

IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING

AND

FRATERNAL ORDER OF POLICE  
UNIT 15

#731

ARBITRATION AWARD

HEARING DATE: February 10, 1992  
CASE NUMBER: 15-03-911020-0106-07-15  
ARBITRATOR: John E. Drotning

## I. HEARING

The undersigned Arbitrator conducted a Hearing on February 10, 1992 at the Office of Collective Bargaining, 106 N. High St., Columbus, Ohio. Appearing for the Union were: Gwen Silverberg, Esq., Ed Baker, David Simpson, Lt. Fred Goldstein, Capt. Ken Marshall, and the grievant, Sgt. Timothy Tuttle. Appearing for the Employer were: Anne Arena, Capt. John Demaree, Paul Kirschner, and Major Robbie K. 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 2/10/92. The discussion and award are based solely on the record described above.

## II. ISSUE

The parties jointly asked:

Whether the State of Ohio violated Article/  
Section 30.03 of the Collective Bargaining  
Agreement? If so, what shall the remedy be?

## III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibit #1 (Collective Bargaining Agreement), Joint Exhibit #2 (Grievance Trail), Joint Exhibit #3 (Personnel Activity), Joint Exhibit #4 (Issue), and Joint Exhibits #5 and #6 (Records of both Sgt. Gary L. Montgomery and Sgt. Timothy J. Tuttle).

#### IV. TESTIMONY, EVIDENCE, AND ARGUMENT

##### A. UNION

##### 1. TESTIMONY AND EVIDENCE

Sgt. Timothy J. Tuttle testified that he began his work with the State Highway Patrol in 1982 and he became a trooper after six months training in March of 1983.

Tuttle said he worked the road and accident investigations as well as crimes on State property. He said he also worked at the Granville post and probably examined crashes three to four hours a day between 1983 and 1988. In the latter year, Tuttle said he went to the Zanesville post and in that capacity, he carries out administrative duties.

Tuttle said that the first responsibility of a sergeant who appears on the scene of crashed cars is to take care of the people involved in the accident and then follow up with pictures, etc.. Tuttle said that at the end of his coaching period, he knew how to investigate accidents. Tuttle said that "coaching" means working with a coach.

Tuttle indicated that he was not a witness in court very often because most cases settle.

Tuttle also testified that he worked as an assistant post commander and he oversees troopers on his shift and he does the same work as troopers although not as often as before because of his administrative duties.

Tuttle said that at the Granville post, he was involved in perhaps 150 cases a year whereas at the Zanesville post, there are only about 40 cases per year because the Granville area has more accidents than in the Zanesville area.

Tuttle said he became aware of an opening in the Crash Reconstruction Unit in or around September 1991. He went on to say that he had taken a computer course and also took a motorcycle course in Florida paid for by himself.

Tuttle said he also was taking algebra and trigonometry courses.

Tuttle bid on the crash reconstruction job and he felt he met job qualifications and he also pointed out that he would lose pay in the "new" job because he would not have the overtime that he had in the past.

Tuttle said that he was aware of crash reconstruction problems and he has been doing accident reports for a number of years. Tuttle said that he took a crash reconstruction course about May 6, 1991.

Tuttle also testified about other training courses which are noted on Joint Exhibit #5. In addition, Tuttle reiterated that he took fall and winter courses in algebra and trigonometry at Muskingham College and he noted that he wanted a BS degree in accident reconstruction.

Tuttle said that the testing process between himself and another sergeant occurred on 9/24 and 9/25. The written test took place on 9/24 and he said he missed three out of eight questions. On the second day, there was an oral interview and he

had to present a statement to Lt. Goldstein about an incident and he had to state in clear and precise language how the accident occurred.

Tuttle said that Lt. Goldstein told him he did okay on the written exam.

Tuttle testified that he is proficient at crash reconstruction and he wants that job.

Lt. Fred D. Goldstein said he began with the Ohio State Patrol in 1976 and that he worked at a training academy for about eight years and in 1990 he headed up the Crash Reconstruction Unit. Goldstein said that office involves two people, himself and Sgt. Montgomery.

Goldstein testified that he trained at the technical level and he also took courses at Northwestern University.

Goldstein said that he testified twice in 1990 and perhaps eight times in 1991 and he went on to say that he has to prepare himself for testimony even if cases are resolved.

Goldstein said that he had been in the reconstruction unit for about two years.

Goldstein said that the crash reconstruction issue requires one to gather appropriate information and one has to learn how to understand the situations that occur in vehicle accidents. As a consequence, one has to know something about mathematics and physics.

