

THE STATE OF OHIO AND OHIO STATE TROOPER ASSOCIATION,  
UNIT 15, VOLUNTARY LABOR ARBITRATION PROCEEDING

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IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO STATE HIGHWAY PATROL

-AND-

OHIO STATE TROOPER ASSOCIATION, UNIT 15<sup>1</sup>

GRIEVANT: GARY E. DOLAK  
GRIEVANCE NO.: 15-03-970106-0003-07-15

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ARBITRATOR'S OPINION AND AWARD  
ARBITRATOR: DAVID M. PINCUS  
DATE: October 19, 1998

**APPEARANCES**

**For the Employer**

Richard Corbin	Captain
Mike Schneider	Sergeant
Susan M. Rance	Observer
Camille Wilson	Observer
Wendy F. Clark	Labor Relations Specialist
Robert J. Young	Advocate

**For the Union**

Gary E. Dolak	Grievant
Elaine M. Silvano	OSTA Assistant
William Gruszecki	Sergeant
Bob Stitt	Local President
Hershell Sigall	Advocate

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<sup>1</sup>The grievance in dispute was initiated under the auspices of an Agreement (Joint Exhibit 1) between the State of Ohio and The Fraternal Order of Police Ohio Labor Council, Inc., Unit 15 for the period 1994-1997. At the present time, the bargaining unit is being represented by a newly elected exclusive representative. Even though the Ohio State Trooper Association was not a party to the previously designated Agreement (Joint Exhibit 1), it is arguing the matter in light of existing contract language specified in the predecessor Agreement.

## **INTRODUCTION**

This is a proceeding under Article 20, Grievance Procedure, Section 20.08 Arbitration, of the Agreement between the State of Ohio, the Ohio State Highway Patrol (the "Employer") and The Fraternal Order of Police, Ohio Labor Council, Inc., Unit 15 (the "Union"), for the period April 1, 1994 to March 31, 1997. The arbitration hearing was held on August 28, 1998, at the Office of Collective Bargaining, Columbus, Ohio. The parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. Issues of timeliness or other procedural and substantive technicalities affecting the merits of the grievance were not raised by either party.

At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post hearing briefs. The parties did not decide to submit briefs, and rested with closing arguments.

## **STIPULATED ISSUE**

Did the promotion and transfer of Sergeant Michael Schneider to the position of Commercial Enforcement Coordinator for District 4 violate Section 30.03 of the Unit 15 labor agreement?

## **PERTINENT CONTRACT PROVISIONS**

### **Article 4 - Management Rights**

Except to the extent modified by this Agreement, the Employer reserves exclusively all of the inherent rights and authority to manage

and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to the following:

1. Determine matters of inherent managerial policy which include, but are not limited to areas of discretion or policy such as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, and organizational structure;
2. Direct, supervise, evaluate, or hire employees;
3. Maintain and improve the efficiency and effectiveness of governmental operations;
4. Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted;
5. Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote, or retain employees;
6. Determine the adequacy of the work force;
7. Determine the overall mission of the employer as a unit of government.
8. Effectively manage the work force;
9. Take actions to carry out the mission of the public employer as a governmental unit;
10. Determine the location and number of facilities;
11. Determine and manage its facilities, equipment, operations, programs and services.
12. Determine and promulgate the standards of quality and work performance to be maintained;
13. Take all necessary and specific action during emergency operations situations;
14. Determine the management organization; including selection, retention, and promotion to positions not within the scope of this Agreement.

**(Joint Exhibit 1, Pgs. 3-4)**

## **ARTICLE 30 - TRANSFERS/PAYMENT FOR MOVING EXPENSES**

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### **30.03 Non-Field Transfers**

For the purpose of this Agreement, a "Non-Field" position is defined as any sergeant's position other than those assigned to one of the fifty-

eight (58) Patrol Post installations located throughout the state that work in a continuous (round the clock) operation. A District Headquarters position is not considered a "Field" position.

When the Employer determines that a vacancy in a non-field position shall be filled by transfer, the position will be posted at all Highway Patrol facilities for a period of seven (7) calendar days. The posting will include the specific qualifications and criteria required of the position. Any sergeant who meets the specific qualifications and criteria may bid for the position. The Employer retains the right to determine and select the most qualified from among the bidders. If all qualifications and criteria are determined to be equal, seniority shall be considered for selection to the position.

