

ROBERT BROOKINS
LABOR ARBITRATOR PROFESSOR OF LAW J.D. PH.D.

#1396



October 20, 1999

Herschel M. Sigall, Esq.
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Grievance # (15-00-980610-0078-01-15
Union: OSTA
Employer: Ohio State Highway Patrol

Dear Attorney Sigall:

Please find the enclosed the Arbitrator's notarized copy of the opinion and award in the captioned matter. Thanks for the opportunity to serve you.

Sincerely,

A handwritten signature in cursive script that reads "Robert Brookins".

Robert Brookins

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OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN
The Ohio Department of Public Safety, Division of State Highway Patrol
-AND-
Ohio State Troopers Association, Unit 15

FOR DIVISION OF STATE HIGHWAY PATROL
STAFF LIEUTENANT ROBERT YOUNG
FOR OSTA
HERSCHEL M. SIGALL, ESQ., ADVOCATE, GENERAL COUNSEL

GRIEVANCE #
15-00-980610-0078-01-15

HEARING HELD
NONE

LAST BRIEF RECEIVED
AUGUST 30, 1999

CASE DECIDED
OCTOBER 14, 1999

ARBITRATOR: ROBERT BROOKINS, J.D., PH.D.
SUBJECT: ASSIGNMENT OF POLICE OFFICER SERGEANTS TO THE OHIO STATEHOUSE

Preliminary Statement

After electing to forego an arbitral hearing on this matter, the parties mailed their briefs and supporting evidence to the Arbitrator. The last brief was received on August 30, 1999 and the record was closed at that time.

In its brief, the Union is much more concerned with the Employer's transferring a Highway Patrol Sergeant from the Statehouse than with assigning a Police Officer Sergeant to the Statehouse. Unfortunately, the parties' submission agreement—which the Union framed and the Employer accepted—does not contemplate transferring a Highway Patrol Sergeant from the Statehouse. Instead, the agreement explicitly focuses on assigning the Police Officer Sergeant to the Statehouse.¹ Furthermore, since the parties elected to forego a hearing on this matter, the Arbitrator's understanding of the issue is wholly dependent upon the paper record that the parties submitted. Therefore, because the Arbitrator lacks authority to exceed the scope of the submission agreement, his opinion in this dispute is limited to deciding whether the Employer violated the Collective-Bargaining Agreement by assigning a Police Officer Sergeant to the Statehouse.

I. Facts

The Fraternal Order of Police, Ohio Council Incorporated is the exclusive collective bargaining representative of police officers in Unit 2. The Ohio state Troopers Association is the exclusive collective bargaining representative of Ohio state Troopers in Unit 15. Police Officer Sergeants are exempt, i.e. they are not members of a union. Highway Patrol Sergeants supervise police officers at the Ohio Statehouse (Statehouse). Prior to 1991, there was one Highway Patrol Sergeant and one Ohio State Trooper. Between 1991 and 1995, the Ohio State Highway Patrol, a division of Ohio Public safety, (OSHP or Employer) assigned a second Highway Patrol Sergeant to the Statehouse. Also, there was one Highway Patrol Sergeant assigned to the state's Fairgrounds.

In August 1995, the Employer promoted a police officer to the rank of Police Officer Sergeant and assigned him to the Statehouse where his immediate supervisor was a Highway Patrol Sergeant. The duties of the Police Officer Sergeant were virtually the same as those of Highway Patrol Sergeants assigned to the Statehouse. On June 5, 1995, Trooper John Allard grieved the assignment of the Police Officer Sergeant to the Statehouse, claiming among other things, that the Police Officer Sergeant was doing bargaining-unit

¹ Although the grievance that is the subject of the instant dispute and of the ensuing opinion and award is drafted broadly enough to encompass the transferring of the Highway Patrol Sergeant from the Statehouse, the Arbitrator lacks authority to circumvent the submission agreement and address the concerns expressed in the underlying grievance. Presumably, the parties have extracted, from the underlying grievance, the issue(s) they wish the Arbitrator to resolve.

work.² Therefore, his assignment to the Statehouse violated section 5.03 of the Collective-Bargaining Agreement.³ On September 6, 1995, the Employer issued a Step-2 denial of the Allard grievance, stating in relevant part: “[E]ven after the Police Sergeant is selected there will still be two highway patrol sergeants assigned to the Statehouse.”⁴

Trooper Allard subsequently withdrew his grievance on June 19, 1996.⁵ However, his notice of withdrawal stated, in relevant part, that the Allard grievance, “will *not* prevent filing of another grievance should *similar circumstances* arise in the future.”⁶

Between the filing and withdrawal of the Allard grievance, the Employer promoted two other Police Officers to Police Officer Sergeants, one of whom was assigned to the state Fairgrounds.⁷ And in August 1997, yet another Police Officer was promoted to Police Officer Sergeant.⁸ However, no more Police Officer Sergeants were assigned to the Statehouse.

