CONTRACTUAL
GRIEVANCE PROCEEDINGS

IN THE MATTER OF	)	
ARBITRATION BETWEEN	)	
	)	
OHIO DEPARTMENT OF PUBLIC SAFETY,	)	**DECISION IN:**
DIVISION OF STATE HIGHWAY PATROL,	)	
OHIO INVESTIGATIVE UNIT	)	**ARTICLE 31**
	)	**SECTION 31.05, (B)**
- AND -	)	**PHYSICAL FITNESS**
	)	**QUALIFICATIONS**
FRATERNAL ORDER OF POLICE,	)	**"OPT IN – OPT OUT"**
OHIO LABOR COUNCIL, INC., UNIT 2	)	**(STEVE STOCKER, ET. AL.)**

GRIEVANCE NO: DPS-2016-04967-2

GRIEVANCE: The Grievance challenges the Employer "opting in" and mandating OPOTC Physical Fitness Testing as violating Section 31.05, (B), "Physical Fitness Qualifications" for all Bargaining Unit Employees hired after January 1, 2004.

AWARD: The Grievance is sustained.

HEARING: December 1, 2017; Columbus, Ohio

ARBITRATOR: David W. Stanton, Esq.

APPEARANCES

FOR THE STATE

Cassandra L. Brewster, Staff Lieutenant
Jacob Pyles, Lieutenant-2nd Chair
Kristen Rankin, Assistant Deputy Director
Matt Telfer, OCB-DAS Policy Analyst
Darrell G. Harris, Lieutenant/Observer
Gary Allen, OIU Commander
Shelly Ward-Tackett,
Human Capital Management Analyst I

FOR THE FOP

Douglas J. Behringer, General
Gwen Callender, Chief Counsel
Joel Glasser, General Counsel
Steve J. Stocker, Grievance Chair
Renee Engelbach, Paralegal
Joel Barden, Staff Representative (Retired)
Mike Coopman, OIU Agent
Andy Bouza, OIU Agent
Dan Mone, OIU Agent

ADMINISTRATION

By email correspondence dated October 23, 2017, from Alicyn Carrel, MBA/MPH Arbitration/Mediation Liaison for the State of Ohio, Office of Collective Bargaining, the undersigned was notified of his mutual selection to serve as an impartial Arbitrator to hear and decide Case Number DPS-2016-04967-2 concerning whether the Employer can "opt in" to mandatory testing obligations as referenced in Article 31, Section 31.05 (B), then in dispute between these Parties. On December 1, 2017, at the Conference Center of the Office of Collective Bargaining, 1610 West Broad Street, Columbus, Ohio, an Arbitration Hearing was conducted wherein each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence supportive of positions advanced; and, where affected Members of the Bargaining Unit appeared and testified. The evidentiary record of this proceeding was subsequently closed upon the Arbitrator's receipt and exchange of each Party's Post-Hearing Brief filed in accordance with the arrangements agreed to at the conclusion of the presentation of evidence and subsequently modified by agreement between the Parties. Accordingly, this matter is now ready for final disposition herein.

GRIEVANCE AND QUESTION TO BE RESOLVED

The Grievance, as set forth in the joint submissions at Joint Exhibit 2, Tabs A and B, respectively, is identified as DPS-2016-04967-2 as follows:

Grievance No: DPS-2016-04967-2

Union Contract Article Link: FOP Articles

Assigned to: Krysten McElfresh

GRIEVANT INFORMATION

Member: Steve Stocker

Grievance Union: Fraternal Order of Police (FOP)

Grievant Name: Steve Stocker

Grievant Worksite: IUCLE

State of Ohio User ID: 10020686

Grievant Department Description: IU Cleveland Investigations

*****

Grievant's Classification No: 23511

Grievant's Classification Title: Enforcement Agent

*****

Grievant's Supervisor: AIC Greg Croft

Union Representative: Doug Behringer

*****

Statement of Grievance:

The Ohio Investigative Unit opted out of the mandatory physical fitness testing requirement in 2007. Article 31.05 provides no provision for the agencies to opt back in.

Resolution Requested:

For the effected members to be made whole, the Ohio State Highway Patrol should cease and desist from making the Physical Fitness mandatory.

*****

The issue for disposition is framed as follows:

Did the Employer violate Article 31, Section 31.05 titled, “Physical Fitness Qualifications”, when it required mandatory fitness testing for all FOP Bargaining Unit No. 2 Employees hired after January 1, 2004? If so, what shall the remedy be?

CITED PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

The following provisions of the Collective Bargaining Agreement, Joint Exhibit-1, were cited and/or are deemed relevant herein as follows:

ARTICLE 4
EFFECT OF AGREEMENT

Total Agreement

This Agreement represents the entire Agreement between the Employer and the Union and unless specifically and expressly set forth in the expressed written provisions of this Agreement, all rules, regulations, practices, and benefits previously and presently in effect, may be modified or discontinued at the sole discretion of the Employer. This section alone shall not operate to avoid any existing or future ORC Statutes or Rules of the OAC and applicable Federal law.

ARTICLE 20
GRIEVANCE PROCEDURE

*****

20.09 Arbitration

*****

5. Limitations of the Arbitrator

Only disputes involving the interpretation, application, or alleged violation of a provision of this Agreement shall be subject to Arbitration. The Arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall the Arbitrator impose on either Party a limitation or obligation not specifically required by the language of this Agreement. Employees who are terminated and subsequently returned to work without any discipline through Arbitration, shall have the termination entry on their Employee History on Computer (EHOC) stricken.

*****

ARTICLE 31
SELECTIONS, PROMOTIONS AND TRANSFERS

*****

31.05 Physical Fitness Qualifications

*****

B. Minimum fitness standards shall be in the form of a work rule and the provisions of Article 21 shall be applicable. Management will provide voluntary testing and voluntary compliance of "OPOTC Basic Training Program Physical Fitness Standards" or other measurable standard to all Employees hired before January 1, 2004. Mandatory testing and mandatory compliance of "OPOTC Basic Training Program Physical Fitness Standards" or other measurable standards will be required for all Employees hired after January 1, 2004. Departments covered by this Agreement may, at their discretion, opt out from the proceeding mandatory testing requirement and offer voluntary testing.

*****

FACTUAL BACKGROUND

The operative facts which gave rise to the filing of this Grievance, challenging the Employer's requirement of Bargaining Unit Members, hired after January 1, 2004, to complete mandatory fitness training as violating Article 31, Section 31.05, (B), of the Collective Bargaining Agreement are, except where otherwise indicated, essentially undisputed. The State of Ohio, Department of Public Safety, Division of State Highway Patrol, Ohio Investigative Unit, hereinafter referred to as the "Employer", is party to a Collective Bargaining Agreement, Joint Exhibit -1, with the Fraternal Order of Police, Ohio Labor Council, Inc., hereinafter referred to as the "Union", which sets forth the terms and conditions of employment for those Employees identified in Article 7, titled "Union Recognition and Security", including "…all permanently appointed full and part-time Employees employed in a classification or position listed in Appendix A…" as set forth at page 139 of the Collective Bargaining Agreement, "Enforcement Agent".

The matter in dispute involves the Grievance filed on behalf of all affected Bargaining Unit Members, hereinafter referred to as the "Grievant(s)" concerning whether certain "Departments" can "opt in" to mandatory physical fitness testing. The case before the Arbitrator concerns the issue of mandatory physical fitness testing versus voluntary physical fitness testing

as both are recognized in the Collective Bargaining Agreement, Section 31.05 (B). More specifically, the issue for disposition concerns whether a Department, under the auspices of the Collective Bargaining Agreement, can "opt in" to mandatory physical fitness testing.

