

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 600

OCB GRIEVANCE NUMBER: 15-03-900905-0071-04-01

GRIEVANT NAME: MALCOM, TROOPER M. A.

UNION: FOP UNIT 1

DEPARTMENT: HIGHWAY PATROL

ARBITRATOR: KEENAN, FRANK

MANAGEMENT ADVOCATE: CORBIN, SGT. RICHARD

2ND CHAIR: KIRSCHNER, PAUL

UNION ADVOCATE: FLORENCE, WALTER

ARBITRATION DATE: MARCH 6, 1991

DECISION DATE: MAY 20, 1991

DECISION: DENIED

CONTRACT SECTIONS
AND/OR ISSUES:

DOES THE POSTING OF A B/U POSITION FOR "FEMALES ONLY" VIOLATE ART. 7 AND/OR ART. 36 AND/OR ARTICLE 30.01?

HOLDING: ARBITRATOR WAS UNPRESUADED BY FOP'S ARGUMENT THAT THIS POSITION COULD HAVE BEEN FILLED BY TEMPORARY ASSIGNMENTS FROM THE FIELD. GENERAL HEADQUARTERS NEEDED AT LEAST ONE PERMANENT FEMALE FOR UNDERCOVER/INVESTIGATIVE DUTY. MEETING THE BFOQ OF FEMALENESS DOES NOT STRAY FROM "ABILITY" AND "SENIORITY" CRITERIA OF SECTION 30.01.

ARB COST: \$562.10

ARBITRATION

BETWEEN

THE OHIO STATE HIGHWAY PATROL

and

OCB GRV. #15-03-900905-071-04-01

THE FRATERNAL ORDER OF POLICE,
OHIO LABOR COUNCIL, INC.

#600

APPEARANCES:

For the Patrol:

Sgt. Richard G. Corbin
Personnel/Labor Relations
Ohio State Highway Patrol
Columbus, Ohio

For the F.O.P.:

Walter Florence Esq., General Counsel
F.O.P., Ohio Labor Council, Inc.
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

Statement of the Case:

The operative facts are not disputed. On July 9, 1990, the following job posting appeared in the Highway Patrol Personnel Bulletin:

"Any female Highway Patrol Trooper interested in a position at GHQ Investigation (this position requires prior completion of the 90 day Investigator Program) must submit a current HP-71 (transfer request) to Major R. K. Hartsell, Personnel Commander, prior to July 26, 1990."

Trooper M. A. Malcom, a male, other male troopers, and Trooper Mary Pfeifer, and other female troopers, requested transfer. Trooper Mary Pfeifer, who had less seniority than Grievant Malcom, was awarded the position. The Grievant grieved. He asserts in pertinent part:

"6. Statement of Grievance . . . :

ON MAY 14, 1990, A JOB OPPORTUNITY POSITION WAS POSTED FOR A GHQ-INVESTIGATOR. QUALIFICATIONS WERE COMPLETION OF THE 90 DAY INVESTIGATOR SCHOOL. THE BULLETIN ALSO STATED THAT "DUE TO THE UNIQUE RESPONSIBILITIES OF THIS POSITION, PREFERENCE WILL BE GIVEN TO MINORITY OFFICERS WHEN MAKING THE SELECTION FOR THIS POSITION." ON JUNE 11, 1990 THE POSITION WAS FILLED BY TROOPER JAMES E. BRYANT UNIT 1014. TROOPER BRYANT WAS QUALIFIED FOR THE POSITION DUE TO HIM COMPLETING THE 90 DAY SCHOOL AND BEING A MINORITY. TROOPER BRYANT ALSO HAD MORE BARGAINING UNIT SENIORITY THAN TROOPER MALCOM. ON JULY 09, 1990 A SECOND GHQ INVESTIGATOR POSITION WAS POSTED ON THE JOB OPPORTUNITIES BULLETIN. THIS POSITION REQUIRED THE SAME QUALIFICATIONS AS THE ONE FILLED BY TROOPER BRYANT. THIS POSITION WAS OPEN TO "FEMALE TROOPERS ONLY." ON AUGUST 26, 1990 THE SECOND POSITION WAS FILLED BY TROOPER MARY A. PFEIFER UNIT 709. BECAUSE THIS POSITION WAS POSTED FOR A FEMALE TROOPER ONLY AND THE FIRST WAS FOR MINORITY PREFERENCE, IT IS CLEAR THAT THIS IS A VIOLATION OF THE BARGAINING UNIT ONE CONTRACT ARTICLE 7 NON-DISCRIMINATION. TROOPER MALCOM WAS ALSO DISCRIMINATED AGAINST BECAUSE OF HIS SENIORITY OVER TROOPER PFEIFER.

7. Remedy Requested: Trooper Malcom be transferred to investigation section and future positions that are posted for a specific type of individual have reasons listed.

The grievance has been denied. At Step 4 the Office of Collective Bargaining stated in pertinent part:

". . . The Agency denies any violation of the terms of the Agreement. It contends that transfers are to be made on the basis of ability and seniority. In the instant case the trooper who was transferred was a female. As the investigation section needs female troopers for undercover work and is generally in need of female troopers as none presently work in that section, the Agency believes that this constitutes a bona fide occupational qualification which relates to ability. . . .

. . . [T]he lack of female troopers in the investigation section impairs the Employer's ability to carry out its mission and also discriminates against female troopers who have only been a part of the Highway Patrol workforce since 1976. We concur with the Agency that this effectively establishes an ability which mitigates the use of seniority as the determinant factor in this transfer.

We also note that Article 7 provides in pertinent part that neither party will discriminate on the basis of gender or other criterion 'except for those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job . . .'. We believe that this reinforces the position of the Agency showing that the parties recognized that positions exist

which are BFOQ and which should be excepted from the overall requirements of Article 7. . . ."

Relevant Contract provisions are excerpted at Appendix I.

The Grievant's seniority date is 5-15-78. Trooper Mary Pfeifer's seniority date is 11-15-82.

The F.O.P. introduced several additional job opportunities postings. They read chronologically, as follows:

"July 24, 1989:

Any trooper interested in a position at GHQ - Investigation - State House Detail (Vern Riffe Center) should submit a current HP-71 (transfer request) to Major R. K. Hartsell, Personnel Commander, prior to August 10, 1989."

"January 16, 1990:

Any present Highway Patrol Trooper interested in a position at Massillon DHQ as a plainclothes investigator should submit a current HP-71 (transfer request) to Major R. K. Hartsell, Personnel Commander, prior to February 1, 1990."

"January 22, 1990:

Any present Highway Patrol Trooper interested in a position at Cambridge DHQ as a plainclothes investigator should submit a current HP-71 (transfer request) to Major R. K. Hartsell, Personnel Commander, prior to February 8, 1990."

"May 7, 1990:

Any present Highway Patrol Trooper, who has completed the 90 day Investigator Program, and is interested in a position at GHQ - Investigation Section, should submit a current HP-71 (transfer request) to Major R. K. Hartsell, Personnel Commander, prior to May 24, 1990. (Due to the unique responsibilities of this position, preference will be given to minority officers when making the selection for this position.)"

"July 9, 1990:

(The posting which is the subject of this proceeding, and as fully set forth above.)"

"September 17, 1990:

Any present Highway Patrol Trooper interested in a position at the Bucyrus DHQ as a plainclothes investigator must submit a current HP-71 (transfer request) to Major R. K. Hartsell, Personnel Commander, prior to October 4, 1990."

"December 10, 1990:

Any present Highway Patrol Trooper interested in a position as a Plainclothes Investigator available at the following locations: Findlay DHQ, Bucyrus DHQ, Massillon DHQ (2 positions), Piqua DHQ, Columbus DHQ (3 positions), Wilmington DHQ and Jackson DHQ (2 positions), must submit a current HP-71 (Transfer Request) to Major R. K. Hartsell, Personnel Commander, prior to December 27, 1990. Officers selected for any of these positions must live within 30 miles of the District Headquarters, at which the position selected for, is located. Some of the selection criteria for these positions are:

1. Experience in case investigation.
2. Good writing, interviewing and communication skills.
3. Knowledge of the Ohio Criminal Statutes and Rules of Evidence."

