

#1337

ARBITRATION

BETWEEN

OHIO STATE HIGHWAY PATROL

and

**O.C.B. CASES NOS. 15-03-970213-0018.04.01
15-03-070219-0021.04.01**

OHIO STATE TROOPERS ASSOCIATION

Appearances:

For the Patrol:

**Lt. Robert W. Booker
Columbus, Ohio**

For the Association:

**Herschel M. Sigall, Esq.
General Counsel
Columbus, Ohio**

OPINION AND AWARD OF THE ARBITRATOR

**Frank A. Keenan
Labor Arbitrator**

Statement of the Case:

This case came on for hearing on October 21, 1998, in Columbus, Ohio. Both parties submitted documentary evidence. The Association called as witnesses Human Resources Management Lieutenant Robert Young and Grievant Susan Adams. The Patrol called Lt. Young as its witness also. Following the hearing the parties filed helpful post hearing briefs.

The Patrol maintains Posts at various locations throughout the State including Marietta, Zanesville, and St. Clairsville. Dispatcher Susan Adams is assigned to the Marietta Post. On February 13, 1997, Dispatcher Adams filed a grievance reading in pertinent part as follows:

"Statement of Grievance: This grievance is filed on behalf of Unit #1 Dispatchers by the undersigned Grievants. The Grievants charge that the Employer has violated Article #7 . . . by engaging in conduct that actively discriminates against certain Dispatchers. The Employer through its hiring potential job opportunities with the Employer beyond Bargaining Unit #1 has elected to restrain the movement of Dispatchers to positions the abolishment of which is not envisioned by the implementation of MARCS. The Grievants as possible until such time as MARCS is implemented. By its actions the Employer has additionally violated its . . . commitment to affirmative action as provided in Article #7 of the . . . Agreement.

Remedy Requested: That all employees be treated equally. That the Employer assist Employees by educating them in the process, posting job opportunities and advising them of openings or tests."

Similar grievances were filed by Dispatchers Stanley W. Sawicki, Dispatcher Rebecca S. Jalbrzikowski, and Dispatcher James S. Stewart, each assigned to the Zanesville Post, on

February 19, 20, and 22, 1997, respectively, each reading in pertinent part as follows:

"Statement of Grievance: This grievance is filed on behalf of Unit #1 Dispatchers by the undersigned grievant. The grievants charge that the Employer has violated Article #2 and 7 . . . by engaging in conduct that actively discriminates against certain dispatchers. The Employer through its hiring practices on potential job openings/opportunities with the Employer beyond Bargaining Unit #1 has elected to restrain the movement of dispatchers to these positions. The dispatchers are seeking these positions due to the inevitable cut in the number of dispatcher positions because of the implementation of the MARCS System. The grievants trying to obtain other jobs/positions within the . . . Patrol and other State agencies are being stopped or hindered by a requirement of their being on a certified list which can only be done by taking a test. These dispatchers were not advised of the certified list, or the tests, or the dates of the past tests which were given without the dispatcher's knowledge. These lists were not required for these job positions in early 1996. The grievants were not aware of these requirements until the job positions/openings were posted. Yet there have been dispatchers hired for other positions within the State without being on a certified list, showing a pattern of discrimination by the Employer. By its actions the Employer has violated its . . . commitment to affirmative action as provided in Article #7. . . .

Remedy Requested: That all employees be treated equally. That the Employer assist employees, by educating them in the process, posting job opportunities and advising them of the openings, tests, or changes in the requirements in these positions. All dispatchers interested in current job opportunities/openings be made eligible for the same, due to failure of the Employer to inform them of the requirements or tests which were already given before the positions were posted. It is also requested that the State follow its past practice and make all the dispatchers/grievants eligible for all current and future openings."

It is noted that these grievances were filed under a predecessor Collective Bargaining Agreement between the Patrol and the Fraternal Order of Police, Ohio Labor Council, Inc., which expired on March 31, 1997. The bargaining unit, then and now, is

identified as Unit #1. The Ohio State Troopers Association is now the bargaining representative of Unit #1.

The governing predecessor Contract provided in pertinent part as follows:

ARTICLE 2 - Effect of Agreement - Past Practice

. . .

Fringe benefits and other rights granted by the Ohio Revised Code which were in effect on the effective date of this Agreement [April 1, 1994] and which are not specifically provided for or abridged by this Agreement will continue to effect under conditions upon which they had previously been granted throughout the life of this Agreement unless altered by mutual consent of the Employer and the Labor Council.