If the above transfer results in a vacancy in another non-field position, the Employer shall survey the "active transfer file", to determine if any incumbent is interested in filling the position. If so, the Employer may select from the most qualified of the members with active transfers in file. If all qualifications and criteria are determined to be equal, seniority shall be considered for selection to the position. If this process fails to fill the position, the Employer shall post the vacancy as noted above if the decision is made to fill the position by transfer.

If the above transfer(s) results in a vacancy in a field position, the Employer may fill any new field position vacancy created by this initial transfer in accordance with Section 30.02 above.

The Employer may involuntarily reassign bargaining unit members in non-field positions to a field or other non-field position for just cause. Any transfer initiated by the Employer for this purpose shall not result in the transferred employee having to relocate.

The Employer agrees to establish specific qualifications and criteria for the selection of sergeants to non-field positions. Where specialized training is required to meet the criteria for these non-field positions, the opportunity for training, if offered or paid for by the Employer, will be posted at all Highway Patrol facilities for a period of seven (7) calendar days. The specific qualifications and criteria for selection will be included in the posting.

Any sergeant who meets the specific qualifications and criteria for the training opportunity shall have a right to bid for the training. Selection of the person to receive the training will be based on seniority from among those bidders who meet the qualification and criteria requirements.

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**(Joint Exhibit 1, Pgs. 53-54)**

**CASE HISTORY**

Gary E. Dolak, the Grievant, is currently a Sergeant and acting as an Assistant Post Commander. The Grievant has approximately twenty (20) years of total service with the State and has been a Sergeant since 1989. Prior to late 1996, the Grievant discussed the upcoming employment status of Sergeant Charles Robinson. Sergeant Robinson told him he was considering retirement. At the time, Sergeant Robinson was serving as a Commercial Enforcement Coordinator, a "Non-Field" position, at the Warren District Headquarters. In this capacity, Sergeant Robinson was responsible for the investigation, inspection and auditing of all commercial driving schools, portable scales, and motor vehicle inspection teams. He was also responsible for the commercial vehicle enforcement/inspection program.

Pursuant to the Grievant's interest, he filed a Request For Transfer (Union Exhibit 1) with the Warren District Headquarters. He indicated a general interest "in the CEC position" by requesting a transfer from Lisbon 15 to Warren District Headquarters. He, moreover, noted that his request was not in response to a posted position.

The Request for Transfer (Union Exhibit 1) was subsequently reviewed by the Grievant's supervisors. The Post or Unit Commander and District or Section Commander commented that the transfer request should be considered when it becomes available. At the General Headquarters level, the Major noted the transfer request would be "filed for consideration."

It appears the Grievant's request was never given any formal consideration. He was never interviewed by the Post Commander, the Staff Lieutenant or the Commander of the District, or the head of the Human Resource Department at General Headquarters.

The Employer never posted the disputed position. It was, however, filled by promoting a "qualified" Trooper (Mike Schneider) from Bargaining Unit 1 (Union Exhibit 3).

On or about January 6, 1997, the Grievant formally protested the Employer's administrative action. The Statement of Grievance contains the following relevant particulars:

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I put in a transfer request on 12-26-95 for CEC position at Warren DHQ when it became available. On 12-31-96 when I returned to duty I saw a promotions and transfer list indicating a promotion to the Warren CEC position was going to take place on 1-2-97. Past practice of the posting of this position has been established by the Wilmington and Findley CEC positions after I have submitted my transfer request. I was never

contacted reference my transfer request and the position is being filled by someone.

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**(Joint Exhibit 2)**

The parties were unable to resolve the disputed matter in subsequent portions of the grievance procedure. The parties stipulated the grievance was properly before the Arbitrator.

**THE MERITS OF THE CASE**

**The Union's Position**

It is the Union's position that the Employer violated Section 30.03 by failing to fill a non-field position with an incumbent sergeant via transfer, rather than filling the position by promoting a Trooper into a non-field specialty position. Several arguments were proposed in support of this position including in pertinent part: the controlling status of an internal policy with related condition precedents for the CEC Sergeant position and distinguishing circumstances which disrupt the application of a prior arbitration award.

