

1618

**IN THE MATTER OF AN ARBITRATION
BETWEEN**

**THE OHIO STATE TROOPERS ASSOCIATION,
IUPA/AFL-CIO**

The Union,

and

**FMCS NO: 15-00-020111-0004-04-01
ARBITRATOR: Jerry B. Sellman
DECISION DATED: November 18, 2002**

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

The Employer.

APPEARANCES

FOR THE UNION:

Herschel M. Sigall, Esq. - General Counsel, Ohio State Troopers Association IUPA/AFL-CIO,
representing the Grievant
Elaine N. Silveira - Assistant General Counsel, Ohio State Troopers Association IUPA/AFL-CIO.
Assisting in the presentation
Dennis Gorski - President, Ohio State Troopers Association IUPA/AFL-CIO
Wayne McGlone - Staff Representative, Ohio State Highway Patrol IUPA/AFL-CIO
Trooper Larry Phillips - District 9 Salvage Title Inspector, Witness
Trooper Russell A. Cantrell - Grievant, Witness
Captain Robert J. Young - Executive Officer, Office of Human Resource Management, Witness
Major Fred Goldstein - Chief, Office of Human Resource Management, Witness

FOR THE EMPLOYER:

Lt. Reginald Lumpkins - Office of Human Resources, Ohio State Highway Patrol, representing the
Employer
S/Lt. Kevin Teaford - Office of Human Resources, Ohio State Highway Patrol
Andrew Shuman - Office of Collective Bargaining
Sergeant Kevin Brun - District 6 Investigation Supervisor for the Salvage Title Inspection
Operation, Witness
Trooper David K. Mills - Salvage Inspector, Witness

I. NATURE OF THE CASE

Transfers: Determination of Ability, Seniority. This labor arbitration proceeding arises pursuant to the provisions of the Collective Bargaining Agreement (hereinafter referred to as the "Agreement") between the Ohio State Troopers Association (hereinafter referred to as the "Union") and the State of Ohio Department of Public Safety, Division of the Ohio State Highway Patrol (hereinafter referred to as the "Employer"). It concerns a grievance filed by Trooper Russell A. Cantrell (hereinafter referred to as the "Grievant") objecting to the decision of the Employer denying his transfer request for the position of Salvage Inspector - Trooper (hereinafter referred to as "Salvage Inspector" or "Blue Title Trooper"). He maintains that the Company violated provisions of the Agreement when it selected a less senior trooper to fill the position. The Employer maintains that it did not violate the Agreement for it choose the most senior officer with the ability to perform the job as required by the parties' Agreement. The Grievant opines that he had the ability and, therefore, he was entitled to the job as the more senior trooper.

The issue in this proceeding is as follows:

Did the Employer violate Section 30.01 of the Agreement by transferring David K. Mills to the District 6 Salvage Inspector Trooper position instead of the Grievant? If so, what shall the remedy be?

The pertinent provision of the Agreement in this proceeding is as follows:

COLLECTIVE BARGAINING AGREEMENT

ARTICLE 30 - TRANSFERS/PAYMENT FOR MOVING EXPENSES

Section 30.01. Transfers.

- A. Employees shall submit transfer requests to the Office of Human Resource Management (HRM) for both Patrol post and

specialty positions. Those transfer requests shall be maintained in an active transfer file. When the Employer determines a position shall be filled by transfer, the active transfer file shall be used to fill the position. When the Employer creates a new position, to be filled by transfer, the position will be posted at all Highway Patrol facilities for a period of seven (7) calendar days. All personnel in the affected classification shall have the right to bid on the position. 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. If no bid is received and the Employer determines the position must be filled, the most junior employee shall be transferred.

When position openings are created as the result of the impending graduation of a cadet class, the Employer shall post an "open bid" period for transfer requests. The Employer shall state the graduation date of the cadet class, and the effective date of position openings as the result of the graduation. The Employer shall then receive and consider all transfer requests of incumbents prior to assigning cadets to positions. Transfer requests may list up to five posts.

There shall be no cadet assigned to a position if a member has properly submitted a transfer request for that position during the posted "open bid" period. The Employer is not otherwise required to honor a member's transfer request during this period.