ARTICLE 7 - NON-DISCRIMINATION

Neither party will discriminate for or against any member of the bargaining unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, veteran status, or for the purpose of evading the spirit of this Agreement; except for those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States, the State of Ohio, or Executive Orders of the State of Ohio.

. . .

The Employer and the Union hereby state a mutual commitment to affirmative action, as regards job opportunities within the agencies covered by the contract.

ARTICLE 20 - GRIEVANCE PROCEDURE

. . .

20.02 Definitions

1. A grievance is an alleged violation, misinterpretation or misapplication of a specific article(s) or section(s) of this Agreement.

At Step 2 the Patrol articulated its rationale for denying the grievance(s) in pertinent part as follows:

"Grievants cannot establish a discrimination complaint based on an allegation the Employer has failed to educate them on the process of civil service testing. There can be no violation of the labor agreement where the Employer has no duty to perform a service or grant a right. . . . [T]he Union has . . . not negotiated any language which requires the Employer to offer special training or civil service testing information to members. The labor agreement deals with Unit 1 positions only, not how to get other jobs.

. . . .

A phone call . . . to the Department of Administrative Services will provide access to the desired information.

. . . .

Since the labor agreement does not require the Employer to act in the capacity demanded by grievants, there can be no violation of the . . . agreement. This claim of discrimination does not pass the definition of a grievance . . . under Article 20, Section 20.02. The grievance is denied."

The record indicates that the initial MARCS communications system contemplated the implementation of new technology, which eventually would likely lead to consolidation of dispatcher positions and a downsizing of the number of dispatcher positions. Dispatcher employees were advised of this potential consolidation and downsizing in a letter from Major Everhart, Commander of the Patrol's Human Resource Management Department.

Grievant Susan Adams worked as a Dispatcher at the Marietta Post under Post Commander Lt. Robert J. Dunn and Sergeant Roger Doak. She was hired March 4, 1995. Post secretary Russell Walters also worked at the Post as a secretary. The terms and conditions of this secretarial position are governed by the collective

bargaining agreement by and between the Patrol and AFSCME. The secretarial position pays less than a dispatcher position. Walters left the secretarial position at Marietta and a vacancy thereby was created and posted. According to the uncontradicted testimony of Grievant Adams, the posting indicated that certification may or may not be required. The record further indicated that neither Post Commander Dunn nor Sergeant Doak possessed the final authority to fill the vacancy with a candidate of their choice. Following Walters leaving the Marietta Post and the filling of the vacancy his departure created, Grievant Adams, who had thirteen years of secretarial experience prior to her hire as a Dispatcher for the Patrol, was asked to perform various of the secretarial tasks previously performed by Walters. From time to time Grievant Adams was relieved of her Dispatcher duties in order that she might accomplish these secretarial tasks. Grievant Adams also applied for the secretarial vacancy. It is clear that she did so, even though it paid less, because she perceived that it would have afforded her greater job security. At the time of her application for the vacancy she had not taken and passed the Civil Service examination which would have placed her on a certified list for openings in the Post secretary position. Both Lt. Dunn and Sgt. Doak expressed their pleasure with the good job Grievant Adams was doing in connection with the secretarial duties assigned to her, and both indicated they hoped she would be awarded the secretary position. It was Grievant Adams's uncontradicted testimony that neither Sgt. Doak nor Lt. Dunn told her that certification was

required for the secretarial position, prior to its award to one Mary Lou Shell, who was certified and on the Civil Service certification list. Adams also testified that a secretarial position at the St. Clairsville Post was filled by one who was not certified. It was Adams's testimony that when she was not awarded the secretarial position she was told by Lt. Dunn that the Patrol had to hire someone from the certified list. Grievant Adams has since taken the Civil Service test and been placed on a certified list.

The Association's Position:

The Association takes the position that Marietta Post Manager Lt. Dunn had ample time to advise Grievant Adams that the Post secretarial position she sought required that the applicant be civil service certified. The Association asserts that the job posting did not give any indication as to whether the requirement was mandatory or whether once hired, the applicant could then be certified. It was Lt. Dunn's responsibility to be truthful to Grievant Adams.

