

ALTERNATIVE DISPUTE RESOLUTION

STATE OF OHIO	:	
	:	
The Employer	:	
	:	
-and-	:	<u>OPINION AND AWARD</u>
	:	
FRATERNAL ORDER OF POLICE,	:	
OHIO LABOR COUNCIL, INC.	:	
	:	
The Union	:	

APPEARANCESFor the Employer:

Robert J. Young, Advocate
Michael P. Duco, Second Chair
Captain F. Freeman, Jr., Jackson Station
Sergeant E. W. Kelly, Jackson Station
Trooper H. K. Barnitz, Jackson Station
Trooper G. A. McKeever, Jackson Station

For the Union:

Paul F. Cox, Chief Counsel
Ed Baker, Staff Representative
Renee Engelbach, Paralegal
Trooper John Risner, Grievant
Trooper Larry Phillips, Grievant
John Allard, Unit 15 Release Person
Ron Mottning, Unit 1 Chairman
Charles J. Linek, Jr., Unit 1 Release Person

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I. SUBMISSION

This matter came before this mediator pursuant to the terms of the collective bargaining agreement generally and pursuant to clause 20.13 specifically, the parties having been unable to resolve their differences prior to the instant hearing. The instant hearing was scheduled and conducted at the offices of the employer in Columbus, Ohio, on August 21, 1995, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the mediator; that the witnesses should be sworn and sequestered and that post hearing briefs would not be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS

By virtue of a retirement the position of commercial motor vehicle trooper became open. That position indicated the following nature of work:

"Enforce the laws as prescribed in Section 5503.02 of the Ohio Revised Code and other laws which fall within the jurisdiction and authority of the Ohio State Highway Patrol; inspect commercial motor vehicles for safety using Federal Motor Carrier Safety Regulation (FMCSR) and Public Utilities Commission (PUCO) regulations and standards; possess knowledge and adhere to all written directives of the Ohio State Highway Patrol; and assist the supervisory officers in designated administrative duties. Reports to the commercial enforcement coordinator."

Both parties agreed that clause 30.01 applied to the choice

involved in this particular matter. The pertinent language in that particular section revealed the following:

"Selection of the person to fill the position shall be based on ability and seniority. In the event of a field opening, i.e., an opening at one of the fifty-eight (58) Patrol posts, seniority shall be the determining factor."

It might be noted that the employer did not consider the opening a field opening but rather a non-field position. The union on the other hand indicated and stated that the pertinent clause relative to that matter is found in section B of that particular article at 30.01 and that language revealed the following:

"B. Specialty Positions

The Employer shall have the right to transfer members out of any non-field position at its discretion pursuant to the following:

For the purpose of this agreement, a 'non-field' position is defined as any position within the Academy, Office of Human Resource Management, Aviation, Planning and Analysis, Inspections and Standards, Executive Protection, Office of Investigative Services, Crash Reconstruction, or as a Plain Clothes Investigator."

From that the union concluded that since the commercial motor vehicles trooper position was not mentioned as a non-field position specifically within the language of the contract of collective bargaining, then in fact it was a field position. The employer indicated and stated that the indicated position was not one which belonged to any patrol post but rather to the district at large and even though it is not mentioned as a non-field position in the contract at

paragraph B of 30.01, the fact of the matter is that such was the case contrary to the union's argument. At any rate, the parties not only disagreed as to whether or not the opening was a field position or a non-field position, the parties also disagreed on how the choices involved should be made.

There were two grievances filed in this particular matter after trooper Gregory A. McKeever was chosen. The first grievance was filed by John Risner and his protest was placed into the grievance procedure on a timely basis. He was the most senior trooper to request and protest for the position. He was interviewed just as everyone else was and his score for both an oral test and a written test was indicated to be forty-five percent. The write-up concerning him revealed the following:

"Trooper John Risner, Unit 1446

Trooper Risner does not require alot of supervision. He stated his goal is to stay out of trouble. Trooper Risner has no sincere enthusiasm for this position. His commercial activity percentage is far below post average. His only motivation for the position is wanting the training for employment upon retirement in 5 to 7 years. He stated he cannot compete with younger troopers, but is willing to do the best job he can. Trooper Risner has shown no past interest in commercial enforcement until this position became available. He does not seek out the CVI or Scale Team when in his area. He also lacks knowledge in the most common ORC Laws that apply to commercial vehicles. He did not know the district commercial enforcement goal for 1995.

Test Score: 45%

Commercial Enforcement Percentages:

1993 - 4%
1994 - 4%
1995 - 7%

Seniority: 9/22/71"

The second protest was filed by Trooper Larry K. Phillips and revealed that Phillips was not as senior as Risner but was much more senior than the successful candidate. The write-up of Phillips revealed the following:

"Trooper Larry K. Phillips, Unit 1226

Trooper Phillips shows some enthusiasm for this position. He wants a new challenge in his career. He has many years of experience dealing with people and requires little supervision. In 1993, Trooper Phillips was chosen as Trooper of Year at Portsmouth Post. He has demonstrated little involvement in the commercial enforcement program. Currently, his commercial activity is below his post and district average.

