

#1628

**IN THE MATTER OF AN ARBITRATION
BETWEEN**

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

The Union,

**FMCS NO: 15-00-020225-0032-04-01
ARBITRATOR: Jerry B. Sellman
DECISION DATED: December 19, 2002
GRIEVANT: TIMOTHY A. DUNLAP**

and

**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
Edwin Richardson - Staff Representative, Ohio State Highway Patrol IUPA/AFL-CIO
Trooper Timothy A. Dunlap - Trooper, Ohio State Highway Patrol, Grievant, Witness

FOR THE EMPLOYER:

Lt. Reginald Lumpkins - Office of Human Resources, Ohio State Highway Patrol, representing the
Employer
Andrew Shuman - Office of Collective Bargaining
Kevin Teaford - Office of Human Resources, Ohio State Highway Patrol
Captain Richard H. Collins - District Commander, Findlay District, Ohio State Highway Patrol,
Witness
Thomas W. Moline - Retired Sergeant with Ohio State Highway Patrol, Witness
Trooper Jana J. McClain - MVI Trooper, Ohio State Highway Patrol, 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 Timothy A. Dunlap (hereinafter referred to as the "Grievant") objecting to the decision of the Employer denying his transfer request for the position of Motor Vehicle Inspection Trooper (hereinafter referred to as "MVI 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 has served for a number of years in an MVI position and did not perform the duties of that job in a satisfactory manner. The Grievant argues that his past experience demonstrated his ability to perform the job 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 Jana J. McClain to the MVI 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 Motor Vehicle Inspection Trooper at the Findlay District of the Ohio State Highway Patrol was removed from the position resulting in a vacancy. The Employer posted the opening throughout the State for troopers to bid upon.

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.

The Grievant was the most senior trooper of the two applicants. The trooper that was awarded the position had less seniority by nearly twelve years, but was given the position primarily because of a determination by the Employer that the Grievant's performance in that same position previously was unsatisfactory. The Grievant was an MVI Trooper at the Van Wert Post from 1980 to 1992.

The duties of an MVI Trooper involve making annual inspections and safety certifications of school buses, church buses, ambulances, cabs, and Mental Retardation and Developmental Disability buses, as well as making spot inspections of these vehicles throughout the year. The MVI Trooper is also required to make roadside inspections of passenger motor vehicles. The MVI Trooper is responsible for scheduling and supervising two (2) civilians who assist him or her in these

inspections. MVI Troopers in the Findlay District make almost 2,000 inspections per year. In addition to these primary duties, MVI Troopers are also expected, while on duty, to observe motorists and enforce traffic laws in the State of Ohio so that citations are issued when violations of law are detected.

When the transfer requests of the Grievant and another Trooper¹ were submitted, the District One Commander, Captain Collins, recommended Trooper McClain for the job. Captain Collins believed that Trooper McClain had demonstrated the performance-driven attitude necessary to effectively manage the activities involved in the position. In her evaluations, she had met or exceeded the expectations of her Employer. The Grievant was not recommended. It was communicated to Central Headquarters that he had been removed from his position as an MVI Trooper in 1998 and was assigned as a road trooper to the Van Wert Patrol Post. Captain Collins stated in a memo that the Grievant had been removed due to his inability to effectively manage the administrative requirements of the position and the subordinate employees for which he was responsible. Based upon the Grievant's subsequent performance in 2001 and 2002, the District One Commander believed that his performance had not improved and he, therefore, lacked the ability to perform the job in question.

The Sergeant supervising the Grievant in the 1990's testified about the Grievant's performance as an MVI Trooper while under his supervision. He indicated that the Grievant had technical knowledge of the job and all the tools to do the job, but his performance in that position was inadequate. He indicated that the Grievant was responsible for scheduling, but he left many of those duties to the civilian staff. His arrest averages were far below those of his work group. Due

¹Trooper Jan J. McClain

to these performance problems, the Grievant was counseled about his lack of citations per day. The Grievant admitted that he could improve but he never did.

In June or July of 1998, the Grievant's supervisor met with him and other management personnel. They indicated to him that his performance would need to improve within ninety (90) days or he would lose his job. While the Grievant's supervisor indicated that there were several inspections that he did not deem to be satisfactory, he admitted that he never issued a reprimand or a warning relative to any inadequacies.

In disputing the characterization of his performance as inadequate, the Grievant submitted ten (10) letters of commendation from individuals in the community praising the Grievant's work as an MVI Trooper. These letters came from schools and private industry during the eight (8) year period between 1990 and 1998.