II. STATEMENT OF THE CASE AND POSITION OF THE PARTIES

A trooper holding the position of "Salvage Inspector - Trooper" in District 6 of the Ohio State Highway Patrol was scheduled to retire. In advance of that retirement, the Employer determined that the impending vacancy should be filled. The Employer posted the opening throughout the State for troopers to bid upon. The position posted contained the following job classification description:

I - NATURE OF THE WORK

Enforce the laws as prescribed in ORC Section 5503.02 and other laws which fall within the authority or jurisdiction of the Ohio State Highway Patrol. This officer will: Conduct salvage title inspections, any other motor vehicle inspections as required, and conduct and assist investigations as assigned. Reports to the Auto Title Fraud Unit Supervisor, the district line lieutenant or other supervisor designated by the component commander.

II - ILLUSTRATIVE EXAMPLES OF WORK

- A. Schedule and conduct inspections of vehicles to verify ownership as requested by citizens and/or the Bureau of Motor Vehicles, including salvage, self-assembled, out-of-state, title verifications and replacement of VIN plates.
- B. Conduct preliminary investigations in absence of investigators.
- C. Investigate and report all motor vehicle crashes on all roads and highways outside of municipal corporations and conduct crash investigations occurring on state property.
- D. Enforce the laws relating to the operation and use of vehicles on the highway.
- E. Enforce the laws relating to licensing of motor vehicles.
- F. Perform additional applicable duties and responsibilities defined in the job description for trooper (Policy 9-502.08-03B).

III - ESSENTIAL SKILLS, KNOWLEDGE & ABILITIES

- A. Understand that Highway Patrol Officers are held to a higher standard of conduct, both on and off duty, than the general public.
- B. Demonstrate leadership skills by example.
- C. Demonstrate the ability to work as a team member.
- D. Display and continue to refine written and verbal

communication skills, including the ability to speak in public.

- E. Carry out assigned duties fairly, reasonably, and without prejudice or malice.
- F. Display self-discipline, moral courage, and compassion.
- G. Understand the organizational structure of the Highway Patrol.
- H. Take personal responsibility for one's own career development.
- I. Demonstrate ability to detect traffic/criminal violations and apply the Ohio Revised Code.
- J. Demonstrate ability to accurately and completely investigate, report facts and conclude objectively.
- K. Understand and adhere to the public records laws and Ohio ethics laws.
- L. Cooperate and communicate with all other criminal justice agents/agencies.
- M. Possess thorough knowledge of Ohio title laws and locations of vehicle identification numbers.

IV - SPECIAL REQUIREMENTS

- A. Commissioned as a trooper.
- B. Perform satisfactorily as a trooper for two years.
- C. In-depth knowledge of motor vehicle equipment, drivers license, registration and titling laws.
- D. In-depth knowledge of motor vehicle identification methods and procedures through vehicle identification numbers both public and concealed.
- E. Continuous effort toward improving knowledge of the present position.

The bidding process and requirements for the subject job opening is set forth in Section 30.01 of Article 30 of the parties' Agreement. The pertinent language is as follows:

“All personnel in the affected classification shall have the right to bid on the position. Selection of the person to fill the position shall be based on ability and seniority.”

The Employer and the Union were both in agreement that the posted position was not a “Field” position, but was treated as a “Specialty” position under the Collective Bargaining Agreement. The difference between the two positions is that the Field positions are filled solely on the basis of seniority, while Specialty positions are filled on the basis of ability and seniority.

Five troopers complied with the procedure of requesting a transfer to the open position either by evidencing a desire prior to the posting or by doing so within the seven day window period of the posting as required by the Collective Bargaining Agreement. The Grievant was one of the five. He was the most senior trooper of all the applicants. The trooper that was awarded the position had less seniority by several months, but was deemed by the Employer to have the ability to perform the job with the most seniority. The Employer believed that the Grievant would require a significant amount of training before having the ability to perform as a Blue Title Trooper. Both troopers were veterans of the Highway Patrol and respected for their accomplishments. It was the issue of the ability to perform the duties of a Blue Title Trooper that was deemed to be the differentiating factor in the selection process.

The Grievant was, at the time of the posting, serving as an Instructor at the Ohio Highway Patrol Academy. While he had taught a number of different disciplines, a large portion of his instruction has been as a Firearms Instructor. His most recent Annual Performance Evaluation conducted by the Employer indicated that he either met or exceeded expectations in all facets of his performance. In five of the eight categories he was rated "Above Expectations." He scored at the highest rating permitted in the categories of "Team Effort And Cooperation" and "Directing/Coordinating Behavior Of Others".

