

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 740

OCB GRIEVANCE NUMBER: 21-05-890508-0107-05-02

GRIEVANT NAME: MALONE, JOHN

UNION: FOP2

DEPARTMENT: LIQUOR CONTROL

ARBITRATOR: GRAHAM, HARRY

MANAGEMENT ADVOCATE: MILLER, SALLY

2ND CHAIR: ~~LIVENGOOD, RACHEL~~ *V. Butler*

UNION ADVOCATE: BUKOVAN, DEBORAH

ARBITRATION DATE: JANUARY 13, 1992

DECISION DATE: MARCH 12, 1992

DECISION: SUSTAINED

CONTRACT SECTIONS

AND/OR ISSUES: DID MANAGEMENT VIOLATE THE AGREEMENT WHEN IT
REFUSED TO CREATE AN OPPORTUNITY FOR GRIEVANT
TO BECOME ELIGIBLE FOR CERTIFICATION INTO THE
PERS-LE PROGRAM?

HOLDING: THE DEPARTMENT ENTERED INTO AN AGREEMENT WITH THE
UNION TO PLACE EMPLOYEES, WITHIN THE ENFORCEMENT DIVISION,
WHO DESIRED INTO THE PERS- LE PROGRAM. GRIEVANT WAS
INVOLVED IN A 60-DAY SUSPENSION THAT RESULTED IN THE
CESSATION OF HIS DUTIES WITH THE ENFORCEMENT DIVISION.
FOR THOSE EMPLOYEES WHO MADE THE DECISION TO PARTICIPATE
IN PERS-LE, MGMT. COMMITTED ITSELF TO ASSIGNING THEM
ENFORCEMENT ACTIVITIES, THEREFORE, IS OBLIGATED TO DO SO

COST: \$734.11

#740

In the Matter of Arbitration

Between

Fraternal Order of Police-
Ohio Labor Council

and

The State of Ohio, Department
of Liquor Control

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* Case Number: 21-05-89058-0107-05-02

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* Before: Harry Graham

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Appearances: For Fraternal Order of Police-Ohio Labor Council

Deborah L. Bukovan
General Counsel
Fraternal Order of Police-Ohio Labor Council
222 East Town St.
Columbus, OH. 43215

For Department of Liquor Control:

Sally P. Miller
Labor Relations Manager
Department of Liquor Control
2323 West Fifth Ave.
Columbus, OH. 43266-0701

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham on January 13, 1992. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on February 21, 1992 and the record was closed on that date.

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

Did the Department of Liquor Control violate the Agreement when it refused to create an opportunity for John M. Malone to become eligible for certification into the PERS-LE program in 1989? If so, what shall the remedy be?

Background: No dispute exists over the events that prompt this proceeding. The Grievant, John Malone, is a veteran of over fourteen years of service with the Department. In March, 1989 he was working in the Beer and Wine division of the Department. On March 13, 1989 the Union and the Department reached an agreement that provided that employees of the Beer and Wine Division could become eligible for entry into a special pension program known as PERS-LE. Mr. Malone indicated his desire to be included in the PERS-LE program. When employees agreed to participate in the PERS-LE program a deduction specific to it was to be made from their paychecks.

On May 1, 1989 Mr. Malone discovered that the deduction he expected to have been made for the PERS-LE program for the pay period ending April 8, 1989 had not been made. The appropriate deduction had been taken from the paychecks of his colleagues. Mr. Malone inquired as to why this situation had occurred and discovered that the Department considered him to be ineligible for participation in the program. This was due to an incident which had occurred in 1983. On July 29, 1983 Mr. Malone had received a 60 day suspension. This was due to that fact that he had entered a bar in Van Wert, OH. on April 9, 1983 while under the influence of alcohol.

He had drawn his gun upon entry and held patrons at gun point. He admitted to being drunk. No protest of the suspension was made by the Grievant. In addition to the suspension Mr. Malone was transferred from the Division of Enforcement to the Beer and Wine Division. Under the terms of the discipline of 1983 he cannot work in the Enforcement Division nor can he carry a weapon. He is no longer assigned to the Division of Enforcement.

