

ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: 1019

OCB GRIEVANT NUMBER: 15-03-940822-0069-04-01

GRIEVANT NAME: David Wolfe1

UNION: FOP 1

DEPARTMENT: Highway Patrol

ARBITRATOR: Harry Graham

MANAGEMENT ADVOCATE: Rick Corbin

2ND CHAIR: Cindy Sovell

UNION ADVOCATE: Paul Cox

ARBITRATION DATE: December 1, 1994

DECISION DATE: December 16, 1994

DECISION: Granted

**CONTRACT SECTIONS
AND/OR ISSUES:** Article 30 - Transfers
Did the Employer violate the Agreement when it failed to award an Electronic Technician 2 position to the Grievant?

HOLDING: The Electronic Technician 2 position was posted as a transfer not a promotion. The Employer selected an ET 1 for the position based on the determination of "best qualified". Although the Drotning case was cited, the Arbitrator found that the circumstances surrounding his award make it of little utility in determination of this dispute. The Employer described the difference in seniority (approx. 5 months) as being "de minimus", however the Arbitrator states "close counts in horseshoes, not in computation of seniority." The Grievant is to receive the position of Electronic Technician 2.

ARB COST: \$

In the Matter of Arbitration

Between

Fraternal Order of Police-Ohio
Labor Council

and

The State of Ohio, Ohio State
Highway Patrol

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Case Number:

15-03-940822-069-04-01

Before: Harry Graham

Appearances: For Fraternal Order of Police-Ohio Labor Council

Paul Cox
Law Enforcement Legal Association
222 East Town St.
Columbus, OH. 43215

For Ohio State Highway Patrol

Rick Corbin
Ohio State Highway Patrol
660 East Main St.
Columbus, OH. 43205

Introduction: Pursuant to the procedures of the parties a hearing was held on December 1, 1994 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

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

Did the Employer violate the Collective Bargaining Agreement when it failed to award an ET 2 position to the Grievant? If so, what shall the remedy be?

Background: There is no dispute over the events that give

rise to this proceeding. The Grievant, David Wolfel, II is employed as an Electronic Technician 2 in District 6 of the Ohio State Highway Patrol. His seniority date is April 22, 1991. In July, 1994 the Patrol posted for a vacant position at General Headquarters. That position was for a vacancy as an Electronic Technician 2. The posting noted that an Electronic Technician 1 could also apply for the vacancy. Should an ET 1 be awarded the vacancy it would represent a promotion for the successful bidder. The posting concluded with a note indicating that the position would "involve a great deal of work with computers and computer related equipment." Among the applicants for transfer to the position was the Grievant, David Wolfel. There was at least one other applicant, Dennis Rogers. At the time of the posting Mr. Rogers was classified as an ET 1. In due course, Mr. Rogers was awarded the position at Headquarters as an ET 2. In order to protest that action Mr. Wolfel 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 Article 30, Section 30.01 of the Agreement and asserts it has been violated in this situation. In relevant part the Agreement provides that "When the Employer determines a position shall be filled by transfer the active transfer file shall be used

to fill the position. When the Employer creates a new position, to be filled by transfer, the position will be posted at all Highway Patrol facilities for a period of seven (7) calendar days. All personnel in the affected classification shall have the right to bid on the position."

In this situation the Employer determined to fill the vacancy at Headquarters via a transfer. This is shown by the posting, Joint Exhibit 3 in this proceeding. That posting clearly references filing of a "Transfer Request" as the mechanism for applicants to show their interest in the position. Mr. Wolfel, an ET 2, applied for a transfer. The Employer filled the vacancy with an ET 1. For that person, the move to the vacant position represented a promotion, not a transfer. As the Union views this situation the Employer is bound by the posting to fill the position via transfer, not promotion. In this case, a promotion occurred. That is a violation of the Agreement the Union claims. It urges the Grievant be awarded the position at issue in this proceeding.

Position of the Employer: The State points out that there were a total of six applicants for this position. Among the applicants were ET 2's and ET 1's. All applicants were interviewed. In this situation the State made a good faith determination that Dennis Rogers was the best qualified applicant. He had a great deal of coursework in computers. This included work in digital communications, programming and

operating systems. No doubt exists but that he was the most qualified bidder.

Section 30.01 of the Agreement provides that "Selection of the person to fill the position shall be based on ability and seniority." Those criteria were observed by the Employer in this instance it asserts. Mr. Rogers was the candidate with the most ability. His ability was greater than that of Mr. Wolfel, the Grievant. As that was the case, the Employer may act as it did in this instance.

The State points out that both Mr. Wolfel and Mr. Rogers are almost equal with respect to their seniority in the bargaining unit. Mr. Wolfel has about five months more service than does Mr. Rogers. The State characterizes that difference as being "de minimus" and not controlling in this situation.

The Agreement is silent on the question of promotion. The Employer through several rounds of negotiation has successfully resisted Union attempts to secure a voice in promotions. This view is bolstered by the decision of Arbitrator John Drotning dated May 1, 1991. (No case number supplied). Arbitrator Drotning determined that:

Management has the right to select employees for specific positions on the basis of ability and/or seniority under Article 30.01 so long as Management's decision is not unreasonable, arbitrary, capricious or discriminatory.

As the State views this situation, the Drotning award is controlling. It permits the State to act as it did in this

instance. Hence, the Grievance should be denied in its entirety according to the State.

Discussion: Joint Exhibit 4 in this proceeding is the Drotning award. It is cursory in nature. The Arbitrator did not indicate if the issue before him was properly to be characterized as a transfer or a promotion. The issue in dispute between the parties in the Drotning case was not agreed upon between the parties. Nor did Arbitrator Drotning frame an issue for decision. The circumstances surrounding his award make it of little utility in determination of this dispute.

The characterization by the State of consideration of seniority as being of little relevance in this situation is rejected. At Article 36 of the Agreement the parties have taken great pains to define seniority. It is defined as the "total length of continuous service in a permanent full-time position or succession of positions with the Employer." Under that definition, the Grievant has more seniority than Mr. Rogers, the successful bidder. The State cannot disregard that seniority. That view is bolstered by the detailed procedure for breaking a tie in seniority dates set forth at Section 36.02. It is oft observed that seniority represents the heart of the Agreement. It cannot be cavalierly dismissed by the State. Close counts in horseshoes, not in computation of seniority.

In this situation the Employer determined to fill the vacancy at Headquarters by transfer. Its own posting indicates that an ET 1 who is interested in a promotion the may apply "(in the event that no transfer requests are received)...." But, transfer requests were received. Among them, that of the Grievant. When that occurs Article 30 is implemented.

The language of Article 30 relied upon by the Employer does not support its position in this dispute. That language, "Selection of the person to fill the position shall be based on ability and seniority" must be read in context. It refers to transfers, not promotions. This is obvious due to its placement in the text of Article 30. It follows the sentence "All personnel in the affected classification shall have the right to bid on the position." The affected classification in this situation was ET 2, not ET 1.

Award: The grievance is sustained. The Grievant is to receive the position of ET 2 referenced in the posting, Joint Exhibit 3.

Signed and dated this 16th day of December, 1994 at South Russell, OH.

Harry Graham
Harry Graham
Arbitrator