The Union opines that promoted Trooper, Michael Schneider, notwithstanding his prior work-related characteristics, was not qualified for purposes of promotion into the non-field Sergeant Commercial Enforcement Coordinator position. It bases this argument on certain Special Requirements contained in OSP-502.08-01J (Union Exhibit 7). This policy clearly specifies the following requirements:

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## **V. SPECIAL REQUIREMENTS**

- A. Has been commissioned as a trooper and served in progressive supervisor positions pursuant to the organizational structure of the Division and was promoted pursuant to Division Rules and Regulations.
- B. Broad supervisory experience in line and staff operations.

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**(Union Exhibit 2, Pg. 22)**

Obviously, Trooper Schneider, at the time of his promotion, never possessed the supervisory skills nor experience mandated by the special requirements. The Grievant, however, based on his experience and standing as an Assistant Post Commander held "progressive supervisory positions" and has had "broad supervisory experiences in line and staff operations." None of these facts were disputed by the Employer.

The Grievant's supervisors, through their actions, underscored the legitimacy of the Grievant's transfer request. The Post Commander acknowledged that the Grievant "should be considered for this position when it becomes available." These remarks were further reinforced and confirmed by the District Commander. At the General Headquarters level, the Major remarked the transfer request should be filed for consideration.

Other than the above stated remarks and reviews, the Grievant's request was never given any consideration. He was neither interviewed nor contacted. He found out about the disputed promotion while discussing the matter with his cohorts.

The Employer's unwillingness to rely on its own policy; by limiting its



justification to promote on minimum qualifications contained in a Highway Patrol Sergeant's job classification (Employer Exhibit 2), is viewed as highly unpersuasive. The policy in question was originally revised to include the supervisory requirements in 1993. It was subsequently revised again in 1996 (Union Exhibit 7); but the areas in dispute were not altered in any substantive manner. The Employer must be held to these policy requirements when a Trooper fails to meet certain qualifications.

An award issued by Arbitrator Drotning on December 13, 1993, was thought to hold very little probative value. There are a number of distinguishing features. When this particular grievance arose, the referenced policy had not yet been revised requiring supervisory responsibility. The record, moreover, fails to disclose whether the chain of command had reviewed and provided considerable support for this particular transfer request.

#### **The Employer's Position**

It is the Employer's position that the promotion and transfer of Sergeant Michael Schneider to the position of Commercial Enforcement Coordinator for District 4 did not violate Section 30.03. This premise was supported by referencing bargaining history, several contract provisions, and the Employer's long term practice and understanding.

Captain Richard D. Corbin provided testimony regarding bargaining history surrounding Section 30.03. The parties originally negotiated the disputed language in 1991. The Employer proposed this language because it wished to retain the right to promote qualified Troopers into non-field positions. These positions normally

require specific expertise in order to properly perform duties and responsibilities. The parties understood that not all non-field positions would be filled by promotion. Yet, the Employer did not agree to post every non-field opening.

Specific language contained in Section 30.03 supports the bargaining history testimony. The language provides the Employer with a discretionary right. The Employer can fill non-field vacancies by either promoting an individual or filling it by transfer and posting at all Highway Patrol facilities.

The Employer's position is further reinforced by the parties' practice and custom. Documents provided by the Union (Union Exhibit 3), and an affidavit submitted by the Employer (Employer Exhibit 3) clearly demonstrate that the Employer has abided by the understanding reached with the Union. It has, since 1993 and probably before, filled non-field vacancies by transfer and promotion.

Reliance on Policy OSP-502.08.01J (Union Exhibit 7), and the Special Requirements contained therein, as a bar to filling non-field vacancies via promotion was thought to be unpersuasive. The requirements dealing with supervisory responsibilities are not used to establish minimum qualifications for any position. The State's classification system establishes minimum qualifications for the Sergeant classification. The policy in question, along with the related revisions, are used for internal purposes and are not part of the Department of Administrative Services' process.

These internal policies are somewhat flawed in terms of specificity and description and do not bind the Employer when filling vacancies. In fact, the Grievant

admitted he could never have achieved Assistant Post Commander status if the Employer required the special requirements contained in Policy 9-502.08.03A (Employer Exhibit 1), the job description for Assistant Post Commander.