The terms of the statute governing the PERS-LE program provide that eligibility for participation is limited to liquor control investigators who were engaged in enforcement of Chapter 4301 of the Ohio Revised Code. Investigators also had to be in compliance with Section 109.77 of the Revised Code. Only people employed as Liquor Control Investigators in the Enforcement Division and the Intelligence Divisions of the Department are eligible for participation. Subsequently, the Department and the Union entered into an agreement that purported to include Liquor Control Investigators who had formerly worked in the Enforcement Division but who had subsequently transferred into the Divisions of Beer and Wine or Permits. Notwithstanding that agreement, officials of the Department felt that Mr. Malone could not qualify for enrollment in the PERS-LE program due to his involvement in the 1983 incident.

In order to protest the rejection of his application for

enrollment in PERS-LE Mr. Malone filed a grievance. That grievance was not resolved in the procedure of the parties and they agree that it is properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points to the Agreement between the parties which sets forth the circumstances under which employees may participate in the PERS-LE program. These are: 1. The employee must have been a member of the Enforcement Division, 2. The employee must requalify and complete training necessary to be eligible for field activities, 3. The employee would be supervised by the Agent-in-Charge of the District when assigned to enforcement activities and 4. Benefits would terminate if an employee failed to comply with any of the three preceding requirements. In the Union's view, the Grievant meets all requirements.

Mr. Malone previously worked in Enforcement. He has completed all necessary training to work in the field. This is shown by Union Exhibit 2, Mr. Malone's Certificate of Completion of the Ohio Peace Officer Training Program, dated February 21, 1991. The fact is that Mr. Malone has qualified for enforcement activity. That the Department has not assigned him to enforcement activity cannot be held against him for purposes of his participation in the PERS-LE pension program. In fact, the Department never intended that that

occur. When Mr. Malone was transferred out of Enforcement to Beer and Wine it was recognized that he had a problem with alcohol. This is an occupational hazard, specific to Enforcement agents. It is due to the fact that their occupation calls for them to drink while on duty. Thomas Aires, former Deputy Director of the Department, testified at the hearing that when Mr. Malone was transferred to Beer and Wine it was not intended that he be precluded forevermore from working in Enforcement. He was to secure assistance in dealing with his drinking problem. Mr. Malone is capable of working in Enforcement as is shown by his passage of the qualifying course. No reason exists to exclude him from the PERS-LE program based upon some assertion that he is ineligible according to the Union.

In addition, the Agreement at Section 17.05 provides that the Employer may not utilize disciplinary records for more than a two year period unless further discipline occurred during that time. Mr. Malone received discipline for an incident in 1983. That incident cannot be held against him in determining eligibility for PERS-LE the Union insists.

When the parties came to draft the agreement that specified the terms under which employees would be eligible for PERS-LE participation the Department never raised a question concerning Mr. Malone's participation. A list of employees considered to be eligible by the Union was

prepared. It contained Mr. Malone's name. It was provided to the Department. The Department raised no question concerning the eligibility of Mr. Malone. Subsequently the Director of the Department at that time declined to approve Mr. Malone's participation. He did so as he believed that there existed a standing order forbidding Mr. Malone to work in Enforcement. No such order is on record.

In 1990 Mr. Malone and a colleague, Elmer Bright, filed grievances over the fact that the Department had refused to permit them to enroll in peace officer training and the PERS-LE program. The grievances were resolved. Part of the settlement agreement (Union Exhibit 4) provides that the parties agree "to make every effort to assure that the parties to the grievance are enrolled in the LE division of PERS with no break in service." In the Union's view, the Department enrolled Mr. Malone in peace officer training. It agreed that he was eligible for PERS-LE and would make efforts to secure his enrollment. The present situation represents a repudiation of the Department's agreement in the Union's view. An agreement was made in good faith. That the present administration of the Department disagrees with it cannot serve to void it in the opinion of the Union. Continued denial of Mr. Malone's participation in PERS-LE represents a continuation of the discipline meted out to him in 1983 and does not meet the just cause standard prescribed

by the Agreement.

