
In the Matter of Arbitration	*	
	*	
Between	*	Case No.:
	*	#519
Fraternal Order of Police-	*	25-17-(3-5-90)-14-05-02
Ohio Labor Council	*	
	*	
and	*	Before: Harry Graham
	*	
The State of Ohio, Department	*	
of Natural Resources	*	
	*	

Appearances: For Fraternal Order of Police-Ohio Labor Council

Paul Cox
 Fraternal Order of Police-Ohio Labor Council
 222 East Town St.
 Columbus, OH. 43215

For Ohio Department of Natural Resources:

William F. Demidovich, Jr.
 Labor Relations Coordinator
 Department of Natural Resources
 Fountain Square, Building D-2
 Columbus, OH. 43224

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on October 29, 1990 before Harry Graham. At that hearing both parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion or oral argument.

Issue: At the hearing the parties were in agreement upon the issue in dispute between them. That issue is:

Did the Employer violate the Collective Bargaining Agreement by failing to place the Grievant in a Ranger 2 vacancy at Zaleski State Forest? If so, what shall the

remedy be?

Background: There is no factual dispute over the events that give rise to this proceeding. The Grievant, Robert Martin, has been employed by the Department as a Watercraft Officer. In November, 1989 he had applied for and secured a promotion to the position of Watercraft Officer Specialist. The latter position is one pay range above that of Watercraft Officer. Consequently the pay attached to it is greater.

At about the same time as he applied for the Watercraft Officer Specialist position Mr. Martin also applied for a position in the Department as a Forest Ranger 2. The particular Forest Ranger 2 vacancy the Department was seeking to fill was located in the Zaleski State Forest which is in the south central part of the state. The area is one which Mr. Martin found attractive and in which he desired to work and reside.

Mr. Martin was not awarded the Forest Ranger 2 vacancy. Rather, it was given to James N. Carnes. Mr. Carnes had worked for the Department as an Intermittent Park Officer from May 27, 1988 to the date he was awarded the Forest Ranger position on January 28, 1990. As an Intermittent Park Officer he was not considered as being part of the bargaining unit represented by the Union. Rather he was viewed as being a new hire.

In order to protest the award of the Forest Ranger 2

position to Mr. Carnes a grievance was filed by Mr. Martin. It was processed through the procedure of the parties without resolution. The State does not agree that it is subject to the arbitration provisions of the Agreement. Nonetheless, arguments concerning arbitrability and merit were made before the Arbitrator on October 29, 1990 and the grievance was placed on the table for neutral resolution.

Position of the Union: The Union points to the resume and work history of the Grievant. No question exists concerning his qualifications for the Forest Ranger 2 position. The State admits as much. Mr. Martin was and remains well qualified for the position.

Turning to the sequence of events in this dispute, the Union indicates that the Forest Ranger 2 vacancy was posted from October 10, 1988 to October 19, 1988. On November 11, 1988 Mr. Martin accepted the Watercraft Officer Specialist position offered by the State. He interviewed for the Forest Ranger 2 opening on November 30, 1989. His duties as a Watercraft Officer Specialist commenced on December 3, 1989. He had not yet taken up his duties as a Watercraft Officer Specialist when he interviewed for the Forest Ranger 2 position. It cannot be said that he was in that classification when he interviewed for the Forest Ranger 2 vacancy.

Pointing to the Collective Bargaining Agreement, the

Union asserts that Article 31 applies. Article 31 is concerned with promotions. It indicates that bargaining unit employees are to be considered for promotions. The Grievant was a bargaining unit member. Mr. Carnes was not in the bargaining unit at the time he received the Forest Ranger 2 position.

Section 31.02 of the Agreement provides that when abilities of bargaining unit promotion applicants are considered to be equal, bargaining unit seniority shall be the deciding factor. In this case as Mr. Carnes was hired from outside of the bargaining unit the Grievant was denied the opportunity to exercise his bargaining unit seniority as contemplated by the Agreement. Consequently the Union asserts the Agreement has been violated by the State's selection of Mr. Carnes rather than Mr. Martin for the Forest Ranger 2 vacancy at issue in this proceeding.

Conceptually the move from Watercraft Officer to Forest Ranger might not be regarded as a promotion as both carry the same pay. The Agreement defines a vacancy as a position above entry level. That definition applies in this instance. Both positions in question are above entry level. The Agreement specifically determines how such vacancies are to be filled. According to Section 31.02 reference must be had to the seniority of applicants.

At Section 31.03 the Agreement defines a promotion as

movement to a bargaining unit position with more pay. Anticipating an argument from the Employer that Mr. Martin's movement from Watercraft Officer to Watercraft Officer Specialist fits that description but that the desired move to Forest Ranger 2 does not, the Union asserts the State's argument is erroneous. The reference to more pay is found in the section of the Article dealing with probationary periods and applies only in that Section according to the Union. Article 31 makes repeated reference to members of the bargaining unit as being eligible candidates for promotion. As Mr. Carnes was not in the bargaining unit and Mr. Martin was, the State erred in awarding the Forest Ranger 2 vacancy to Mr. Carnes according to the Union.