In February 2002 an Administrative Investigation was initiated against the Grievant in regard to his performance throughout 2001 and the beginning of 2002. This Administrative investigation was initiated on February 1, 2001, after the Grievant's request for a transfer to the MVI Trooper was submitted. After the investigation was complete, the Employer had determined that the Grievant continued to display low levels of performance that encompassed all areas of functional activity including many of the Division's major programs such as: Commercial Enforcement, Impaired Drivers, Seat Belts, Failure To Yield Violations and the overall number of traffic stops as measured by Signal 3 Totals. The investigation revealed that the Ohio State Highway Patrol Post Supervisors had held at least eight (8) counseling and ride-along sessions with the Grievant in 2001. He had been counseled for his low activity compared to the other twelve (12) Troopers, four (4) Sergeants, and a Post Commander at his Post. Statistics revealed that for the year 2001, he had

forty-one (41%) percent fewer arrests, his patrol hours per arrest were over one and one-half (1 ½) times higher than the work group average, his pro-active commercial arrests were thirty-five (35%) percent lower than the average of the work group, his seat belt arrests were sixty-seven (67%) percent fewer than the work group average, and his patrol hours and total hours were four (4%) percent and eleven (11%) percent lower, respectively, than the average of the work group.

Statistics for January through February, 2002 remained virtually the same, with the exception that he had better patrol hour ratios than the work group. The Administrative Investigation resulted in the issuance of a written reprimand for violation of the Rules and Regulations of the Ohio State Highway Patrol, specifically Rule 4501:2-602B(5) Performance of Duties – Inefficiency. This written reprimand was issued on March 8, 2002.

The Grievant maintained that he voluntarily resigned from the MVI Trooper position in 1998 because he was threatened with a criminal charge of theft if he refused to voluntarily transfer back to road trooper. He indicated that the alleged theft charge arose out of his use of a cell phone while on duty. In 1998, Troopers were not permitted to have cell phones. The Grievant testified that his supervisor indicated that he was “stealing time” when he was on his cell phone.

The position of the Union is that the Grievant met the procedural antecedents to secure a transfer to this specialty position and he was the senior applicant. It argues that the Grievant, because of his twelve (12) years experience as an MVI Trooper, clearly demonstrated an ability to perform the MVI Trooper job. It argues that the Memorandum recommending Trooper McClain and not recommending the Grievant, which recommendation was sent to the Human Relations Department, was inaccurate. The Grievant was not removed from his former MVI Trooper position, he voluntarily resigned. He believes that inaccurate information inappropriately influenced the

Human Relations Department resulting in the Grievant being denied the position.

The Union further argues that the Grievant was denied the position of MVI Trooper not because he lacked the ability for the job, but because the Employer is unhappy with the number of tickets (HP-7) or citations that the Grievant produces. Because the Grievant's production is lower than other troopers at the post, it reasons that it used the threat of criminal prosecution in 1998 to force him to voluntarily resign and used the Internal Administrative Investigation in 2002 to further unjustifiably harass him for his low production in writing citations. It avers that when viewing the Grievant's annual evaluations, one would conclude that the Grievant, by the Employer's standard, is an excellent Trooper other than he does not write as many citations for traffic violations as demanded by the Employer.

The Employer takes the position that the Grievant does not possess the ability to perform all the duties required of an MVI Trooper. It avers that the Grievant was not motivated to perform all the required duties when he previously held the position, and he has not shown the ability required to be an MVI Trooper since being returned to a "Field" position. It argues that the Grievant's lack of ability is directly proportional to his lack of motivation to do the job. It maintains that the MVI Trooper position requires the Grievant to plan and make decisions that will effect him and the operations of two (2) non-sworn MVI Inspectors. It argues that is unreasonable to expect that the Grievant will suddenly become highly motivated, efficient and effective MVI Trooper, if he has not previously shown those performance characteristics over the last several years.

The Employer maintains that while the Grievant did voluntarily leave the MVI Trooper position previously, it was for his lack of performance, in light of the ninety (90) day warning, not for any other reason, and certainly not because he was "threatened" for use of a cell phone. It

concludes that the notion of the Employer removing an employee from a Specialty position because of unacceptable performance and then being required to return the person to the same position due to his seniority is an absurdity. Based upon these facts and circumstances, it argues that its selection of another trooper for the job was correct.

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.

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 to regulate and authorize 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 of the person to fill the position shall be based on ability and seniority.

The parties have stipulated that the MVI Trooper position is a Specialty Position, and, therefore, must be filled on the basis of ability and seniority. In this case, the Grievant, who had the

most seniority, was not given the job. It was determined by the Employer that his poor performance in an MVI position previously and his continued lack of performance and efficiency was the determining factor in its denial of the transfer request. The less senior employee, Trooper McClain, 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.

