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IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING

AND

FRATERNAL ORDER OF POLICE
UNIT 15

ARBITRATION AWARD

CASE NUMBER: 15-03-910412-043-07-15
HEARING DATE: January 21, 1992
ARBITRATOR: John E. Drotning

I. HEARING

The undersigned Arbitrator conducted a Hearing on January 21, 1992 in the Office of Collective Bargaining, 65 E. State Street, Columbus, Ohio. Appearing for the Union were: Deborah Bukovan, Esq., Ed Baker, Sgt. Roney Powell and the grievant, Sgt. Avery Dyer. Appearing for the Employer were: Anne Arena, Brian Eastman, and Major Robbie Hartsell.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. No post hearing briefs were filed and the case was closed on 1/21/92.

II. ISSUE

The parties jointly asked:

Has the employer violated Article 32 of the collective bargaining agreement? If so, what shall the remedy be?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1 (Unit 15 Contract), #2 (grievance trail) and #3 (statement of facts). The Statement of Facts is as follows:

In March, 1992 Sgt. Dyer, the grievant, was notified he would be appointed officer in charge during the vacation of post commander, Lt. M. P. Megison. Sgt. Dyer began his temporary duties April 2, 1991. On April 4, 1992, Sgt. Dyer received teletype 040401 (attached) from District 2 advising him he was no longer to act as post commander, but as shift supervisor.

IV. TESTIMONY, EVIDENCE, AND ARGUMENT

A. UNION

1. TESTIMONY AND EVIDENCE

Sgt. Avery Dyer testified that he was with the State Highway Patrol in Marion, Ohio. He said he was also an Assistant Post Commander. He was asked whether Lt. Megison directed him to serve as Post Commander between April 4th and April 8th of 1991. Dyer said that the teletype indicated he would not stay in a temporary work level position although he said he assumed Lt. Megison's responsibilities while the latter was away. Dyer said that he was taken off his post commander position by the teletype as noted on Joint Exhibit #3.

Dyer said that a shift supervisor is responsible for a shift but as post commander, one is responsible for all three shifts as well as payroll, etc..

On redirect, Dyer said he did not call the District staff after he was taken off the temporary work level assignment. He said there was no need to call anyone.

Sgt. Roney Powell testified that he was involved in the Contract and attended all the sessions. He said he recalled a discussion on Article 32.01 and he said there was little disagreement over that language. He said the Collective Bargaining Agreement was executed in March of 1991.

Powell said he attended a meeting on April 4, 1991 along with Paul Cox, Ed Baker, and others. He said the meeting was to discuss the Contract, although it had been signed off by both parties.

Powell said the parties did discuss Article 32 and he initiated that discussion and there was a directive from Management that no sergeant would serve in a temporary work level position. Powell went on to say that he asked if Col. Rice's position was because of money and he said that Col. Rice said that money was not the issue but rather Management said that if a sergeant worked in a lieutenant's position, he might essentially be in limbo and they did not want to allow that sort of situation. Powell said that Management stated that no sergeant could act in a lieutenant's position.

On redirect, Powell said that he had never been paid for working at a higher level but rather he donated his time. He said he was paid overtime sometime between 1983 and 1984.

Mr. Ed Baker, Staff Representative for Unit 15, testified that he was involved in all the negotiations and he recalled no significant discussion of the temporary working level assignment. He said he attended the meeting on 4/4/91 and they discussed a number of things and the Colonel did say money was not a problem but he did question whether if a sergeant worked as a lieutenant and did something wrong or made a mistake, would the sergeant get a reprimand or would the sergeant acting as a lieutenant sort of be in limbo.

Baker said the sergeants had no problems with reprimands but they were concerned about suspensions.

Baker said the State Code states that an employee can work nine plus days at a higher rate and he said sergeants work what is called a "comtech" schedule.

Baker said that a Sgt. Lloyd received a higher rate and he worked out of classification.

Baker said that Article 32.01 is worthless because no sergeant really gets temporary working level assignment.

The Union cross examined Management witnesses. Major Robbie Hartsell testified on cross that his office approves temporary working level assignments. He said that he did not approve TWL when a post commander simply went on vacation. He said such an assignment was never approved nor paid.

Hartsell testified that a sergeant can be in an acting post commander position when the post commander is on vacation. He said sergeants are also known as assistant post commanders. Acting post commanders can make decisions and if Management places a sergeant in an acting post commander position, the sergeant would get paid for that position. Hartsell said there are job descriptions for assistant post commander as well as acting post commander.

Major Hartsell testified that it would make sense for a sergeant to contact Management about a situation if the post commander is not available.

Hartsell testified that Article 32 involves permissive language.