The Parties' Collective Bargaining Agreement at Article 31, titled, "Selections, Promotions and Transfers", Section 31.05(B), indicates Management will provide "voluntary" testing and voluntary compliance of OPOTC basic training program physical fitness standards, or other standards, to all Employees hired before January 1, 2004. "Mandatory" testing and mandatory compliance of the afore-referenced standards, or other measurable standard, would be required for all Employees hired after January 1, 2004. The Parties are seemingly in agreement with respect to Article 31 wherein it requires mandatory testing for all Employees hired after January 1, 2004. The dispute involves whether an Agency can "opt in" to mandatory physical fitness testing addressed in Section 31.05 (B) after presumably "opting out" of such mandatory testing.

The Ohio State Highway Patrol has two (2) groups of Employees falling under the Collective Bargaining Agreement represented by the Fraternal Order of Police, Ohio Labor Council, Inc., hereinafter referred to as the "Union", concerning Unit No. 2 - Police Officers and Enforcement Agents. Enforcement Agents are specifically assigned to the Ohio Investigative Unit, otherwise known as the "OIU". That Unit previously fell under the Department of Public Safety and was recently "moved" some five (5) years prior and is now under the auspices of the Ohio State Highway Patrol which has the command and oversight responsibilities for this Unit. As the undisputed evidence of record demonstrates, the entire OIU previously "opted out" of the mandatory fitness testing sometime in 2007 under former Ohio Investigative Unit Director, Kathy Collins-Taylor when that Unit fell under the command of the Department of Public

Safety. Subsequently, Commander Gary Allen, who has served in various positions and was a State Trooper, assumed responsibility for the oversight and command of the Ohio Investigative Unit. He testified he discovered the prior arrangement to "opt out" Enforcement Agents from mandatory fitness testing prompting his inquiry and discussion with the Office of Professional Standards. He decided to opt back into the mandatory fitness testing based on his reading of Section 31.05, (B), titled, "Physical Fitness Qualifications". As the record demonstrates, in 2017 based thereon, all Ohio Investigative Unit Enforcement Agents meeting the requirements of Section 31.05 were required to undergo mandatory testing. Moreover, Police Officers within the Bargaining Unit, Unit No. 2, the same Bargaining Unit as the OIU Enforcement Agents, have always been subjected to mandatory fitness testing for those meeting the requirements of Section 31.05 (B).

As indicated, this Grievance arose, and was filed, as a "Class Action" on behalf of the Membership of the FOP Bargaining Unit, i.e., members of the Bargaining Unit employed by the Department of Public Safety, the Ohio Investigative Unit, which falls under the auspices of the State Highway Patrol. The matter at hand involves the issue of mandatory physical fitness testing versus that of a voluntary nature as impacted by the "opt out" provision contained in Article 31 of the Collective Bargaining Agreement. The afore-referenced Grievance was processed through the negotiated Grievance Procedure without resolution. When the Parties efforts to resolve this matter through the course thereof proved unsuccessful, "mandatory physical fitness testing", a Class Action Grievance filed by Steve Stocker, was appealed to Arbitration hereunder.

CONTENTIONS OF THE PARTIES

UNION CONTENTIONS

The FOP contends the Employer, in 2006, requested the discretionary "opt out" language based on recruitment issues and retention of Employees. Those hired under one set of requirements based on the Employer's unilateral action, will now fall under a new set of requirements to be applied. Such was never anticipated by the Bargaining Unit Members when they applied for and were hired into the Ohio Investigative Unit. To opt out of the fitness test constitutes an established practice between the Employer, the Union, and the Members of this Bargaining Unit. As testified to by Joel Barden, the Union Chief Negotiator for all Contracts that are relevant with respect to this issue, the ability to opt in was never discussed and had it been so discussed, the Union would not have agreed to such language. Since any such ability would directly contradict the very purpose of the Grandfather Clause found in Article 31.05, the Employee knows of any mandatory fitness standard in testing prior to Employment. There is no contractual language that supports the proposition the Employer can unilaterally opt back into mandatory fitness testing. The Collective Bargaining Agreement specifically indicates a Department may only opt out. The Union insists that to require Employees to undergo mandatory fitness qualifications testing would result in the same hindrance in hiring new Employees and retention of those hired after January 1, 2004, referenced by the Employer when this issue was addressed in negotiations.