A resolution of the issue in this proceeding deals with an 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.*" Under these definitions, the ability of the successful candidate for the MVI position was not questioned by the Union; it was her seniority that was challenged. The ability of the Grievant was challenged by the Employer, but his seniority was not. The central focus of the issue, therefore, is on the ability of the Grievant to perform the duties of the job.

In a prior ruling, I found that minimal ability is all that is needed under the terms of the Agreement for a trooper to demonstrate that he or she has met the qualifying language in Article 30.²

That is what the Agreement provides. Here the question of minimal ability must be interpreted in light of alleged evidence that the Grievant had failed to adequately perform the duties of the job previously.

²*In the Matter of an Arbitration Between The Ohio State Troopers Association, IUPA/AFL-CIO, and The Ohio Department of Public Safety, Division of the Ohio State Highway Patrol, Case No. FMCS 15-00-020111-0004-04-0, decided November 18, 2002.*

In determining whether an Employee has sufficient ability to perform the duties of the job, an Arbitrator does not have the contractual authority to weigh the degree of ability among various Employees. Where a contract provides that an individual employee need merely demonstrate ability, then, as discussed above, minimal ability is sufficient. In this instance, the question is not whether one trooper had more ability than the other, but whether the Grievant lacked the ability to perform the job due to his prior work performance. Ability is interpreted in many ways, and one of the factors in assessing ability is past performance. In prior cases dealing with an assessment of ability of a trooper to perform a job, the degree of ability among the applicants was at issue. Those cases properly held that the Agreement did not allow for comparative ability among applicants. That is not the issue here. Here the focus is on an interpretation of ability in the context of past performance. An employer, under its broad grant of management rights, has the contractual right to consider several factors in assessing ability.

The Arbitrator, in this instance, does not believe that the Grievant demonstrated that he had the ability to perform the duties of this particular job. This conclusion is based upon the performance record of the Grievant over a number of years.

It is undisputed that the Grievant wrote fewer citations than others in his work group. The Grievant admitted that his performance in this area was substandard and he was unable to explain why his production was lower. The Union's advocate correctly argued that issuing more tickets or citations in order to meet some type of perceived "quota" should not be factored into the determination of ability for a job. As a general principle that is correct, but an employer has the right to compare the performance of employees in similar jobs as a factor in assessing the employee's capability to perform an act or service.

The purpose of the MVI Trooper is two-fold. First, to inspect vehicles to make sure that they are safe, and to issue citations where appropriate. The Grievant's performance while executing the duties of an MVI Trooper certainly had to have been brought into question in light of the ninety (90) day ultimatum to improve his work performance or he would lose the position. The Union's advocate argued that under the 1998-2000 Collective Bargaining Agreement, the Employer would not have the ability to transfer the Grievant out of the MVI Trooper position without just cause. Certainly, the Employer was aware of this factor and would not have put the Grievant on notice, but for that requirement.

While the Grievant indicated that he resigned because of threatened criminal prosecution, that argument is unpersuasive to the Arbitrator. It seems more likely than not to the Arbitrator that the Grievant withdrew because of his work performance record.

Even if the Arbitrator were incorrect in this assessment, the Grievant's performance, for which he was cautioned in 1998, continued to be less than satisfactory to the Employer in subsequent years. The various counseling sessions in 2001, continuing into 2002, were for the very same reasons that he was counseled about his performance as an MVI Trooper in 1998. The Grievant essentially argued that the duties of the job do not include a requirement to write a certain number of citations. That statement is correct, but when the job specifically requires certification of motor vehicle safety compliance and others on average write significantly more citations, it is not unreasonable for the Employer to conclude that the Employee is not adequately performing his job. Testimony revealed that during the short duration of Trooper McClain's activity as an MVI Trooper she had issued many more citations than the Grievant, even in MVI.

The Employer presented evidence indicating the Grievant assigned scheduling duties to

civilian staff instead of handling those himself. It viewed this as not performing the duties of the job. It is not unreasonable for an employer to judge an employee's ability by what he or she does, as opposed to what they could do.

When an employee's performance in a particular job does not meet an Employer's expectations and requirements, particularly in an area such as commitment to Goals/Objectives/Special Programs, one must bring into question his ability to perform the job. Here evidence indicates the Grievant did not adequately perform the duties of the job of an MVI Trooper when he held the position previously. The Arbitrator does not believe that the voluntary withdrawal in 1998 was for the reasons stated by the Grievant. The more credible evidence is that the withdrawal was motivated by poor performance. This fact, coupled with evidence of his ongoing poor performance, gave the Employer a reasonable basis for determining the Grievant lacked the ability to perform the job. An employer is not required under the Agreement to place an employee into a position where past performance demonstrates a lack of ability to perform the duties of that position.

IV. AWARD

For all of the above reasons and conclusions, the Grievance is denied.


Jerry B. Sellman, