#1289

In the Matter of Arbitration Between:

OHIO DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF THE STATE HIGHWAY PATROL

and

OHIO STATE TROOPERS ASSOCIATION

Re: Gr. 15-03-960312-0025-07-15 (O'Rourke training)

Hearing held April 30, 1998

Decision issued May 29, 1998

APPEARANCES

Employer
Capt. Richard Corbin, Advocate
S/Lt. Robert Booker, Co-advocate
Rodney Sampson, OCB, Second Chair

Union
Herschel M. Sigall, Esq., Chief Legal Counsel, OTA
Bob Stitt, Vice President, OTA
Sgt. W. J. O'Rourke, Grievant

Arbitrator
Douglas E. Ray

I. BACKGROUND

Grievant has been a member of the State Highway Patrol since 1969 and a Sergeant since 1976. He serves as Assistant Post Commander at the Bucyrus post and is in a bargaining unit represented by the Ohio Troopers Association which is party to a collective bargaining agreement with the State of Ohio. Grievant was 52 years old at the time of the incidents that led to this grievance.

The incidents that led to this grievance are briefly summarized below. In late 1995, Grievant applied to attend Electronic Speed Measuring Device training (ESMD). Such training enables a sergeant to be certified as a trainer and qualifies him or her for certain overtime opportunities as a trainer in federally funded programs designed to train officers from other law enforcement agencies. Grievant's application was recommended by his Post and by the District and he was scheduled, by the Academy, to attend a 4 day course in June, 1996. On January 30, 1996, the District requested that he be replaced in the training class by Sgt. Errington, a then 32 year old sergeant from another post. The memorandum stated as justification that "The Marion Post is in need of a certified instructor, while the Bucyrus Post already has one." Thereafter, Grievant had a number of conversations with his assistant district commander, S/Lt Maxey. Lt. Maxey first advised him in February that there might be a problem with his attending the June course. Later in the month, he told Grievant that he would not be

attending and that it was nothing personal and nothing against him. He told Grievant that the district commander had asked why they were sending Grievant when he was so close to retirement and why couldn't they send a young sergeant, suggesting that Sgt. Errington wanted to be a radar instructor. This appeared to be the gist of the second conversation on the subject and Grievant surreptitiously tape recorded their third conversation in which these remarks were made. At hearing, Lt. Maxey confirmed that he did say the things on the tape recording transcript.

At hearing, Lt. Maxey testified that he had given Grievant the age reason to let him down gently and that the district commander had not relied on age as his reason, but, rather, Grievant's history of low evaluations and inability to get along with people. In the 6-14-96 investigative report, the investigating officer reports that Lt. Maxey stated that the district commander had advised him that Grievant's performance had been poor, that Grievant had been talking about retirement within a year and that there were better candidates to send. The investigative report also states that the staff lieutenant also related that the captain had told him to cancel Grievant and select another sergeant who was younger.

Captain Hoeft, the district commander, testified that the November, 1995, approval of Grievant's training had been processed under his name but that he had not seen it and

that he would not have approved the training for Grievant. He testified that he did not rely on age as a reason but, rather, relied on Grievant's low evaluations. He also testified that he had turned down Grievant for radar school in the past and told Grievant then that he needed to improve in how he gets along with people before he could go to radar school. He testified that there had not been improvement. In the investigative report dated 6-14-96, the investigating officer indicates that Captain Hoeft said that when he and Lt. Maxey were discussing how to inform Grievant of the decision, they "may have mentioned" age but age was not a factor in the decision.

At the direction of general headquarters, Grievant was approved for ESMD training and attended a course in March, 1997. He did receive overtime opportunities as a trainer in 1997.

II. ISSUE

The parties stipulated the issue to be:

Did the Employer Violate Article 7 based on Grievant's non-selection to attend Electronic Speed Measuring Device Training in June, 1996? If so, what shall the remedy be?

III. CONTRACT PROVISIONS

Article 7, Non-Discrimination provides in part that "Neither party will discriminate for or against any member of the bargaining unit on the basis of age, ..."

IV. POSITIONS OF THE PARTIES

Both parties made extensive arguments at hearing. Their positions are only briefly summarized below.

A. The Union

The Union asks that the grievance be upheld. It argues that Grievant was 52 years of age and that the Employer has discriminated against him because of age. It points out that, at the time of the incidents in question, there was no mandatory retirement at age 55 and that the Employer's denial could have cost Grievant substantial opportunities. The Union points out that the only requirements for the course were to be a sergeant and meet health and fitness requirements which Grievant did satisfy.

The Union argues that Grievant testified credibly as to what he was told and points to confirmation in the statements and testimony of Lt. Maxey. It argues that age was a factor in the decision and that the Employer has scrambled to construct a new scenario to explain the decision. It points out that Grievant already had received his low evaluations so there was no need to "let him down gently." It points out, too, that the Employer's stated reason for cancellation on the January, 1996, memo was also admitted to be a false reason. It asserts that current testimony about low evaluations as the reason for cancellation is merely a smoke screen and notes that S/Lt. Maxey went out to Sgt. Errington's post to suggest that he, a younger sergeant, apply. It asserts that neither the law

nor the contract permit an employer to get "more bang for the buck" by reserving training opportunities only for young people.

With regard to remedy, the Union asks that Grievant be made whole. Although Grievant received opportunities to work as a trainer in 1997, he did not receive such opportunities in 1996. Although the 5 sergeants, including Sgt. Errington, trained in the June, 1996, class were not put on the training roster until January, 1997, the Union asserts that Grievant would not have allowed such an error to occur and would have worked 1996 opportunities as well.