In January 1998, the Employer transferred one Highway Patrol Sergeant and one Police Officer Sergeant from the Statehouse to the new Department of public Safety, housed in the Shipley Building. The Employer offers the following charts to explain the effects of the transfers on Bargaining-Unit 15 and to support its position:

Distribution of Highway Patrol Sergeants when Allard Grievance filed		
Fairgrounds	Statehouse	Shipley Building
One Highway Patrol Sergeant	Two Highway Patrol Sergeants	Not yet open

² Employer Exhibit a, at 5-6.

³ *Id.*

⁴ Union Exhibit 3.

⁵ Employer Exhibit A, at 8.

⁶ Employer’s Brief, at 8 (emphasis added).

⁷ Employer Exhibits B & C.

⁸ Employer Exhibit D.

Distribution of Highway Patrol Sergeants when Allard Grievance Withdrawn		
Fairgrounds	Statehouse	Shipley Building
One Highway Patrol Sergeant	Two Highway Patrol Sergeants	Not yet open
One Police Officer Sergeant	One Police Officer Sergeant	

Distribution of Highway Patrol Sergeants when 1998 grievance Filed		
Fairgrounds	Statehouse	Shipley Building
One Highway Patrol Sergeant	One Highway Patrol Sergeants	One Highway Patrol Sergeant
One Police Officer Sergeant	One Police Officer Sergeant	One Police Officer Sergeant

On June 10, 1998, the Union filed the grievance (1998 Grievance) that is the subject of the instant dispute. On July 9, 1999, in a step-2 response to 1998 Grievance, the Employer challenged that grievance as being woefully untimely and, thus, fatally flawed from a procedural perspective. Being unable to negotiate a settlement to 1998 Grievance, the parties submitted to this Arbitrator for resolution.

II. The Agree-Upon Issue

Does the assignment of Highway Patrol Police Officer Sergeants to the Statehouse facility constitute a violation of Section 5.03 of the Unit 15 labor agreement?⁹

III. Relevant Contractual Provisions

ARTICLE 5 - UNION RECOGNITION AND SECURITY

Section 5.03 - Bargaining Unit Work

Management shall not attempt to erode the bargaining unit, the rights of bargaining unit employees, or adversely affect the safety of employees. . . . The parties recognize that Sergeants shall continue to perform all duties, functions, and responsibilities of functional supervision that they previously and currently perform including, but not limited to, evaluating troopers, recommending discipline and promotions of troopers, accessing trooper files, and conducting internal investigations. . . . Except in emergency circumstances, overtime opportunities for work normally performed by uniformed employees shall first be offered to uniformed employees. This Article shall apply to special duty or special assignments which result from

⁹ Observe that, in its brief, the Union stated that the issue was: "Does the assignment of *Highway Patrol Police Officer Sergeants* to the Statehouse facility constitute a violation of Section 5.03 of the Unit 15 labor agreement? The Arbitrator found the italicized portion of the issue confusing and, consequently, spoke to Mr. Sigall's Assistant who clarified and refined the issue as set forth in the text accompanying this footnote.

requests by private individuals or groups for security or traffic control.

Article 20 - Grievance Procedure
Section 20.02 - Definitions

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

* * * *

3. Day, as used in this Article, means calendar day. The days and times shall be computed by excluding the first and including the last day, except when the last day falls on Saturday, Sunday or legal holiday, the act may be initiated on the next succeeding day, which is not a Saturday, Sunday or legal holiday.

Section 20.05 - Grievant

A grievance may be initiated by any bargaining unit member who believes himself/herself to be aggrieved by a specific violation of this Agreement.

When a group of bargaining unit members desires to file a grievance involving an alleged violation which affects more than one member in the same manner, the grievance may be filed by the Union provided that at least one member so affected signs the grievance. Grievances so initiated shall be designated Class Grievances. The title on the grievance shall bear the name of the one (1) affected member plus the designation 'et al'. Class Grievances shall be filed within fourteen (14) days of the date on which any of the like affected grievants knew or reasonably could have had knowledge of the event giving rise to the class grievance. Class grievances shall be initiated directly at the second step of the grievance procedure. The Union shall have the right to file grievances of a non-disciplinary nature.

20.07 Grievance Procedure
Step I - Immediate Supervisor or Designee

An employee having a grievance shall present it to his/her immediate supervisor within fourteen (14) days of the date which the grievant knew or reasonably should have had knowledge of the event giving rise to the grievance

20.11 - Miscellaneous (in part)

Should the grievant or the Union fail to comply with the time limits specified herein, the grievance will be considered to have been resolved in favor of the position of the Employer and that decision will be final.

Article 5 - Union Recognition and Security
Section 5.03 - Bargaining Unit Work

Management shall not attempt to erode the bargaining unit, the rights of bargaining unit employees, or adversely affect the safety of employees. The parties recognize that Sergeants shall continue to perform all duties, functions, and responsibilities of functional supervision that they previously and currently perform including, but not limited to, evaluating troopers, recommending discipline and promotions of troopers, accessing trooper files, and conducting internal investigations.