Lt. Goldstein testified about job opportunities (see Joint Exhibit #3) and he restated the opportunities which are listed on the document. He pointed out that a sergeant interested in crash

reconstruction must be able to instruct others in problems involving crash situations and must be able to take accurate photographs and have knowledge of computer programs. A certain amount of statistical analysis is important, said Goldstein, and writing, editing, etc. are requirements of crash reconstruction unit employees.

Goldstein said that two sergeants bid for the position. He went on to say that each officer took a two plus hour written test involving eleven questions. The test focused on crash reconstruction issues, said Goldstein, and both Tuttle and Montgomery each missed three (3) questions on September 24th. On September 25th, each person was evaluated and each was asked to present a half-hour presentation on a specific issue.

Goldstein said that Tuttle's presentation about a motorcycle incident was excellent. He also said that Montgomery's presentation was poor and fragmentary and in effect, Montgomery missed the boat. Goldstein and Capt. Marshall gave Montgomery a second chance and he tried the same issue as Tuttle but again Montgomery performed poorly.

Goldstein said that verbal skills are important to a crash reconstruction unit officer because in many cases, they are on the phone and they must be able to accurately state data and issues to the person they are talking to.

Lt. Goldstein recommended Sgt. Timothy Tuttle for the position based on roughly equal test results for Tuttle and Montgomery. However, Tuttle's verbal skills far surpassed those of Montgomery.

Captain Ken Marshall said that he was involved in the second day interviewing along with Lt. Goldstein and his task was to help evaluate the candidates. He said he listened to the presentations and Tuttle's presentation was excellent. Tuttle, said Marshall, used good charts and graphics and his statement was clear as a bell. Marshall said he clearly understood the problem described by Tuttle.

Montgomery's presentation, said Marshall, was not good and Montgomery was somewhat hesitant and his comments were disjointed and he had sketchy notes. Capt. Marshall suggested to Lt. Goldstein that they give Sgt. Montgomery another chance. He was given that opportunity, noted Marshall, and his second presentation was no better than the first.

Marshall said that Tuttle was the better of the two employees based on Tuttle's oral presentation. Moreover, Capt. Marshall said he felt Lt. Goldstein's test was absolutely fair.

The Union cross examined Major Robert K. Hartsell who testified that neither he or Co. Rice was involved in the testing procedures on the days in question. He also said that Col. Rice had never taken a crash reconstruction course.

Hartsell noted that he had not taken a current crash dynamics course. He also said that seniority is a factor only if all qualifications are the same.

Major Hartsell said that Montgomery went to Malone College in or around 1970 which was about twenty years ago.

## 2. ARGUMENT

The Union asserts that the evidence shows that the Employer violated Section 30.03 by not selecting the most qualified person. The Union goes on to say the qualifications listed on page 35 are clear and Sgt. Tuttle knew these qualifications and he had taken a computer course and, in addition, he had flown to Miami for a motorcycle course and clearly, he was qualified for the job.

The Union notes that Sgt. Montgomery has more seniority than Sgt. Tuttle.

The Union points out that the two day testing involving both Sgt. Tuttle and Sgt. Montgomery allowed the conclusion that Tuttle was more qualified largely because of his second day performance. The Union reiterates that Montgomery was given two chances to present statements and he failed on both these. The Union points out that if an expert in crash reconstruction cannot make clear, persuasive presentations, how is Management to understand the problem?

The Union agrees that Montgomery has more letters of commendation than Tuttle and that is simply because Montgomery has been employed by the State Highway Patrol longer than Tuttle.



The Union points out that Lt. Goldstein recommended Tuttle over Montgomery because of the latter's educational efforts along with his presentation skills. Moreover, the Union points out that Montgomery's 64 hours of classes occurred in 1971 which is about 20 years ago. Thus, Tuttle who is now taking algebra and trigonometry is clearly in the mainstream, asserts the Union.

The Union also notes that years of experience as a trooper is not listed in the posting and the Contract, itself, says that seniority is used only if all things are equal. The Employer tested both employees and they were not equal.

Sgt. Tuttle is more qualified and his request conforms with the Contract and, therefore, the grievance should be sustained and the Union asks that Sgt. Timothy Tuttle be awarded the position in the Crash Reconstruction Unit.

## B. MANAGEMENT

### 1. TESTIMONY AND EVIDENCE

Major Robbie K. Hartsell testified that he is Commander of the Office of Personnel and he promotes, evaluates, assigns personnel and fills vacant positions, etc. He said he was involved in Unit 15 and knows the bidding process.