For a number of years the Grievant was a road trooper. On several occasions he was asked to act as a temporary fill-in as a Blue Title Trooper. Most of these occurrences took place between 1983 and 1990 when salvage title inspections were performed at field posts. Most recently, salvage title inspections have been consolidated and are performed at district locations. In addition to these prior opportunities to perform salvage title inspections, the Grievant indicated that he had performed such inspections during a two day period when he filled in for Trooper Mills in August, 2002.

The Grievant admitted that his participation in the inspection process, most recently, was limited to filling out documents and making computer queries for wanted persons and to determine if vehicle parts were stolen. He admitted that he did not physically check any of the vehicles or vehicle parts for serial numbers, for that task was left to civilian salvage inspectors.

Evidence indicates that much of the Blue Title Salvage operations are

conducted by civilians who provide expertise and continuity to the job. The primary purpose of the Blue Title Salvage operation is to ascertain that neither a salvaged car nor any of its replacement parts are stolen. When vehicles are damaged in accidents beyond feasible economic repair, the insurance companies declare the car(s) to be a "total" loss for insurance purposes. The insurance company can then sell the vehicle for "salvage." A salvage title or document then issues. That document can be exchanged for a regular title upon paying a fee and having the vehicle inspected by the Ohio State Highway Patrol. The inspection is not a safety inspection, but one to ascertain, as mentioned above, whether or not the car or any of its replacement parts were stolen.

The process involved in the operation is such that the Vehicle Inspection Number (VIN) is taken from the title and is then cross-checked with the physical placement of the number in a location or locations on the automobile itself. New parts used in the restoration of the vehicle are identified and receipts for the purchase of such parts must be produced. Any individual seeking authority to obtain a new and regular title is checked for outstanding arrest warrants.

Since the civilian workers often have the most experience and are proficient at identifying various numbers on the automobile and its replacement parts, they do most of the actual inspections. While the troopers do perform some of the inspections, they usually check the computer to determine that there are no warrants on the title applicants and that neither the car nor its parts are stolen once the numbers are provided. Troopers have the ability to perform these functions because they are

certified in LEADS operations. The trooper generally fills out the paperwork and issues the documentation to secure a title. On occasion, the trooper arrests individuals bringing in a vehicle for an inspection due to outstanding warrants. The trooper is an essential component to the operation in as much as only the trooper has the arrest power and the LEADS certification.

When the Grievant performed services as a temporary Blue Title Trooper, the civilian employee would instruct him on the preparation of the paperwork and show him methods of identifying the VIN on the vehicles. When the Grievant, most recently, filled in for Trooper Mills as a temporary Blue Title Trooper, he admitted that the forms had changed quite a bit since the 80's, but he believed that it was not difficult to learn how to fill out the new forms and, in fact, he did complete a number of the forms as required by that job.

Trooper Mills, the trooper selected for the position, had been a trooper in the field until his assignment to the Blue Title Trooper position. During his tenure in the field, Trooper Mills earned the division's Distinguished Ace Award four times and the coveted Blue Max Award once. The Ace and Blue Max Awards are meritorious recognition for excellence in the Ohio State Highway Patrol's Auto Larceny Program. Trooper Mills made persistent efforts to recover stolen vehicles and make apprehensions during the course of performing his normal duties as a road trooper. Since the salvage title inspection process is an examination of vehicles to determine if they are stolen or reassembled with stolen parts, Trooper Mills experience in the Auto Larceny Program was considered an indicia of his ability to perform the job posted.

None of the candidates for the District 6 Blue Title Trooper position were interviewed. The Employer indicated, however, that this was not particularly unique. Once of the Union's witnesses, who is the current District 9 Salvage Title Inspector, indicated that he was not interviewed prior to his selection. He testified that when he arrived at the salvage facility, he had never conducted a single salvage inspection. He read the procedure and was helped along by the civilian inspector. He further testified that, when it is necessary for him to be absent from his job, he is replaced with other troopers without reference to whether they have any experience in the salvage inspection process or not. He gave the example of being absent two weeks in 2001 at the Ohio State Fair, at which time he was replaced by a difference trooper each day. He indicated that there was no apparent harm to the operation during his absence.

The immediate supervisor of the District 6 Salvage Title Operation testified about his experience in performing the duties of a Blue Title Trooper. He testified that he has filled in for the Blue Title Trooper on occasion, but he does not have the ability to perform all the required job tasks associated with an inspection without assistance. He testified that he had to rely heavily on the civilian salvage inspector. While he indicated he could conduct salvage inspections without the civilian inspector present, the pace of the investigations would slow to an unacceptable level.

The trooper selected by the Employer to fill the position was desirous of replacing the retiring Blue Title Trooper and, on several occasions prior to the job posting volunteered to fill in when the inspector was absent. Trooper Mills testified that he would split his days off to fill in and increase his knowledge of the Salvage Title

operation. He also spent his lunch breaks at the inspection facility so he could gain experience to do the job without relying on the civilian Salvage Inspector. Based upon this experience, the Employer believed that Trooper Mills had demonstrated the ability to operate the District 6 Salvage facility without any of support staff in place. This included the ability to schedule inspections, conduct inspections, and fill out related documentation.

Testimony indicates that, at the time of the retirement of the District 6 Blue Title Trooper, a backlog was increasing on the number of inspections that needed to be performed. In light of this situation, the Employer wanted to hire an individual that had the ability to "hit the road running".

The position of the Union is that the Grievant met the procedural antecedents to secure a transfer to this speciality position and he was the senior applicant. It maintains that the Grievant, because of his job and employment history and training, did have the ability to perform the job of Salvage Inspector - Trooper. It maintains that ability is not the same as experience and the Employer was incorrect in its assessment of the applicants for the job.

The Employer maintains that the position was filled in accordance with provisions of Article 30 of the Unit One Labor Agreement. The selection of the person to fill the position was based upon ability and seniority. It states that Trooper Mills temporary performance as a District 6 Blue Title Salvage Trooper in the last three years demonstrates his ability to perform the job. It believes that the Grievant's last three years experience as an Academy Firearms Instructor is not the same. It believes he

would require a significant amount of training before having the ability to perform at an acceptable level as a Blue Title Trooper.

III. DISCUSSION AND OPINION

Management has the inherent right to determine what individuals will be selected to perform the duties of the jobs specified by it. This inherent managerial right is subject only to exceptions carved out in a Collective Bargaining Agreement. In this case, exceptions to this unfettered right regarding job transfers within the Ohio State Highway Patrol is governed by Article 30. In particular, Article 30, Section 30.01 provides that transfer requests shall be maintained in an active transfer file and when the Employer determines a position is to be filled by transfer, the active transfer file shall be used to fill that position. All personnel in the various affected classifications have the right to bid on the position. If it is a Field Opening, which is an opening at any one of the fifty-eight Patrol posts in the State of Ohio, seniority of the employee is the sole determining factor. To the extent that a Specialty Position is posted, however, the parties have agreed that the selection the person to fill the position shall be based on ability and seniority. The parties have stipulated that the Blue Title Trooper position is a Specialty Position, and, therefore, must be filled on the basis of ability and seniority.

In this case, the dispute between the parties arises not so much between an employee and the Employer as much as it is between two employees who desire the same position. The Grievant, who had the most seniority, was not given the job. It was determined by the Employer that he did not have the ability to perform the job.

The less senior employee, Trooper Mills, was deemed to have the ability to perform the job and, being more senior than any of the other applicants with the ability to perform the job, was granted the transfer.

The crux of this case deals specifically with the interpretation and application of the term ability. If the Grievant had the ability to perform the job, the Employer violated the provisions of the Collective Bargaining Agreement by granting the transfer to a less senior employee.

Black's Law Dictionary defines ability as: "*Capacity to perform an act or service.*" Ability is also defined by the American Heritage Dictionary of the English Language as: "*The quality of being able to do something; the physical, mental, financial, or legal power to perform.*" The secondary and more applicable definition for this case is "*a natural or acquired skill or talent.*" The application of these definitions prove helpful in arriving at a resolution herein.

Both the Grievant and the trooper he seeks to displace are qualified, veteran, well respected troopers. They both have similar, if not identical, training in basic law enforcement. This is necessary to maintain their jobs. It is this general training and experience that bears on the specific issue of ability, particularly in this instance.

After reviewing all of the testimony and evidence, it is the Arbitrator's determination that the Grievant did have the ability to perform the job of a Blue Title Trooper. This conclusion is based a review of the evidence relating to the job history and qualifications of the individuals and the specific aspects of the job that practice and custom indicates the successful applicant will perform.