At Article 4 the Collective Bargaining Agreement provides that any benefits in place at its date of execution shall remain in place unless altered by mutual consent. The Collective Bargaining Agreement was executed March 29, 1989. The pension agreement was executed on March 13, 1989. It is obvious that the Employer cannot deprive Mr. Malone of a benefit to which he is entitled according to the Union.

The Union anticipates two lines of argument from the State in this dispute. These are that Mr. Malone is prohibited from participating in the PERS-LE program due to statute and that the remedy requested by the Union and the Grievant exceeds the authority of the Arbitrator. Both claims are spurious in the Union's view. The Agreement providing for Liquor Control Employees participation in PERS-LE was drafted by the Department. It is hypocritical for the Department to now assert that the agreement is illegal. Furthermore, no expert opinion to that effect is on record. No one in the office of the Attorney General or the Pension Board has opined the Agreement is unlawful. Furthermore, there are people who are presently participants in the LE program and retirees from the program who are situated in the same manner as Mr. Malone. If he is ineligible, they are as well. The Union sees this dispute as a Trojan Horse for the Department to repudiate its agreement.

An award in favor of the Grievant and his placement into the PERS-LE program retroactively does not exceed the authority of the Arbitrator according to the Union. The agreement determining eligibility for participation in PERS-LE is a benefit to employees. It was negotiated prior to execution of the Collective Bargaining Agreement. It is in the Agreement by reference under Article 4. Consequently, ample authority exists to direct the Department to place Mr. Malone in PERS-LE. As this is the case, the Union urges the grievance be sustained.

Position of the Employer: The State asserts that there is no contractual violation in this situation. The agreement between the parties concerning eligibility to participate in the PERS-LE pension program is in violation of the Ohio Revised Code, Section 4117.10(A) in the State's opinion. That Section of the Code provides that the retirement law of the State is to prevail over conflicting provisions of collective bargaining agreements. Section 145.33 of the Code provides for eligibility in the pension system to be for persons "while serving as a law enforcement officer." Mr. Malone is not serving as a law enforcement officer. Under the policy of the Department pertaining to him that is in effect as a result of the incident in Van Wert which occurred in 1983 he will never serve in the enforcement or intelligence divisions of the Department again. Hence, he is not a law enforcement

officer within the meaning of the statute according to the Employer. As that is the case, he is not eligible to participate in the PERS-LE program. In spite of the agreement of March 13, 1989, the Department is free to act as it did in this instance as the agreement is in conflict with the pension law of the State. As that is the case, no violation of the Collective Bargaining Agreement has occurred the State asserts.

The State acknowledges that it treated Mr. Malone differently than other employees of the Department. It is permitted to do so as an exercise of its managerial prerogative according to the Department.

The 60 day suspension administered to Mr. Malone represented the discipline administered to him as a result of the incident in Van Wert. It has been removed from his personnel file and not used against him in this situation. However, the Department may take administrative action to prohibit Mr. Malone from carrying a weapon and from being assigned to the enforcement or intelligence divisions of the Department. In an arbitration decision involving authorization to carry a weapon Arbitrator Margaret Nancy Johnson determined that such authority was a "managerial prerogative." In its exercise the state could not be arbitrary or capricious. Arbitrator Johnson found in the dispute before her that the State had not acted arbitrarily

or capriciously. So too in this case according to the Department. Mr. Malone was prohibited from carrying a weapon due to the Van Wert incident. That action was not unreasonable according to the State considering the circumstances surrounding Mr. Malone's use of the weapon in the Van Wert bar.

In the view of the Department the terms of its agreement with the Union on March 13, 1989 appear to be in conflict with the Revised Code at Sections 145.01 and 145.33. Section 145.01 defines a "liquor control investigator" as a full-time employee of the Department who is engaged in enforcement. Similarly, Section 145.33 prescribes that people who are law enforcement officers may apply for age and service benefits. In the Department's view the statutory language clearly provides that only people in the enforcement division of the Department are eligible for PERS-LE. Mr. Malone does not work in that division of the Department. Hence he cannot be eligible for PERS-LE benefits the Department asserts.