Hartsell testified that non-field positions are jobs which are not in field posts and he talked about planning, crash reconstruction and investigation, et al. Hartsell testified that he identifies position openings and qualifications and he cited Employer Exhibits #1 and #2. He noted that Montgomery had seniority date of 9/17/71 and thus, he had at least 20 years in the job. He pointed out that Montgomery had a number of positive letters and 62 semester hours of education whereas Tuttle had zero semester hours. He went on to discuss Montgomery's prior employment and training record.

Hartsell said he reviewed the documents identified as Joint Exhibits #5 and #6 and he asked people to evaluate and interview the candidates. He went on to say he gathered data from the exhibits, that is, HP 59 and then he asked Major Davies for some material from his office. Hartsell said he discussed the point with the labor relations people and he identified a good deal of information.

Hartsell also testified that another factor in his decision

was that Montgomery graduated in the 93rd class in 1971 whereas Tuttle graduated in the 112th class. Hartsell said that Montgomery had a number of awards and became Trooper of the Year. He went on to say that Sgt. Montgomery had broader experience as an instructor than Sgt. Tuttle.

Hartsell said that Lt. Goldstein did not cover all of the issues involved in making a final decision. He went on to say that he discussed the issues with Major Davies, Major Goodman, Lt. Col. Curtis, and Col. Rice. He said that he talked to Col. Rice who made the final decision in favor of Montgomery. However, Hartsell agreed that both men were highly recommended.

Hartsell testified that he was aware of the language of Article 30.03. He said he knew Unit 1 language and Unit 15 language is different than Unit 1's since Management has the right to make a final decision as noted on page 35 of the Contract (see Joint Exhibit #1).

On redirect, Major Hartsell said that he did take a crash reconstruction course in 1971-72 at Northwestern University and he also pointed out that he had a Masters degree in Public Administration.

Management cross examined Union witnesses. Sgt. Tuttle was not cross examined. Lt. Goldstein on cross simply said that he does not make final decisions on who fills positions.

Capt. Ken Marshall testified on cross that concurred with Lt. Goldstein's recommendation as noted on Union Exhibit #6. He also pointed out that he supported the last paragraph of Union Exhibit #6. Marshall also acknowledged that he did not make final decisions.

## 2. ARGUMENT

The Employer argues that the dispute focuses on the plain language of the Contract which talks about who is most qualified. The Employer can retain the right to select people for speciality jobs. The decision was not arbitrary and the Employer acted in good faith.

The Employer goes on to say that it has the right to determine the work elements of the job.

In this case, the Employer notes that the two bidders were fairly equal and the Employer considered the recommendations and selected one over the other. Moreover, Col. Rice and Lt. Col. Curtis have primary responsibility for identifying the person for the job.

The Employer indicates that Major Hartsell testified carefully about Montgomery's education, awards, and experience. As a consequence, the Employer notes that it favored Montgomery because it felt he was more qualified. In short, the Union's position is without fact and/or merit and therefore, the Employer argues that the grievance should be denied and that Sgt. Montgomery should retain his current position.

## V. DISCUSSION AND AWARD

The parties agreed that the question is whether the State violated Article/Section 30.03 of the Collective Bargaining Agreement (see Joint Exhibit #1).

The Job Opportunities statement (Joint Exhibit #3) notes an opening in the Crash Reconstruction Unit. That document talks about minimum qualifications and identifies mathematics and physics skills and ability in writing, editing, and photography as noted: .

Any present Highway Patrol Sergeant interested in a position at GHQ-Operations-Crash Reconstruction Unit must submit a current HP-71 (Transfer Request) and written correspondence outlining their qualifications to Major R. K. Hartsell, Personnel Commander, to be received prior to September 12, 1991. This position requires the following qualifications and will involve the following duties:

Minimum Qualifications: Must have completed Academy (or equivalent) courses in Technical Crash Investigation, Vehicle Dynamics,, and Crash Reconstruction. The ability to demonstrate an understanding of the principles of mathematics and physics as they relate to the reconstruction of traffic crashes. Demonstrated ability in writing, editing, management, and personnel training. Must be certified to instruct subjects related to crash reconstruction. Must possess above average photographic skills and have a working knowledge of personal computer and crash reconstruction software. A working knowledge of basic statistical analysis is required.

An oral interview and a written exam will be administered to measure an applicant's knowledge of crash reconstruction techniques. In addition to the above qualifications, the employer will consider formal education, experience, supervisory recommendations and deportment.

Sample Duties: Assist with the reconstruction of crashes and provide expert court testimony for the Highway Patrol and other law enforcement agencies. Prepare training bulletin, instruct reconstruction related subjects and prepare comprehensive analytical reports. Prepare concise comprehensive investigatory reports. Manage the operations of the Reconstruction service Section and the work of the Unit's Programmer in the absence of the Commander.