"January 14, 1991:

Any present female Highway Patrol Trooper interested in a position at Columbus DHQ - Plainclothes Investigator must submit a current HP-59 (transfer request) to Major R. K. Hartsell, Personnel Commander, prior to January 31, 1991."

"January 28, 1991:

Any present Highway Patrol Trooper interested in a position at Berea DHQ - Plainclothes Investigator must submit a current HP-59 (Transfer Request) to Major R. K. Hartsell, Personnel Commander, prior to February 14, 1991."

The F.O.P.'s Position:

The F.O.P. contends that the Patrol's posting of the position in question here, namely, a GHQ Investigation position, for females only, was violative of Articles 7, 30.01 and 36 of the Contract. Pointing to Article 30, Section 30.01's provision to the effect that "[s]election of the person to fill the position shall be based upon ability and seniority," the F.O.P. asserts that the Patrol erroneously, and in breach of this provision, in effect ignored the Grievant's "seniority" inasmuch as the Grievant had greater seniority than did Trooper Mary Pfeifer, who was transferred into the position in question here. In setting as a criteria a gender factor, femaleness, the Patrol has strayed from its commitment in Section 30.01 to fill positions based solely on "ability" and "seniority" thereby violating said Section. Countering the Patrol's pointing out that in Article 7 the parties have made, quote: "a mutual commitment to affirmative action, as regards job opportunities," the F.O.P. asserts that no such language appears in Article 30 dealing with transfers, which is involved here.

It is the F.O.P.'s contention that the Patrol has an obligation to operate and manage the business of the Patrol without violating the Contract. This it can do, argues the F.O.P., by relying on temporary assignments of District female employees, as it has indeed done in the past. Moreover when this alternative was in fact in the past relied upon "there is no evidence of grave inadequacies." Indeed, argues the F.O.P., on

these past occasions the Patrol continued to function well. Alternatively, the Patrol can initiate more 90 day training programs for undercover work among its 52 female employee complement, thereby increasing the pool of qualified female employees for the headquarters plainclothes investigative officer position, and, in turn, thereby increase the likelihood of female employees being selected as headquarters investigative officers. It is the F.O.P.'s contention that in light of the foregoing alternatives to obtaining female investigative officers at headquarters, the Patrol's contention that a bona fide occupational qualification of female for the investigative officer headquarters vacancy exists is misplaced and erroneous. Furthermore, argues the F.O.P., the position in question cannot come within the Article 7 exception for BFOQ because the position "is not so unique as to require a female."

Then too, asserts the F.O.P., there is no justification for confining the investigative officer vacancy posting to females in light of the circumstance that since approximately 20% of the Patrol's cases involve females, either as victim or suspect, it is doubtful that the hiring of but one female investigative officer at headquarters would meet the alleged need for such.

So it is that the F.O.P. urges that the grievance be sustained.

The Patrol's Position:

The Patrol takes the position "there has been no violation of the agreement." It states that "there is no contract language which prohibits female only postings of bargaining unit positions. The topic of female only postings has never been a subject of negotiations. The Union has the burden of proof [and can't meet it] . . . [T]hey must prove the employer is guilty of discrimination and of ignoring the grievant's seniority rights."

The Patrol asserts that "the history of the Highway Patrol and law enforcement in general lends itself to a historical disparate impact against female troopers. Females were not eligible to become troopers until 1976. If seniority is a deciding factor among qualified candidates in many employment decisions, female troopers have a built-in disadvantage. . . . [A]t the time of this position, of the nineteen investigator troopers statewide, none were female."

Furthermore, argues the Patrol, "[t]he posting of a female only position was not simply based on a need to adjust for past male only employment practices but instead is based solidly on [the BFOQ exception in Article 7] . . . [A] bona fide occupational qualification existed for the contested provision. Specifically, in the area of female undercover investigative work. . . . [F]emale only postings in specialized areas helps to further the goal of equal career opportunity for all members of the bargaining unit. A decision in favor of the [F.O.P.'s]

position would serve only to limit career paths for female troopers due primarily to lack of seniority."

By way of elaboration, the Patrol asserts that there are no promotions as such within the classification of trooper, but only speciality positions including that of investigative officer. It is the Patrol's contention that a gender BFOQ exists here, thereby justifying its posting the headquarters investigative position for females only. Failure to find a gender BFOQ would impair the mission of the Patrol which encompasses providing well trained and experienced undercover officers. Temporary assignments are an unsatisfactory alternative to full-time female investigative officers for the reason that such sporadic service is less efficient and additionally increases risk of harm to the trooper so assigned, thereby posing safety concerns, and its concomitant liability on the part of the Patrol. Temporary assignments would also have an adverse impact on the operations of the Post from which the female Trooper was transferred.

With respect to seniority preferences, the Patrol asserts it met its commitments under Article 30, Section 30.01, when it selected Trooper Mary Pfeifer, who had more seniority than another female applicant, who was otherwise qualified.

The Patrol asserts that the grievance seeks to have the Arbitrator ignore the exception for BFOQ's within Article 7, and the parties' commitment to affirmative action.

In any event, argues the Patrol, should the grievance be granted, the remedy should be confined to reposting an investigator position.

So it is that the Patrol urges that the grievance be denied.

The Issue:

It was the parties' stipulation that the issue is:

"Does the posting of a bargaining unit position for females only violate Article 7 and/or Article 36, and/or Article 30.01? If so, what shall the remedy be?"

Discussion and Opinion:

As a logical starting point, I note at the outset that Article 7 - Non-Discrimination is by its clear and unambiguous terms a generic article, intended to proscribe "discrimination", as therein delineated, by either party to the Contract in the course of administering, applying, and enforcing all of the terms of the Contract. At the same time, in the clearest of terms an exception to this encompassing proscription is set forth, namely, what would otherwise constitute "discrimination" is nonetheless excepted and made permissible "for those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing [federal, state, and executive order laws]." (Emphasis supplied). The language emphasized clearly introduces concepts which serve to restrict the scope of the exception created. And it is well established that the party which seeks to bring its conduct within any "exception," has the burden of establishing the applicability of the exception they invoke in justification

of their actions. It is additionally noted that in light of the reality of established specialties within the classification of Highway Patrol Trooper, such as that of plainclothes investigator, it must be inferred that the reference to "those positions" within the exception in Article 7 was intended to refer to the various specialties within the Trooper classification and not to simply the "Trooper" classification.

Applying these observations and the analytical framework delineated above to the facts at hand, directly to the point, notwithstanding the sweeping nature of the discrimination proscription and the rather restrictive exception thereto, I believe the Patrol has established that the circumstances present here fall within the exception. Thus, as the Patrol points out, to accomplish its law enforcement mission, the Patrol must be able to rely upon undercover operations, both as an absolute necessity and perhaps in many instances simply for the sake of increased efficacy if not absolute necessity. As a matter of necessity, and doubtless frequently so, the undercover officer simply must be a female. The uniqueness of undercover work would often simply require such. Since the Patrol had no permanently assigned females as a plainclothes investigator at this time of the grievance herein, it was simply entitled to at least one such female investigator. As OCB pointed out in the course of the processing of the grievance, the femaleness of at least one undercover investigator at General Headquarters constitutes "a bona fide occupational qualification which relates to ability."

I remain unpersuaded that this need for at least one female undercover officer at General Headquarters could simply have been accomplished by temporary assignments to the position from the field. Thus, as the Patrol in effect points out, a permanent assignment results in continuity and cumulative experience which in turn makes for safer operation of the Patrol's undercover investigative mission. All who are familiar with law enforcement are well aware that undercover work is particularly dangerous both with respect to the undercover officer's personal safety and with respect to the personal safety of other supporting officers. And as is often observed, safety is paramount. Moreover, as the Patrol points out, such temporary assignments adversely impact normal operations and manpower needs at the Post which lends the female trooper for such temporary assignments.

Nor can meeting the BFOQ of femaleness in an investigative officer at General Headquarters need be found to stray from the "ability" and "seniority" criteria of Section 30.01, Transfers. This is so both because, as previously, indicated, Article 7's proscriptions and its exceptions are generic, and must therefore be read along with and into the "ability and seniority" criteria of Section 30.01, and because, as previously noted, in any event the BFOQ in question here is simply an "ability" factor. And the fact that other "abilities" may also be required, namely, case investigation experience, good writing skills, good interviewing skills, good communication skills, knowledge of Ohio's Criminal Statutes and Rules of Evidence, and completion of the 90 day

Investigator Program, does not serve to undermine the indispensable ability factor of femaleness.

Nor need the Patrol simply rely on increasing the "likelihood" of obtaining a female investigator at General Headquarters by seeking to increase the pool of female candidates by way of increasing female troopers' investigative training opportunities. The short of the matter is that the Patrol is currently in need of at least one female undercover investigator at General Headquarters, and the mere potential of enhancing the chances of getting such simply doesn't match its present need.

In sum therefore, it is found that in the circumstances present here,^{1/} the Patrol was entitled to recruit a female and hence post a female only notice on July 9, 1990, and hence the grievance must be denied.

Award:

For the reasons more fully noted above, the grievance is denied.

Dated: May 20, 1991


Frank A. Keenan
Arbitrator

^{1/} In light of this disposition I find it unnecessary to, and do not, make any findings or rulings with respect to the Patrol's alternative contentions concerning affirmative action. Nor do I pass any judgment on how many more, if any, investigators who are female may be maintained at General Headquarters.

ARTICLE 7 - NON-DISCRIMINATION

Neither party will discriminate for or against any member 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; except for those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio.

Spouses shall neither supervise nor evaluate their spouse. The State can continue the practice of assigning spouses to different posts.

No grievance will be processed involving any different dollar value of fringe benefits provided to married or single members of the bargaining unit as a result of their being married or single.

The marriage of two members of the Highway Patrol may be considered in the assignments and direction of the work force.

If two members of the Highway Patrol marry during the term of this Agreement, the Patrol may assign them to different posts.

Married members of the Highway Patrol will be assigned to adjoining posts.

The Employer and the Union hereby state a mutual commitment to affirmative action, as regards job opportunities within the agencies covered by the contract.

ARTICLE 30 - TRANSFERS/PAYMENT FOR MOVING EXPENSES

§30.01 Transfers

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

When position openings are created as the result of the impending graduation of a cadet class, the Employer shall post an "open bid" period for transfer requests. The Employer shall state the graduation date of the cadet class, and the effective date of position openings as the result of the graduation. The Employer shall then receive and consider all transfer requests of incumbents prior to assigning cadets to positions. Transfer requests may list up to five posts.

There shall be no cadet assigned to a position if a member has properly submitted a transfer request for that position during the posted "open bid" period. The Employer is not otherwise required to honor member's transfers during this period.

ARTICLE 36 - SENIORITY

§36.01 Definition

Seniority shall be defined as the total length of continuous service in a permanent full-time position or succession of positions with the Employer. Continuous services also will not be interrupted if the employee was on approved leave of absence or if the employee is reemployed within two (2) years from the date of a layoff.

For all employees entering this bargaining unit after the effective date of the Agreement, any time previously served as an employee of any state agency shall not count toward the employee's continuous service.

§36.02 Bargaining Unit Seniority

Bargaining unit seniority is the length of continuous service in a position or a series of positions within the bargaining unit.

Continuous service for the purpose of calculating bargaining unit seniority shall terminate when a member is promoted out of the bargaining unit after the effective date of this Agreement and has successfully completed his/her probationary period.

§36.03 Identical Hire Dates

When two (2) or more employees have the same seniority dates, seniority shall be determined by length of service at the facility. Should a tie still exist, seniority shall be based on the Civil Service examination taken by the employees. The employee having the highest examination score shall be considered the most senior. If the examination scores are identical or the examination scores are unavailable, then a flip of the coin shall determine which employee is the most senior.

§36.04 Termination of Seniority

Seniority shall terminate when the employee:

- 1) Quits, resigns, or is otherwise separated from the Patrol for more than one (1) year;
- 2) Retires;
- 3) Is discharged;
- 4) Fails to timely return without permission from:
 - a. leave of absence;
 - b. recall after layoff; or
 - c. sick leave.
- 5) Is on layoff for a period of time equivalent to the employee's accumulated time in service seniority or twenty-four (24) months, whichever occurs last.