The issue in this dispute extends beyond the Grievant in the Department's view. Only service in the enforcement or intelligence divisions of the Department confer eligibility for participation in PERS-LE. Such service is by its nature, temporary. That results in a situation whereby employees while serving in enforcement or intelligence are eligible for PERS-LE. At other times, they are properly enrolled in PERS.

Regularly there will be changes in contribution rates of employees and employer alike. Paperwork will multiply. This situation was never contemplated by either the Department or the Union. As that is the case, the Department asserts it is not bound by the provisions of the March 13, 1989 agreement. Discussion: Mr. Malone meets certain of the requirements set forth in the pension eligibility agreement of March 13, 1989. He was at one time assigned to the Enforcement Division of the Department. He has requalified and completed the necessary training to qualify for field activities. The difficulty lies elsewhere. It is found in the requirement that employees "electing to participate in the law enforcement retirement plan will be assigned to enforcement activities in order to be consistent with H.B. 552."

(Emphasis added) The Department entered into an agreement with the Union to place employees who desired to participate in the Law Enforcement pension program in enforcement activities. In Mr. Malone's case, it has failed to do so.

The action taken by the Department as the result of the 1983 incident in Van Wert was two-fold in nature. One aspect was discipline. A sixty day suspension was administered and served by the Grievant. The second element of the Department's action was removal of the Grievant from service in the Enforcement Division and use of a firearm. Those actions are conceptually different. The first represents

discipline, the second represents an administrative action within the authority of the Employer. No right exists for an employee to be assigned to a particular Division of the Department. Nor does a specific right inure to an employee to carry a firearm in the course of his duties. The decision of Arbitrator Johnson is specific on this point and indicates that whether or not an employee carries a weapon is to be left to the discretion of the Employer. Notwithstanding the managerial authority for assignment of employees and whether or not they will have access to weapons in the course of their duties, the Employer has compromised its authority by virtue of the March 13, 1989 agreement. It unequivocally agreed that employees electing to participate in the law enforcement retirement plan would be assigned to enforcement activities. It offered employees an option to participate in PERS-LE. For those employees that made such an election, it committed itself to assigning them to enforcement activities. It has declined to do so in Mr. Malone's case, thereby making him ineligible for the pension program into which it agreed to place him. The Department is in violation of the agreement into which it entered on March 13, 1989.

In June, 1990 the Employer and the Union resolved a grievance that had been filed by Mr. Malone and a co-worker. Part of the grievance settlement involved a commitment by the Department to "assure that the parties to the grievance are

enrolled in the LE division of PERS with no break in service." Unrefuted testimony is on the record from Gary Jones, the Union representative involved, to the effect that that commitment was taken with specific reference to the Grievant. The ability to complete that commitment is uniquely within the authority of the Employer. It can place Mr. Malone in the Enforcement Division if that is what is required to meet the eligibility requirements for enrollment in PERS-LE.


Article 5 of the Collective Bargaining Agreement deals specifically with the legal concerns raised by the Employer. The final paragraph of Article 5 provides that in the event of conflict between the Agreement and state law, that the Agreement will prevail except in instances where it may be in conflict with Chapter 4117. Grievance settlements such as occurred in June, 1990, are viewed as integral sections of a labor agreement. It is grievance settlements that provide life to the Agreement. In this situation, the parties agreed to make "every effort to assure that the parties to the grievance are enrolled in the LE division of PERS with no break in service." (Union Exhibit 4) That commitment of the Employer has not been met in this instance.

The State has raised a substantial question concerning the practicality of enrolling employees in two pension systems, PERS and PERS-LE, based upon their changing job assignments. It is impossible for resolution of this issue to

occur in the arbitration forum as the parties have an agreement to place Departmental employees, including the Grievant, in PERS-LE. If modification of that agreement is in order, it is solely within the province of the parties to do so.

Award: The grievance is sustained. The Grievant is to be enrolled in the PERS-LE pension plan in the same manner as other Department of Liquor Control employees included in the agreement of March 13, 1989.

Signed and dated this 12th day of March, 1992 at South Russell, OH.



Harry Graham
Arbitrator