B. The Employer

The Employer asks that the grievance be denied. It asserts that the staff lieutenant did make a mistake in characterizing the denial as being based on age but argues that such mistake does not establish that Article 7 was violated. It asserts that the real reason for the denial was established and that it was a legitimate reason. It asserts that the Captain had authority to make the change and did so because of his knowledge of Grievant's work record.

The Employer also argues that Grievant has shown no job detriment. It points to testimony that Grievant attended the training class in March, 1997, and received the same number of 1997 overtime rate training opportunities as Sgt. Errington and more than the other sergeants who completed the June, 1996, course for which Grievant was originally

scheduled. It points to testimony that those who completed the June, 1996, course, including Sgt. Errington, were not put on the training roster before January, 1997, and therefore Grievant lost no opportunities as a result of the delayed date on which he received training.

The Employer asserts that Grievant does deserve an apology for how this was handled but that there was no age discrimination and no remedy is warranted. It asks that the grievance be denied.

V. DECISION AND ANALYSIS

In reaching a decision in this matter, the arbitrator has reviewed the collective bargaining agreement, the testimony produced at hearing, the exhibits introduced into evidence and the arguments of the parties.

At the outset, the arbitrator notes that this decision is limited to interpreting the collective bargaining agreement. Although legal standards may be referenced, the arbitrator intends only to interpret the contract. An arbitrator does not apply the same evidentiary standards as do federal and state courts nor are the parties to an arbitration proceeding generally provided the kind of extensive discovery available in a court proceeding.

Interpreting Article 7 will require a finding of motive. If the arbitrator were to apply the McDonnell Douglas test for determining motive based on circumstantial evidence, the Union would most likely have established a prima facie case. The Employer would then have to come

forward with an allegedly legitimate non-discriminatory reason for its decision to cancel Grievant's training. Here, the Employer points to Grievant's low evaluations and alleged difficulties dealing with people in asserting that he would not have been an ideal representative of the Patrol in dealing with officers of outside law enforcement agencies. The Union would then have the opportunity to show that such reason was a pretext for discrimination. The fact that the January 30, 1996 memo gives a different reason and the various statements by S/Lt. Maxey pointing to age would surely give the Union ammunition with regard to pretext. The Union would bear the ultimate burden of proving that the real reason was age discrimination but it would have a chance of prevailing on this theory.

If the slightly less well known Hopkins test were applied, the Union would have the burden of showing that age was a motivating factor. Statements apparently made to the investigating officer as well as the conversations with S/Lt. Maxey would provide the Union with evidence in this regard. If this were established, the Employer would then have the burden of proving that it would have made the same decision without reference to age. Management would no doubt point out that the January 30 memo cancelling Grievant's training also cancelled a trooper's enrollment in a different course. To resolve the issue, however, a fact finder would probably have to review extensive records to determine the degree to which the District had cancelled

other people's training and if people with low evaluations had ever been allowed to take training. Also relevant would be the Employer's assertion that Grievant had been denied radar training in the past due to his record.

This being an arbitration, the arbitrator does not intend to determine how this matter should come out in a court of law. The arbitrator believes that, on the facts of this case, the Union has proved a violation of Article 7. Because the labor contract is a promise between the Employer and the Union, the arbitrator believes that the Employer should be bound by the representations made by its designated representative for purposes of contract enforcement. S/Lt Maxey was assistant district commander. He apparently was the person who initialed the district commander's initials on the directives approving the training and rescinding the training. The January 30, 1996, memo rescinding approval for training provided a reason that was not accurate. The assistant district commander was directed to advise Grievant that his registration in the training course was cancelled. He told Grievant that, in essence, age was the basis. Contract enforcement and labor negotiations require that accurate reasons be given. The arbitrator believes that, for labor contract purposes and in the circumstances of this case, the Employer should be bound by representations made by its designated representative and, on this basis, finds a contract violation.

The arbitrator does not reach the issue of whether it might be valid for an employer to deny training opportunities to a bargaining unit member who is on the verge of retirement. This issue was not before the arbitrator. At the time he was denied training, Grievant was eligible to continue in service for a substantial number of years. There was no mandatory age 55 retirement in place at the time. Further, while retirement might have been discussed, it was not established that Grievant had decided to retire or had announced an intent to retire.

On the issue of remedy, the arbitrator finds that no remedy is called for in light of subsequent developments. Headquarters overruled the District and ordered that Grievant be placed in the March, 1997 training program. As a consequence, he received at least as many opportunities to be a trainer in off duty details as the 5 OSHP members who took the June, 1996, course for which he was originally scheduled. He received the same number of 1997 off duty training opportunities, two, as did Sgt. Errington who replaced him. None of the June, 1996, trainees received any opportunities in 1996 as they had not been put on the training roster. Although the Union argues that the failure to place them on the roster was wrongful and that Grievant would have had it corrected and would have received overtime opportunities in 1996, the arbitrator finds this argument too speculative to credit. First, there is no indication that such opportunities are governed by the collective

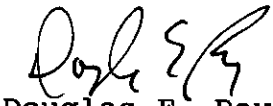
bargaining agreement. Even if they were, there was no grievance filed and it appeared to be the practice in 1996 not to put recent trainees on the roster. Finally, there is no way that the arbitrator could determine whether Grievant could have gotten the practice changed.

Despite the lack of remedy, the arbitrator does not declare the matter moot. The Employer did deny Grievant an opportunity and the arbitrator finds that the denial violated Article 7.

VI. DECISION AND AWARD

The grievance is sustained. The arbitrator finds that no remedy is necessary to make Grievant whole.

Toledo, Ohio, County of Lucas
May 29, 1998



Douglas E. Ray
Arbitrator