On recross, Hartsell said that the sergeant who received a temporary working level assignment was in the Executive Protective section.

2. ARGUMENT

The Union asserts that Management did not technically violate Article 32 of the Contract (Joint Exhibit #1), but in effect Article 32 was really violated. Management, argues the Union, negotiated Contract language and nothing was said about Article 32.

The Union argues that Management avoided paying sergeants TWL pay mainly because of similar language in Unit #1 and, in fact, Article 32 language came from Unit #1.

The Union points out that only one sergeant has received TWL pay. It goes on to say that sergeants would like to get paid for doing higher classification work.

The Union asserts that Sgt. Dyer was assigned to work as a post commander and he was taken off that job but yet he still worked those duties and Management knew he would work that post. In short, sergeants in this case are working as post commanders and they are not paid for that task.

B. MANAGEMENT

1. TESTIMONY AND EVIDENCE

Major Robbie Hartsell, Commander of Personnel of the Ohio State Patrol, testified he was involved in the Unit #15 Collective Bargaining Agreement.

Hartsell said that a temporary working level assignment must be approved by himself for the Ohio State Patrol. Hartsell went on to say that TWL was not used except in unusual situations when, for example, a post commander would be absent from his task for a long time and he indicated a ten week situation. In such a situation, a sergeant would serve as post commander. Hartsell testified that when a post commander went on a short term vacation, they never approved a temporary working level assignment for a sergeant in those situations.

Hartsell said a TWL employee has to carry out all the duties of a post commander. He indicated it is difficult to distinguish between an acting post commander and a TWL situation. He noted that an acting post commander may not do all the duties of a post commander. He said that if a sergeant cannot make a final decision, he should notify a post commander or if that person is not available, he should notify the District.

Hartsell said that if a sergeant is designated in a TWL status, he might actually operate as a post commander.

Hartsell testified that he reviewed Management Exhibit #2 which is a set of six exhibits of both FOP and Management proposals. Hartsell went on to say that the Union tried to reduce a two week assignment to three days and Management wanted

a two week assignment as stated in the Ohio Revised Code. He went on to say that the FOP again argued for three days and Management tried for ten days and finally Management said that Article 32 was permissive. The reason, said Hartsell, was that the language says that "The Employer may temporarily assign an employee to replace an absent employee or to fill a vacant position during the posting and selection process".

On redirect, Hartsell said that one sergeant in the state does get TWL pay because he fills in for a lieutenant's position.

Management cross examined Union witnesses. Sgt. Dyer on cross testified that he had been a sergeant for about one and one-half years beginning in April 4th. He said he never had TWL pay and after he was taken off the TWL assignment, he was never called at home and asked to make decisions.

Sgt. Roney Powell on cross testified that as a sergeant he has acted as a lieutenant but he never got paid for working in a higher classification.

Powell said that the Colonel's directive was written and he said there were about forty people in the meeting.

Powell said that there was a good deal of training and scheduling at the meeting.

The Contract, noted Powell, had been signed on March 26, 1991.

He also stated that the language of Article 32 came from the troopers' contract.

Mr. Ed Baker, on cross, testified that Management Exhibit #1 is probably the past practice before the Collective Bargaining Agreement came into effect on March 26, 1991.

2. ARGUMENT

Management states that it was aware that TWL was not paid to sergeants in the past. Moreover, Management noted that Sgt. Powell was never paid TWL for working during vacation time while presumably the post commander was on vacation.

Management notes that Major Hartsell pointed out that there is no pay for TWL and that negotiations for Article 32 resulted in the same language as in the trooper contract of 1989. That language says the Employer may temporarily assign an employee.

Management notes that the parties did not spend much time discussing the language of Article 32. It goes on to say that the assignments are not mandatory and the plain language is clear as noted by Elkouri and Elkouri.

The Arbitrator cannot alter the Contract unless it is ambiguous and in this case, it is not and the Employer cites an arbitration award identified as 76 LA 571.

Management notes that the parties were clear about the issue and there is nothing ambiguous about the Contract.

The Employer notes that it does not compensate people for assignments unless over a four day period. It claims the Union is attempting to get what it could not achieve at the bargaining table. Management pointed out that negotiations will occur soon and the place for this issue is for the upcoming contract.

Management points out that the Union wants the Arbitrator to override the Contract and the Arbitrator cannot add or subtract from the Agreement. Moreover, Article 32 is a retained Management right.

The Employer notes the fact that the grievant might have continued to perform duties and there might have been a blurring of duties, but Dyer was specifically told not to stay in the post commander position. Moreover, if he had problems, he could have called the District.

The Employer reiterates that it may temporarily assign employees to replace absent employees.