As the Union contends, during the 2004 Contract negotiations, the Parties agreed mandatory physical fitness testing would be manifestly unfair to apply to those Employees hired prior to any such standards being required. As such, the Parties agreed Employees hired prior to January 1, 2004 would be grandfathered and not required to participate in mandatory testing requirements as a condition of employment. Those Employees hired prior to January 1, 2004

could participate in voluntary testing, but would not be required to undergo mandatory testing. Employees hired after that date were put on notice about the testing requirement.

Joel Barden, Chief Negotiator and FOP Staff Representative for this Unit since 1994, testified it was characterized as a "best management practice" that mandatory testing would only apply to future hires and therefore they would be placed on notice and have actual knowledge of this job requirement. To allow an Agency to opt out of the mandatory fitness testing is consistent with that principle. However, allowing an Agency to opt in after hiring Employees for years and specifically telling them the job has no mandatory fitness standards after their hire date, contradicts the very purpose of the grandfather clause that both sides agreed upon.

During the 2006 Contract negotiations, the Employer requested the Union negotiate changes to these requirements due to issues it was having with hiring and retaining well-trained Employees. Despite its need to change the fitness requirement, some Agencies were not permitted to opt out. Management Exhibit 1 is a copy of a "white board" utilized by the Employer during these negotiations. Based thereon, certain Departments could opt out except ODNR and Public Safety. Such was used in a private management discussion and was never signed by the Union and was not language ultimately memorialized in the Collective Bargaining Agreement. The Contract makes no exceptions to the opt out option for individual Agencies.

After the 2006 Agreement was ratified, the Department of Public Safety chose to opt out of mandatory fitness testing. Employees are entitled to forewarning upon hire that mandatory testing for physical fitness is a requirement to retain employment. The Employer concedes, as addressed in its Opening Statement, Departments are indeed permitted to opt out of mandatory testing. It now takes the position these Departments may unilaterally decide when, and if, they opt back into mandatory testing. The Union submits there is no language in this Article of the

Parties' Agreement permitting the Employer to opt in once it has opted out of mandatory testing. The Employer brought this issue to the Bargaining table whereby it indicated it was having difficulty filling positions within some Departments, including the Ohio Investigative Unit. The Employer expressed dismay about losing Employees it preferred to keep because they failed the fitness test. As a direct result of hiring and retention issues, the Employer proposed permitting Agencies to opt out of mandatory physical fitness testing. It agreed some Employees did not need to be tested and the Parties then agreed to allow each Department to decide whether to opt out of mandatory testing procedures since those Departments knew the Employees and could best determine the necessity for testing.

The record demonstrates the OIU decided to opt out of testing well over 10 years ago. Employees hired during that time were advised they would only be tested during the hiring process. The Employer advised each of them they could volunteer to participate in the fitness testing, but never be required to test again. As testified to by its witnesses, Employees were advised they would not be subjected to mandatory testing for the rest of their careers. As set forth in Union Exhibit 1, mandatory testing is not included in their requirements for retaining employment. Employees who have not participated in this testing for over 10 years are now faced with losing their chosen career since many of these Employees will have problems passing the test at this stage in their careers.

OIU Agents are undercover and if they must do a "door knock" as characterized, they take a uniformed Officer with them. These Agents work in bars and at events where drugs or alcohol may be present. They “fit in” with the clientele at these establishments or events, do not wear uniforms, and are generally undercover unlike Police Officers and/or Highway Patrol State Troopers. The OIU was once under the umbrella of the Agency of Liquor Control and then

became part of the Department of Commerce and more recently placed under the Department of Public Safety, the State of Ohio, Highway Patrol. The current Commander, Gary Allen, is a Highway Patrol State Trooper and has never worked as an OIU Agent. Troopers are uniformed and abide by a strict Uniform Code. Commander Allen's predecessor, who also came from the State Highway Patrol, chose not to require mandatory testing.

