducing their understanding to writing cannot affect the result here. The Arbitrator must analyze a grievance based on the facts as they existed when it was filed; later-occurring events are not properly considered.

The parties have expressed an intent in Article II that their written Agreement not be verbally superceded. Though clearly from the record neither party objects to use of the open period, the fact remains that until it was actually reduced to writing, it was no more than a 'verbal statement' in conflict with the terms of Section 30.01.

The Arbitrator operates under the parties' designated limitations: "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 language of this Agreement." To countenance a verbal agreement as superceding the written provisions of Section 30.01 would plainly exceed the Arbitrator's authority.

Notably, the Labor-Management Committee is expressly precluded from altering the Collective Bargaining Agreement. Article 15 - Labor/Management Committee states "This committee will meet at least quarterly and discuss any issues which either party wishes to raise relating to the Highway Patrol provided that no agreement may be reached on any matter that would alter in any way the terms of this Agreement."

Clearly, allowing an open period as an exception to the posting requirement would alter the terms of the Agreement. This the Committee is specifically prohibited from doing. Because the open period directly conflicted with the terms of Section 30.01, there is no need to delve into the parties' arguments about confusion and inconsistency in its implementation.

C. Past Practice

The parties specifically addressed issues of 'past practice' in Article II:

"Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement and which are not specifically provided for or abridged by this Agreement will continue in effect under conditions upon which they had previously been granted throughout the life of this Agreement unless altered

by mutual consent of the Employer and the Labor Council."

This language serves to limit and define those practices upon which the parties intend to confer protection during the life of the Agreement. The open period fails to meet the parties definition of past practice. First, the practice of open periods was not in effect on the effective date of the Agreement; rather it arose sometime thereafter. Secondly, the posting of all transfers is specifically provided for in Section 30.01 of the Agreement.

It is a well-accepted precept in labor relations that the parties to a collective bargaining agreement can define their own terms. The parties have defined the meaning of "past practice" as it is to be applied to issues arising under their Agreement, and their definition will be accorded full effect. A past practice of transfers to specialty positions during an open period cannot be credited where the open period itself fails to meet the definition of 'past practice.'

D. Impossibility

Management has in its defense argued the posting of all openings is unworkable at the time of cadet class graduation because each posting would leave another opening to be filled prior to assignment of the graduating class. This argument parallels a well-established defense recognized in traditional contract law -- the defense of impossibility.

The rationale behind this defense is that Management cannot in reality comply with the exact terms of the Agreement because it simply is not possible.

While Management's argument of impossibility is certainly logical, there is no evidence the argument is specifically applicable to Grievant's case. There was no showing whatsoever that it was impossible to post the MVI Ashland position.

The grievance identifies Bright's transfer date as August 24, 1988. The 1988 inter-office communication states graduation was scheduled for September 9, 1988. There is a space of 17 days between the transfer and graduation; the contract calls for a posting period of seven calendar days. Anderson testified to a practice of accepting transfer requests 14 days after a posting. No witness was testified on behalf of Management that compliance with the contract terms could not be achieved at the time of Bright's transfer.

While the timing is admittedly tight, there is no factual basis in support of Management's contention. The record simply does not uphold an argument that posting the MVI Ashland position was precluded by graduation of the cadet class of 1988.

CONCLUSION

The contract language is clear in requiring Management to post any position it desires to fill by transfer. The evidence failed to establish any basis for recognizing an exception to the express language - either through modification or past practice. In the instant case, a job was filled by transfer without compliance with the posting procedure. There has been no showing that compliance with the contract terms could not be achieved in this case. While the convenience of swapping two members may have appeared inviting, it directly contravened the express language of Article XXX.

AWARD

The grievance is granted. The position of MVI in Ashland, Ohio shall be posted within 20 calendar days of the receipt of this award for a period of seven calendar days. The job shall be filled in accordance with Article XXX as written in the 1986-1988 collective bargaining agreement between the parties.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Patricia Thomas Bittel".

Patricia Thomas Bittel

Dated: September 6, 1989