The Employer notes that the parties agreed to the four day language for the implementation of the TWL, but there was no intent by the parties to make the assignment a mandatory obligation. There was no intent to compensate employees after two days work. Management has the right to assign TWL and there is no obligation on the part of the Employer to make that assignment and it does not have to compensate employees for working less than four days.

V. DISCUSSION AND AWARD

The question is whether the Employer violated Article 32 of the Contract by not awarding Sgt. Dyer the temporary post commander position. The Contract language is as follows:

The Employer may temporarily assign an employee to replace an absent employee or to fill a vacant position during the posting and selection process. If the temporary assignment is for a continuous period in excess of four (4) days, the affected employee shall receive a pay adjustment which increases the employee's step rate of pay to the greater of: a) the classification salary base of the higher level position, of b) a rate of pay at least five (5) percent above his/her current step rate of compensation. The pay adjustment shall in no way affect any other pay supplement which shall be calculated using the employee's normal classification salary base. The employee shall receive the pay adjustment for the duration of the temporary assignment. A position filled in this manner for more than three (3) months shall be posted as a vacancy unless the vacancy is caused by a long term illness from which the employee is expected to return.

Before the parties worked out their Contract Agreement in 1991, the Employer paid an employee temporarily assigned to a vacant position higher pay if the employee stayed in the higher position for at least two weeks (ORC).

In the negotiations for the 1991 Contract, the Union wanted a three day period specified while the Employer wanted to maintain the prior past practice of ten working days. The final agreement was that the employee receives higher pay in a temporary higher level job if the job was in excess of four days. Testimony concerning the negotiations leading to the first Contract effective April 2, 1991 indicated Article 32 was taken from the Trooper's contract without any particular discussion

regarding under what specific conditions, if any, temporary assignments are made. The Union apparently assumed that as in the past, the duties and functions of a vacationing post commander would be performed by a sergeant but instead of "volunteering", they now would be temporarily assigned and receive higher pay if the temporary duties involved more than four days in the higher classification.

This case focuses on Sergeant Dyer's assignment as post commander and the subsequent withdrawal of his temporary assignment.

Major Hartsell testified about the Acting Post Commander and Assistant Post Commander job descriptions and he said that it was difficult to distinguish between an Acting Post Commander and a temporary work level assignment. Hartsell pointed out that the intent was not to put a sergeant in TWL status when a post commander (Lt.) was on a routine leave.

If a temporary assignment is for a continuous period in excess of four days, the employee receives a pay adjustment, but Article 32 says the Employer "may temporarily assign" a sergeant to the lieutenant's position. The four day language is important but the issue is when is an absent post commander replaced by a sergeant temporarily assigned to a higher level position.

The Employer withdrew Sgt. Dyer's temporary work level assignment made by Lt. Megison and the lieutenant's position was, in one way or the other, covered during his absence. The Union's claim that Sgt. Dyer worked as the post commander is not

persuasive. The facts indicate that Sgt. Dyer did not act as post commander. Sgt. Dyer on redirect indicated that he did not call the District staff office after he was taken off TWL, although he said he thought he was touch with the District. Dyer said he did not need to call anyone at District staff while he was working in what he viewed as a higher level assignment; namely, as post commander.

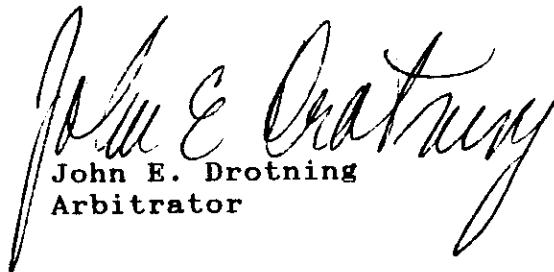
At the same time, however, if Article 32 is never implemented, it becomes meaningless and in effect, sergeants never get the opportunity to work as a post commander and so improve their skills. If the Employer does not formally designate a sergeant to act as post commander for shorter term absences and requires the shift commanders or others to assume some of the duties and functions of the post commander position, the Employer negates the intent of Article 32 as viewed by the sergeants. However, the Contract language must be considered.

Obviously, it makes sense for sergeants to gain experience in lieutenants' positions, but Contract language gives the Employer the right to make temporary assignments. The language is such that it is impossible for the Union to argue persuasively that any time a lieutenant is absent, a sergeant must be temporarily assigned to that working level.

The Contract language says that the Employer "may temporarily assign" or replace an "absent" employee. That is the crucial language and while the Union's claim of a technical violation makes some sense, the Contract language takes

precedence. The Article 32 language gives the Employer the right to make temporary assignments. Thus, the grievance must be denied.

February 3, 1992


John E. Drotning
Arbitrator