It is the Association's position that Grievant Adams was discriminated against. It points out that at the St. Clairsville Post a non-certified secretary was hired. Had the Grievant, who was not certified at the time of her application for the Post secretary position, been assigned to a different Post she may have been hired into the secretarial position, asserts the Association. To cause Grievant Adams to lose this position for the sheer fact of her location is completely unjust. Requiring the Patrol to

implement uniform hiring practices among the several Posts would eliminate this type of discrimination from ever happening again. Grievant Adams demonstrated the needed qualifications for the secretarial position and her supervisors encouraged her to apply, yet she was not informed by her supervisors of the certification requirement. Post Management utilized the Grievant's secretarial skills, and discarded her when she was no longer needed.

The Association contends that the Employer argues that this case is based on speculative information, yet it did not put forth any witnesses of its own. It did not refute Grievant Adams's testimony by producing the job posting in question. This is Grievant Adams's fight and therefore her testimony should reign supreme. The Patrol had the opportunity to counter the Association's argument with their witnesses and failed to do so. Grievant Adams should not be punished because the Employer did not adequately represent their case with "substantiated" evidence. The Association has proved their burden with Grievant Adams's unchallenged testimony.

Based on all the foregoing the Association requests the remedies requested in the grievances and further that the undersigned Arbitrator order the Patrol to implement and follow uniform hiring practices so that the type of discrimination occurring here does not happen again.

The Patrol's Position:

The Patrol takes the position that missing from the instant case is any evidence of discrimination in violation of Article 7.

Nor can the Association point to a contractual duty whereby the Employer is required to educate bargaining unit employees on the process of Civil Service testing, with the consequence that a grievance as defined in Article 20.02 is not made out. It is the Patrol's position that in cases where the Contract is silent, the Administrative Code prevails, and that under O.R.C. 124.23, it is the responsibility of the Department of Administrative Services to provide information on Civil Service testing and other requirements to the general public, which it has done. There is no provision in the Code that requires or obligates the Employer to provide Civil Service testing information to the bargaining unit employees. Competitive exams are available to all who apply. No language can be found in the labor agreement guaranteeing a right to be informed of civil service testing processes and certification lists. The information Grievant Adams sought is available to her through the same avenues as are available to the public at large. It is the public in general with whom she is competing, because she has no collective bargaining right to the position of secretary.

It is the Patrol's position that there has been no discrimination. The Union has failed to establish even a prima facie case. The grievance must be denied.

Discussion and Opinion:

On the record made before me no basis exists to find that the Patrol has violated the governing Collective Bargaining Agreement. No discrimination within the intendment of Article 7 or otherwise was established by the evidence of record. The situation here is

not covered by any of the specific proscriptions of Article 7, nor can it be said that the Patrol's conduct under scrutiny here was undertaken "for the purpose of evading the spirit of [the parties'] Agreement," the generic proscription within Article 7. Some collective bargaining agreements do provide contractual rights for bargaining unit employees for notice of, and training for, non-bargaining unit positions, but the Association has not pointed out as to how and where in the governing Agreement here, the Employer, either directly, or by inference, has committed itself to do so. Nor has the Association pointed to any statutory obligations in that regard.

With respect to the alleged disparate and hence discriminatory treatment of either Grievant Adams or the Zanesville Grievants vis-a-vis the manner in which the contemporaneous St. Clairsville secretarial position vacancy was filled, it is well established in arbitration that disparate treatment allegations are dependent upon "like circumstances" existing in the two situations being compared.

The party asserting disparate treatment, here the Association, has the burden of proof on the issue. Such "like circumstances" have not been established here. Thus the Association has only shown that a vacancy in a secretarial position arose at both posts and that one was filled with a certified candidate (at Marietta), and the other was not. This sparse showing as to the "circumstances" surrounding the filling of these positions is simply inadequate a basis to conclude that "like circumstances" existed in the filling of these positions, such that like outcomes in the filling of the


positions was warranted. Hence the differing outcomes fail to establish disparate treatment. This is especially so in light of the evidence that the Marietta posting indicated that certification may, or may not, be required. Additionally, no evidence was put in to the record to the effect that it was Patrol policies and/or practices, as opposed to Civil Service regulations, which established the potential for the need for certification. Accordingly, disparate/discriminatory treatment has not been established.

It follows from all the foregoing that the grievances must be denied.

Award:

For the reasons more fully set forth above, the grievances are denied.

Dated: December 14, 1998



Frank A. Keenan
Arbitrator