The Contract (see Joint Exhibit #1) notes that any sergeant who meets the qualifications may bid for an open position and both Tuttle and Montgomery bid. The Contract language says, in part:

The Employer retains the right to determine and select the most qualified from among the bidders. If all qualifications and criteria are determined to be equal, seniority shall be considered for selection to the position.

Both officers took tests on Tuesday, September 24, 1991 and on Wednesday, September 25, 1991. The tests taken on the 24th were designed to evaluate the individual's knowledge and given the testimony of all witnesses, it is reasonable to conclude that both sergeants did equally well on the written test. In fact, Lt. Goldstein stated that the test scores for both officers were very good.

Thus, the basic issue focuses on the 25th when each employee made a verbal case presentation.

Lt. Goldstein's testimony as corroborated by Capt. Marshall was that Sgt. Tuttle's presentation was logical and his use of visual aids enabled him to emphasize and explain his points very clearly. In addition, he responded directly to questions asked of him during his presentation and as a result, management considered his performance very effective.

On the other hand, Sgt. Montgomery initially selected a question on momentum analysis which he had missed on the written exam and as a consequence, his presentation was poor in the eyes of Lt. Goldstein and Capt. Marshall.

In order to give Sgt. Montgomery another chance, Capt. Marshall suggested Montgomery prepare a presentation on the identical issue put forward by Sgt. Tuttle. However, Montgomery's second presentation was just as bad as his initial presentation.

Therefore, Lt. Goldstein and Capt. Marshall supported Sgt. Tuttle for the vacant position in the Crash Reconstruction Unit.

The best argument in favor of Montgomery is that his inability to handle the verbal case presentation was simply a mishap. But that is not the case. Major Hartsell in his direct examination simply said that Montgomery had more experience than Tuttle because he graduated in 1971, but Hartsell did not claim that Montgomery's poor performance on the second day was an error or aberration. Sgt. Montgomery had a number of awards, etc. and he may have had more experience as an instructor than Tuttle because he came to the force in 1971 or eleven years before Sgt. Tuttle was hired. However, that is not the basis to conclude that Tuttle should not get the job opening.

The Contract requires that the Employer "establish specific qualifications and criteria for the selection of sergeants to non-field positions" and that they be specified in the posting. The job opportunities posting (Joint Exhibit #3) not only lists a number of minimum qualifications, but indicates that there will be an oral interview and a written exam to measure an applicant's knowledge of crash reconstruction techniques. Many of the sample duties focus on giving testimony, instructing, writing

comprehensive reports. Both employees met minimum qualifications and both passed the written exam. But, certainly the verbal communication skills are important attributes in determining who is most qualified.

The position opening required a two (2) day testing process and the results are a primary determinant of "who is most qualified". The Contract language states that seniority is used only if Tuttle and Montgomery were equal. But were they? Obviously, the second day of testing produced significant differences. Tuttle's presentation was much better than Montgomery's which is not to say that Montgomery is not a first class sergeant. However, verbal skills are critically important in working out and discussing situations with persons involved in vehicle crashes.

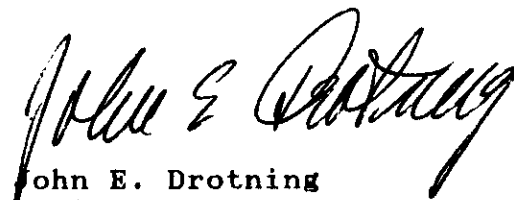
In this case, Major Hartsell emphasized, to some extent, seniority, or at least the broader experiences one obtains by working more years, as the basis for awarding Montgomery the job. But the job in question requires specific abilities and it is clear that qualification test results and verbal presentations relate more to performance on the particular crash reconstruction unit job than seniority.

Testing and oral presentation for a speciality job involve high priority; otherwise what is the point of going through the two days of interaction and then rely on seniority when Lt. Goldstein and Captain Marshall found Tuttle "most qualified"?

Both Tuttle and Montgomery are first class officers, but Lt. Goldstein and Capt. Marshall's testing and assessment of the two



bidders distinguished their abilities in relation to the criteria specified by Management for the particular position. Therefore, it is reasonable to conclude the Employer incorrectly determined Montgomery's appointment by relying on seniority when the evidence shows that Tuttle was "most qualified" by virtue of the latter's performance on day two. Thus, Sgt. Tuttle shall be awarded the Crash Reconstruction Unit position.

  
John E. Drotning  
Arbitrator

February 13, 1992