Article 33 of the Agreement cannot operate in this situation. Mr. Carnes was a new hire. Article 33 is concerned with transfer. He was not an employee under the terms of the Agreement when he was awarded the Forest Ranger 2 vacancy. Hence, the concept of transfer embodied in Article 33 cannot apply to him in the Union's view.

Position of the Employer: The State takes the view that the issue raised by the Grievant does not fall within the purview of the Contract. According to the Employer, it is a complaint, not a bona-fide grievance.

Assuming that Mr. Martin is found to have a grievance, the State asserts that the Agreement was not violated when

Mr. Carnes was awarded the Forest Ranger position. When Mr. Martin interviewed for the Forest Ranger vacancy he had already been promoted to the Watercraft Officer Specialist position. He was serving his probationary period. The Agreement is very specific and provides that people in a promotion probationary period "shall" serve for up to 180 days. As the Grievant was a probationary Forest Ranger nothing in the Agreement permits him to leave probationary status unless the Employer permits him to do so. That did not occur in this situation.

When Mr. Martin was in the Watercraft Officer Specialist position and sought to become Forest Ranger he was seeking a demotion. There is no provision in the Agreement for a demotion to be made at the behest of the Employee. As he was seeking a downward movement in the job classification system of the State and no rights to such movement exist the State asserts the Agreement has not been violated.

The record in this case indicates that the Grievant accepted the Watercraft Officer Specialist position on November 13, 1989. He wrote an unequivocal letter to that effect on that date to the Chief of the Division of Watercraft. Only subsequently, when he was a finalist in the selection process for Forest Ranger did he seek to change his mind. This cannot be permitted to occur according to the State.

Discussion: This dispute is not the proverbial "simple case" or "bogus dispute" as asserted by the parties at the hearing. To the contrary, it is a complex dispute. This is due to the fact that the fact situation presented is not explicitly addressed by the language of the Agreement. It must be suspected that the circumstances that prompted this dispute were never considered by the parties in the course of negotiations. Consequently, the Union and the Employer each performed selective surgery on the Agreement to bolster their position.

No cogent argument was made by the State as to why this proceeding should not fall within the confines of the Grievance Procedure. At all times Mr. Martin and the Union asserted the Agreement had been violated. Their claim falls squarely within the definition of a grievance found in the Agreement at Article 20.02. It cannot be dismissed as cavalierly as the State urges upon the Arbitrator.

The Agreement does not provide a definition of a promotion that is applicable to this dispute. The language setting forth the Agreement of the parties as to what constitutes a promotion is found in Section 31.03 of the Agreement dealing with probationary periods. The language applies to people serving those trials, not to promotions as a whole. The Agreement does not provide a generic definition of the concept of promotion. In the probationary section,

31.03, employees who are promoted "shall serve a probationary period up to one hundred and eighty (180) days." The words "up to" permit the State to determine that an employee has passed his probationary period in less than 180 days. They also permit an employee to determine in the course of a probationary period that the position to which he has moved is not to his liking and to renounce it. That is what Mr. Martin sought to do in this instance. He sought to move to a "bargaining unit vacancy ... above entry level for a full or part-time permanent position which the Employer (had) determined to fill." As a member of the bargaining unit Mr. Martin had priority over the person ultimately hired to fill the position, Mr. Carnes. Carnes was a new hire who did not possess any seniority in state service. The Grievant possessed bargaining unit seniority by virtue of his years of service as a Watercraft Officer. It is not sensible to believe that a new hire should prevail over an internal applicant for a vacancy when the qualifications of the internal applicant fit him for the position. At the hearing the State stipulated that Mr. Martin was well qualified for the Forest Ranger 2 vacancy. As he was senior to Mr. Carnes by virtue of the fact that Carnes had no state service whatsoever it must be concluded that his seniority should have carried the day for him. If new hires are selected over senior employees the heart of the Agreement providing

benefits to employees by virtue of the length of service with the State will be destroyed.

The Forest Ranger 2 position filled by Mr. Carnes was "above entry level." He could not be promoted to it as he was not a member of the bargaining unit. He was a new hire. The Agreement is specific and indicates that "all" vacancies above entry level must be filled through promotion except those filled pursuant to Article 33. That article deals with transfers. Mr. Carnes was not transferred. He was newly hired. Neither the promotion nor the transfer article in the Agreement could apply to him. As Mr. Carnes possessed no rights under the Agreement and Mr. Martin possessed bargaining unit seniority it must be concluded that he was improperly denied the move he sought in this dispute.

This decision represents an attempt to give life to language in the Agreement that was not designed to apply to this situation. If the parties specifically desire to clarify the circumstances under which new hires may be selected over internal applicants for positions the proper forum is the bargaining table. Similarly, if the parties seek a definition of the concept of promotion which applies in all circumstances, not just those involving probationary employees, their recourse is the bargaining table, not an attempt to apply language in the probation section to all circumstances involving promotion.

Award: Based upon the preceding discussion the grievance is sustained. The Grievant is to be awarded the Forest Ranger 2 position at Zaleski State Forest as soon as practicable after receipt of this award.

Signed and dated this 16th day of November, 1990
at South Russell, OH.

Harry Graham
Harry Graham
Arbitrator