Simply stated, the Union insists the Employer cannot be permitted to require Employees to undergo mandatory testing to opt out and opt back in on a whim. The careers of these Employees are in jeopardy as a direct result of the Employer's decision to change a long-standing practice. If in fact the Employer wanted to maintain the ability to opt back into mandatory testing, that language should have been presented to the Union during negotiations. The Collective Bargaining Agreement simply contains no language that allows the Employer to opt back in once it has opted out. Members of the Bargaining Unit have a right to expect the Employer to maintain an established practice such as the opt-out practice. This practice, unlike other past practice issues, is contained within the four corners of the Collective Bargaining Agreement. The Employer cannot be permitted to unilaterally change or refuse to allow the practices of allowing Departments to opt out of mandatory testing. It is a legitimate practice and has become, by its nature, enforceable.

For these reasons, the FOP requests the Grievance be sustained.

EMPLOYER CONTENTIONS

The State contends Article 4 of the Collective Bargaining Agreement permits the Employer to opt back into mandatory physical fitness testing since such is not specifically and expressly set forth in the written provisions of the Parties' Agreement. It insists there is no language that prohibits the Employer from opting back into physical fitness testing. As testified

to by Human Capital Management Analyst I, Shelly Ward-Tackett, of the Ohio Department of Natural Resources and former Labor Relations Specialist with the Office of Collective Bargaining, she was part of the negotiations team in 2006 and recalled discussions regarding the physical fitness testing for Unit 2 Employees. Management Exhibit 1 represents a printout of the "white board" utilized by Chief Negotiator Gary Johnson. That Exhibit indicates all Departments can opt out except for Safety and ODNR. Additionally, it also indicates "all will offer voluntary." She indicated when this deal was struck regarding physical fitness, Public Safety and ODNR were the two Agencies that would be excluded from opting out of the mandatory fitness testing. Such was done so because Members in these Agencies carried firearms and performed law enforcement duties. Agencies such as Mental Health had Officers who did not carry firearms and opting out of the mandatory fitness testing would assist with recruitment and retention. It was determined mandatory testing would be kept in place for those Agencies employing Officers who carried firearms.

She also testified that Article 31, Section 31.05, Paragraph (B), includes the term "discretion" to provide Agencies and future Department leaders the ability to determine when an Agency could opt out of mandatory testing. She indicated it was never the intent of the language for Management to surrender that right to opt back into mandatory testing if they had previously chosen to opt out.

Additionally, Assistant Deputy Director of the Office of Collective Bargaining, Kristen Rankin, indicated as part of the Negotiations Team in 2006, she recalled specific discussions that Public Safety and ODNR would be excluded from opting out of the mandatory physical fitness testing because both Agencies performed law enforcement duties; both Agencies wanted to require their Officers to complete the mandatory physical fitness testing. The absence of "opting

in" language, under Section 31.05, (B), does not mean the Employer cannot opt back into the mandatory testing if they had previously opted out. The term "discretion" exists to allow an Agency to determine whether to have its Members complete mandatory fitness testing.

The Employer also emphasizes the testimony of Captain Allen who became responsible for the oversight of the Ohio Investigative Unit and learned the Enforcement Agents were not required to complete mandatory fitness like other Members of Bargaining Unit No. 2. He testified he brought this to Staff Lieutenant Cassandra Brewster's attention in the Office of Professional Standards and determined Enforcement Agents should be required to participate in mandatory testing with a hire date after January 1, 2004, in accordance with Section 31.05 (B). He indicated all Enforcement Agents were given at least six (6) months' notice of the requirement to test. Mandatory fitness testing was completed in 2017 whereby all Agents passed their physical fitness tests. He emphasized these Agents are commissioned Officers, carry firearms and work in an undercover capacity performing law enforcement duties; they are involved in resisting arrest/use of force cases and need to maintain their fitness to perform their job duties, protect those they serve and, more importantly, to protect themselves.