When one reviews the description of the nature of the work of a Blue Title Inspector (illustrious examples of the work; the essential skills, knowledge, and abilities for the job; and special requirements for the job) one must conclude that conducting the actual inspection of vehicles to verify ownership is not a major part of the job for the Trooper. Testimony from all of the witnesses indicated that civilian inspectors are hired to perform most of the actual inspections of the vehicles. Those inspections produce Vehicle Identification Numbers and part numbers on the replacement parts. It appears from the testimony of record that the major duties of the trooper is to supervise the inspections, fill out paperwork, run the LEADS operation relating to the salvage inspection, determine whether there are any warrants and exercise arrest power where necessary. Based upon a description of what the civilian employees do, the Union's description of the trooper as primarily "essential to the operation in as much as only the trooper has the arrest power and LEADS certification" appears to be a primary attribute needed to perform the job. That is not to say that troopers do not identify VINs or part numbers. That is part of the job description. Past practice, however, indicates that the degree to which the trooper performs this function varies.

Even if the Arbitrator were to conclude that the above described duties were not the primary and/or sole duties of the trooper, it cannot be overlooked that numerous troopers assist in the ongoing operation of a Blue Title Trooper when the Trooper is unavailable. Obviously, the operation would be slowed because the temporary Blue Title Trooper does not have the experience to perform the job, but there is no indication that the operation cannot run or the functions of the operation

performed without an experienced trooper. This is obviously because the civilian staff provides continuity for the job.

In this instance, there is no question that the trooper awarded the transfer request has more experience as a Blue Title Trooper than the Grievant. But as Arbitrator Marvin J. Feldman found in an arbitration between the State of Ohio and the Fraternal Order of Police, Ohio Labor of Counsel, decided August 25, 1995, the issue of review under Article 30 is whether or not an individual has the ability to perform the job, not whether or not one individual has more ability than another. At Page 9 of his Decision, he stated: "Simply put, minimal ability is all that is needed under the terms of the Contract." This Arbitrator would agree with that view.

Subsequent to Arbitrator Feldman's Decision, further contract negotiations on a Collective Bargaining Agreement between the Ohio State Troopers Association and the Ohio State Highway Patrol ensued. Notwithstanding the Feldman decision, the parties did not change the language in Section 30.01. As a result, if an individual is deemed to have at least minimum ability to perform the job, then seniority must be the determining factor in awarding the job and/or transfer.

The Employer did not have a basis to conclude that the Grievant did not have the ability to perform the duties of the job. He had performed the duties of a Blue Title Trooper in the past, albeit on a temporary basis; he demonstrated leadership skills and an ability to work as a team member as an instructor at the academy; and he possessed most of the skills and requirements set forth in the job description. Perhaps he was not as familiar with the procedural aspects of the job as Trooper Mills, nor as experienced,

but he has demonstrated an ability to perform the job.

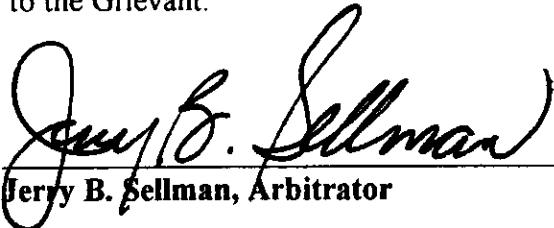
To the extent that a trooper has been exposed to the Blue Title operation, he or she would certainly have much more experience. Any other "technical expertise" seems to be provided by the civilian inspectors and that does not seem to be something that cannot be learned in a very short period of time by any well-trained trooper.

When one considers the application of the term "ability", the greater the level of education, training, and experience is needed to perform the tasks of a job the greater emphasis is given to ability. Here it seems that most troopers have the inherent ability to perform the tasks of this specific job, and it is only additional experience that is necessary to perform the job better. As an example, the Grievant was able to perform as a temporary Blue Title Trooper in the recent past. If he lacked the ability to perform the duties of that job, he would not have been able complete any aspect of the job.

In light of the above, it is the finding of the Arbitrator that the Grievant should have been considered the successful applicant for the Salvage Inspector - Trooper job.

IV. AWARD

For all of the above reasons and conclusions, the Grievance is sustained. The Grievant should have been awarded the position of Salvage Inspector - Trooper. The Employer is directed to award the job to the Grievant.


Jerry B. Sellman, Arbitrator