Test Score: 55%

Commercial Enforcement Percentages:

1993 - 14%

1994 - 9%

1995 - 5%

Seniority: 2/25/81"

The successful candidate had a test score of seventy percent which was better than both grievants (Risner and Phillips) but was the most junior employee. The write-up concerning McKeever who is a choice of the appointing authority revealed the following:

"Trooper Gregory A. McKeever, Unit 1079

Trooper McKeever has specialized training as a Field Training Officer, Police Instructor, ADAP Instructor, and in Technical Crash Investigations. He has demonstrated an eagerness and enthusiasm in commercial enforcement. He is self-motivated and

has consistently produced a high percentage of commercial activity during the past three years. On numerous occasions, he has voluntarily worked with the CVI Trooper and PUCO units gaining knowledge and experience conducting commercial vehicle inspections. His work records indicate loyalty to the division and willingness to work toward the goals of his supervisors, the district and the division. He plans to take the CVI position to the 'next level'.

Test Score: 70%

Commercial Enforcement Percentage:

1993 - 7%
1994 - 19%
1995 - 18%

Seniority: 4/1/87"

There were three other candidates for the position but those three did not file a protest and do not need to be entered into the discussion in this particular matter. Further, there was no indication in the grievances as filed by Phillips and Risner that the test was unfair or weighted or in any way improper. A discussion therefore of the test need not be made. It is interesting to note that the appointing authority testified that Risner was not qualified for the position; that Phillips had the minimal qualifications for the position and that McKeever had the best qualifications for the position. The union did not question that McKeever had the best qualifications for the position. The union argued however that Phillips had minimum qualifications for the position and that the employer by virtue of choosing the most junior but allegedly the best qualified ignored the contractual clause which demanded that both seniority and ability be considered in a non-field position opening. The union still maintained, in the alternative, however, that only seniority need be the only factor involved since the position was a field position.

On the basis of the evidence revealed and on the basis of the contractual clauses and the arguments of the parties, this matter rose for opinion and award.

III. OPINION AND DISCUSSION

A field opening is an opening at any one of the fifty-eight patrol posts. The employer's contention that this is a non-field opening is correct. This is a position that is attached to the district headquarters and even though the place of business is one of the fifty-eight posts, the position is one which is attached to the district rather than to a particular post. Even though the CVI position is not mentioned in 30.01 paragraph B, the fact of the matter is it should have been and by virtue of it being attached to a district rather than to a post is the determining factor. The union's contention is inappropriate and therefore must be dismissed in that regard. As a result, seniority alone is not the determining factor for the position involved in this particular case.

In this particular case it is apparent that the employer conducted a testing and reviewed the backgrounds and interests of the interested applicants for the position. McKeever was one of six candidates and there were several candidates with less seniority than McKeever and the two most senior protested McKeever's appointment. Trooper Risner did not have a distinguished record as to the commercial vehicle aspect of his duties and as a result of that management considered him unfit for this particular appointment. The union offered no persuasive evidence to indicate otherwise. While Risner had been a trooper for a goodly number of years, he indicated and stated that there was no particular

interest to the position sought other than its availability. His evidence as to ability therefore was considered by this writer to be inappropriate for the position sought.

Phillips on the other hand had more seniority than McKeever, the successful candidate, and also had a distinguished career during his tenure as an officer with the patrol. As I read his background he was chosen as trooper of the year at the Portsmouth post and had a bright record. While he did not have as much activity concerning commercial vehicles while on duty, he nonetheless portrayed initiative and was found by the appointing authority to have the minimum qualifications for the position in question. The union did not question McKeever's ability for the position. The other candidates may not be discussed because they did not file a protest and they are not part of this proceeding.

It might be noted that management contended that there was no violation of the agreement. Management however by its own statements indicated and stated that they selected the trooper they believed to be the "most capable". That clause is even found in their opening statement and it stated the following:

"Management selected the trooper they believed was most capable."

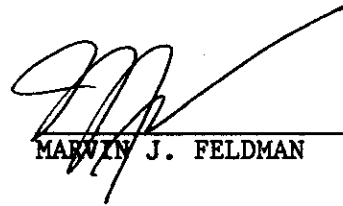
The question arises as to whether or not under the terms of the contract the employer has the right to select "the most capable" when there is language in the contract that says "seniority and ability" shall be considered in this particular matter of choice.

Both parties concede that Risner had no particular ability for the position. Evidence further revealed that this was not a field opening and I have already ruled on that point and therefore seniority alone does not apply. That brings up the next question. Does "more" ability count than "minimal" ability when a choice under a contractual clause, "seniority and ability" is indicated?

Management it appears added a word to the contract and that word is "most". Management picked the most qualified by their own admission. They gave a lesser value to seniority than ability by doing that. It is apparent from the writings of the contract that the parties agreed that seniority and ability are the basis for choice not seniority and most ability. If the parties meant that then they would have agreed to that. If this writer allows that then this writer is allowing different language to be the predicate for the choice than was agreed to. Simply put, minimal ability is all that is needed under the terms of the contract. Like it or not, that is the general rule in matters of this sort. An arbitrator or mediator cannot change, modify, amend or supplement the written word of the contract. The contract demands that there be a choice based on seniority and ability and not on seniority and most ability. That being the case, it is apparent that Phillips should be considered the successful applicant for the sought after position. For all of these reasons therefore Trooper Larry K. Phillips should be the successful applicant for the position based upon the interpretation of the contractual clause involved in this particular matter.

IV. AWARD

It is the Award of this writer that grievant Larry K. Phillips be awarded the position involved in this particular case on the basis of the above indicated analysis.



MARVIN J. FELDMAN

Made and entered
this 25th day
of August, 1995.