The Employer emphasizes the language in Article 31, Section 31.05, (B) titled, "Physical Fitness Qualifications", is clear and unambiguous and does not require interpretation. That language requires mandatory testing for all Employees hired after January 1, 2004. It emphasizes there is no Collective Bargaining language which prohibits the Employer from opting back into the physical fitness testing requirement and to hold otherwise would require the Arbitrator to insert language that is not written into the Agreement. The role of the Arbitrator in this matter is to apply the language to the facts as they exist and based on that assessment, it is

clear the Union has failed to meet its burden of proof warranting a denial of the Union's Grievance.

For these reasons, the Employer requests the Grievance be denied.

DISCUSSION AND FINDINGS

As the evidentiary record demonstrates, the disposition of this matter hinges upon a determination of whether the Employer's actions of requiring members of the Ohio Investigative Unit, hired after January 1, 2004, to undergo mandatory fitness testing after the Unit/Department elected to "opt out" of mandatory testing in 2006/2007 under a previous Commander, violated Article 31, Section 31.05 (B).

The Union insists that more than 10 years ago this Agency "opted out", which the Contract permits it to do, and now it is unilaterally deciding that it will "opt back in", which is not addressed in the Collective Bargaining Agreement. The FOP insists the Agreement does not contain any language in Article 31, Section 31.05, Paragraph (B), permitting the Employer, once it has opted out, to opt back in. It insists this Unit/Agency, under the predecessor to Commander Allen, elected to opt out of the mandatory testing based on the nature of the work performed by these Bargaining Unit Members. Its actions to now require, some ten-plus years later, after it had opted out of this practice, to now unilaterally opt back in is in direct violation of the practice relied upon by these Employees and in violation of Section 31.05 of the Agreement.

The Employer insists the Contract language in question is clear and unambiguous and does not require interpretation. Section 31.05, Paragraph (B), references mandatory testing for all Employees hired after January 1, 2004. There is no language prohibiting the Employer from opting back into the physical fitness testing under that language. To prohibit such would require the Arbitrator to insert language that is not contained within the Collective Bargaining

Agreement. The Arbitrator's role is to apply the language to the facts as they exist at the time the Grievance arose, and based thereon, its actions herein represent its managerial, discretionary prerogative to opt back in to mandatory testing as sanctioned under Article 31, Section 31.05 (B).

First, it must be stated the disposition of this matter is distinguishable from that concerning the personal/individual Grievance of Steve Stocker. His Grievance involved his departure, upon resignation, to pursue a personal employment matter out of the Country and thereby relinquishing his position with the State of Ohio. It is clear upon his return/rehire, he would in fact be under the mandate set forth in the clear and unambiguous language of Article 31.05 (B) - he was subsequently hired "after January 1, 2004". That Grievance involved Stocker resigning and being rehired "after January 1, 2004", thus requiring mandatory physical fitness testing. That language for those Employees, hired after January 1, 2004, speaks of mandatory testing and mandatory compliance with OPOTC basic training, physical fitness standards, or other measurable standards. This matter involves whether the OIU, recognized under that CBA, can "opt" back "in" and require the OIU Employees to undergo mandatory physical fitness testing after it - the OIU - exercised its discretion to opt out of this mandatory testing obligation some ten (10) years prior.

The Collective Bargaining Agreement, under which the Arbitrator's authority is conferred and defined, indicates "Departments covered by this Agreement (OIU) at its discretion, may opt out from the mandatory testing requirement and offer voluntary testing". The record indicates this Unit, under a previous Commander, "opted out" of this mandatory testing requirement based on hiring and retention concerns sometime in 2006 and/or 2007. It is clear based on the evidentiary record numerous Employees did indeed engage in voluntary testing for which a monetary incentive was offered. Those employees who took advantage indeed tested, and based

on the passage of those requirements, would receive a certain compensable amount for their efforts.

The "duties" performed by Members of the Ohio Investigative Unit, as compared to the duties of the Police Officers and the Highway Patrol, are distinguishable in many respects. Indeed, as the record demonstrates, these Employees are Commissioned Officers. They carry firearms and work predominately undercover performing what was characterized as "law enforcement duties". While their exposure to instances involving resisting arrest, use of force, etc., are not as frequent as compared to that of Police Officers and State Troopers, they occasionally run into these encounters. The Parties' Collective Bargaining Agreement does not contain any language addressing whether once an Agency "opts out", as this Agency did some 10-plus years prior, it can now opt back in to requiring Bargaining Unit Members to undergo mandatory fitness testing.