Michael Schneider, the promoted Trooper, was clearly qualified and was rightly promoted and transferred to the position of Commercial Enforcement Coordinator for District 4. Sergeant Schneider was on the promotion list, and desired to attain a CEC position. At the time of his promotion, he worked exclusively in the area of commercial enforcement for over four years. Clearly, the Employer's decision to promote was not arbitrary nor capricious.

Arbitrator Drotning's prior opinion and award should not be discounted. His ruling dealt with a fact pattern quite similar to the one presently in dispute; and also required an interpretation of Article 30, Section 30.03. This present grievance should be denied in a manner similar to the matter heard by Arbitrator Drotning.

#### **THE ARBITRATOR'S OPINION AND AWARD**

From the evidence and testimony introduced at the hearing, a complete and impartial review of the record including pertinent contract provisions, it is this Arbitrator's opinion that the promotion and transfer of Sergeant Michael Schneider to the position of Commercial Enforcement Coordinator for District 4 did not violate Article 30, Section 30.03. This finding is supported by a contract construction analysis and the parties own conduct; which clearly reflect their interest regarding the filling of CEC positions.

Article 4 - Management Rights Allows the Employer to:

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5. Suspend, discipline, demote, or discharge for just cause, or lay off, transfer, assign, schedule, promote (Arbitrator's Emphasis), or retain employees.

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This right, as agreed to by the parties, is an inherent right "Except to the extent modified by the Agreement . . ." Nothing in Section 30.03 precludes the Employer from promoting qualified Troopers into non-field positions rather than granting incumbent Sergeant's transfer requests or posting the position for incumbent bids.

Section 30.03 provides the Employer with alternative means to fill a non-field position. It only requires a posting "When the Employer determines that a vacancy in a non-field position shall be filled by transfer . . ." Clearly, this language allows the Employer to promote qualified Troopers into non-field positions. This option was agreed to by the parties since the language provides the Employer with some discretion surrounding the filling of non-field vacancies.

The Union relied, to some degree, on the Grievant's transfer request being in the "active transfer file" prior to the decision to promote and formal posting of the position. Such reliance, however, does not properly provide the Grievant with some form of preference to that enjoyed by the promoted Trooper. Section 30.03 does require the Employer to survey the "active transfer file" when the Employer has determined a vacancy shall be filled by transfer, and that "transfer results in a

vacancy in another non-field position." Here, there was no need to review the "active transfer file" since the Employer determined the vacancy was to be filled via promotion rather than transfer.

It is, moreover, inherently obvious to this Arbitrator that the parties were aware of how to limit the discretion allowed the Employer regarding the filling of non-field positions. Such a discretionary right does not exist for field position transfers under Section 30.02. This provision requires the Employer to fill Sergeant vacancies in field positions "in accordance with procedures contained in this Article. . ." including seniority.

The previously described provisions provide the discretionary right, but the parties own conduct further reinforces this interpretation. Since 1991, the Employer has used its discretion by filling non-field positions by posting and promoting.

For the most part, the Employer has done an excellent job by not abusing this discretionary right. This conclusion is supported by data provided for the period 1993-1998 (Employer Exhibit 3) and testimony adduced at the hearing. The Union, in my view, has acquiesced to the Employer's interpretation, for a considerable period of time, by only filing the presently disputed grievance and the grievance dealt with by Arbitrator Drotning. The contract language in dispute, moreover, has not been changed over a number of negotiation cycles.

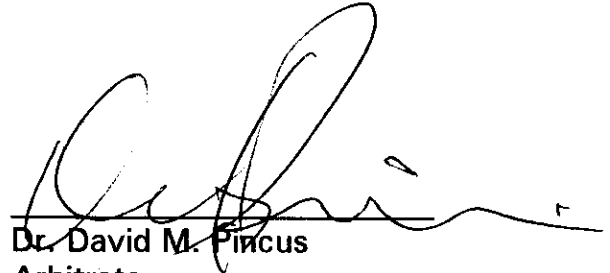
Although this Arbitrator can understand the Union's dilemma, the contract does not require the filling of all non-field positions by posting vacancies. An alternative

ruling is outside of my authority because it would cause me to add or modify the terms negotiated by the parties. A direct violation of Section 20.08(5).

**AWARD**

The grievance is denied.

October 19, 1998  
Moreland Hills, Ohio

  
Dr. David M. Pincus  
Arbitrator