IV. Parties' Arguments

A. Procedural Arbitrability

At the outset, the Employer raises a procedural challenge to the 1998 Grievance and offers two detailed arguments in support of that challenge. The Employer argues that it is too late for the Union to grieve the assignment of Police Officer Sergeants to the Statehouse because a Police Officer Sergeant was assigned there even before the Allard grievance was withdrawn on June 9, 1995. Consequently, the 1998 Grievance is tardy and, thus, fatally flawed.¹⁰

Here it seems that the Employer is arguing that the Allard grievance was effectively settled on the basis of the Employer's Step-2 denial and that settlement bars the Union from challenging subsequent assignments of Police Officer Sergeants either to the Statehouse or to the other two facilities.

If so, the Arbitrator disagrees. There are at least two bases from which one can address the argument that the 1998 Grievance is time barred because it was settled in on June 19, 1996 on the Employer's terms. First, the Collective-Bargaining Agreement is silent about the effect of grievance withdrawals. And where such silence exists, the parties' intent, if otherwise manifested, governs. In this case, the only available evidence of such intent is the language accompanying the Union's withdrawal of the Allard grievance, stating that by withdrawing the Allard grievance, the Union did not intend to relinquish its right to grieve similar events in the future. Given this explicit reservation of the right to file subsequent grievances in response to actions similar to those that triggered the Allard grievance, the Arbitrator holds that withdrawing the Allard grievance did not preclude the Union from filing the 1998 Grievance bar the Union from grieving future assignments of Police Officer Sergeant to the Statehouse. In short, the withdrawal of the Allard grievance

¹⁰ The Employer suggests that the Union answered this charge by claiming that the 1998 Grievance was filed as soon as the Union discovered during an investigation. Since, neither the Union's brief nor any of its evidence addresses this defense, the Arbitrator is in no position to assess the validity of that defense and will afford no further consideration in this opinion.

did not prevent the Union from grieving similar decisions in the future.¹¹

Second, the Employer argues that if the 1998 Grievance is challenging OSHP's right to assign a Police Officer Sergeant to the Statehouse, then the grievance is still fatally tardy because that assignment occurred before the Allard grievance was withdrawn in 1996. The Union offers no argument on this point.

Apparently, in support of its right to file the 1998 Grievance, the Union argues that the Allard grievance was withdrawn in reliance on the Employer's promise not to retain two Highway Patrol Sergeants at the Statehouse. The Employer, on the other hand, claims that Allard grievance was withdrawn with "no strings attached" and denies having made any assurances to the Union in order to get the withdrawal.¹² According to the Employer the statement was simply intended to show, "no Unit 15 members had been replaced."¹³

Unfortunately the Union's argument and the Employer's response exceed the scope of their submission agreement, which focuses exclusively on the propriety of assigning Police Officer Sergeant to the Statehouse. In short, whether the Employer made such a promise does address whether the Employer had the right to assign a Police Officer Sergeant to the Statehouse.

If the instant grievance was filed in response to assignments of Police Officer Sergeants to any of the other facilities in question, then there is a question of continuing violation if the Union reserved the right to challenge similar, subsequent assignments of Police Officer Sergeants.

B. Decision on Issue of Procedural Arbitrability

The Arbitrator lacks jurisdiction to hear this dispute. The Allard grievance was withdrawn on June 19, 1996, after the Employer had assigned a Police Officer Sergeant to the Statehouse. The record does not

¹¹ The Employer argues that there is no continuing violation because withdrawal of the Allard grievance—which addressed assigning a Police Officer Sergeant to the Statehouse—precludes any claim of continuing violation. The foregoing holding renders any discussion of the Employer's "continuing violation" argument superfluous.

¹² Employer's Brief, at 10.

¹³ Employer's Brief, at 9.

reflect that, since that time, the Employer has assigned another Police Officer Sergeant to the Statehouse. Yet, the issue before the Arbitrator is: "Does the assignment of Highway Patrol Police Officer Sergeants to the Statehouse facility constitute a violation of Section 5.03 of the Unit 15 labor agreement? Although, in withdrawing the Allard grievance, the Union reserved the right to grieve similar assignments in the future, nothing in the record reveals that the Employer has assigned another Police Officer Sergeant to the Statehouse since the first Police Officer Sergeant was assigned there. Consequently, the 1998 Grievance is tardy relative to the first and only assignment of a Police Officer Sergeant to the Statehouse as well as premature relative to any future assignments of Police Officer Sergeants to the Statehouse. The Arbitrator is and always has been reluctant to resolve grievances purely on the basis of procedural errors, but, under the circumstances in this case, he has no recourse. Of course, the parties are free to resubmit this dispute to the Arbitrator with a properly framed issue that covers the facts.

V. Award

For all the foregoing reasons, 1998 Grievance is hereby denied because it suffers from a fatal procedural flaw, which precludes the Arbitrator from addressing any issues on the merits that might inhere in this dispute.

Notary Certificate

State of Indiana)
)SS:
County of Marion

Before me the undersigned, Notary Public for Hendricks County, State of Indiana, personally appeared Robert Brookins, and acknowledged the execution of this instrument this 20th day of October, 1999

Signature of Notary Public: Susan K. Agnew

Printed Name of Notary Public: Susan K. Agnew

My commission expires: 11/13/2006

County of Residency: Hendricks

Robert Brookins
Robert Brookins