It is a generally recognized standard in Contract interpretation matters, arising under a Collective Bargaining Agreement, to expressly include certain mandates or guarantees is to exclude other mandates or guarantees. Contained in section 31.05, Paragraph (B), are two (2) "included" such mandates and/or guarantees addressing mandatory and voluntary physical fitness testing. The expressed mandatory testing proposition is addressed and made applicable to all employees hired after January 1, 2004. Additionally, voluntary testing would be made available to all Employees hired before January 1, 2004. The "exception" if you will, to these "general" propositions, is seen in the last sentence of that Paragraph wherein "opting out" of mandatory testing is addressed. There exists no language addressing whether a "Department covered by this Agreement…" may "opt back in" and require mandatory physical fitness testing after "opting out". The OIU, under a previous Commander, elected to forego, or "opt out" of,

mandatory testing and made such voluntary. There exists no evidence to suggest Employees in this Unit job performance was hindered or rendered sub-par as "voluntary" testers versus "mandatory" testers. In fact, one such Agent suffered knee injuries while attempting to "pass" the mandatory testing. The record also indicates all Agents successfully completed such.

That sentence as contained in Section 31.05 (B), as "expressed", provides discretion to "Departments covered by this Agreement…" to "opt out" from the mandatory testing requirement. The Parties, in Paragraph (B), expressly memorialized a Department's discretion to "opt out" from mandatory testing. There is no language expressed therein allowing "Departments covered by this Agreement…" to "opt in" and require mandatory testing after exercising said discretion to "opt out". Based on this principle of contract interpretation that language indicates an "opt out" opportunity and fails to address whether a Department covered by this Agreement may opt in after opting out. Expressed language affording Departments covered by this Agreement the ability to opt in and require mandatory testing is missing in Paragraph (B) of Section 31.05. It is clear based on this contract interpretation standard the Parties expressly included the ability to "opt out" of mandatory testing and in doing so did not memorialize any language allowing Departments covered by this Agreement to opt back in and require mandatory testing. That language is clear and unambiguous and memorialized in the Collective Bargaining Agreement. The Parties expressed the ability to "opt out" and, as such, absent any language to the contrary, excluded the ability of a "Department covered by this Agreement…" to opt in to mandatory testing after opting out.

The concept of "testing" - mandatory or voluntary - is a condition of employment based on a practice that has existed for a reasonably long period of time whereby this Unit, under the command of the predecessor to Commander Gary Allen, elected to opt out in accordance with

Article 31, Section 31.05 (B). As previously indicated, there is no language addressing whether the Department can opt back in after it has exercised its discretion under Section 31.05 (B) to "opt out" of the mandatory testing requirement. The discretion lies in the ability, contractually, of a Department covered by the Collective Bargaining Agreement, to opt out of this mandatory testing requirement. Such was done with the Ohio Investigative Unit some 10-plus years prior. Employees in the Ohio Investigative Unit, with certain distinguishable job responsibilities unlike Police Officers and State Highway Patrol Troopers (undercover operations and the need to "fit in") would be adversely impacted. As the testimony of record indicates, these Employees were advised and placed on notice that upon their hiring, conditioned upon passing the required OPOTC testing at issue herein, such would never be required in their respective careers in the Ohio Investigative Unit. Based on the lack of any language memorialized by the Parties concerning "opting back in" to the mandatory testing requirement, the Employer's unilateral implementation of this mandatory requirement is in direct violation of Article 31, Section 31.05 (B). Whatever changes the Employer desires to implement with respect thereto is best served at the bargaining table.

AWARD

The Grievance is sustained.

David W. Stanton
David W. Stanton, Esq.
NAA Arbitrator

March 9, 2018
Cincinnati, Ohio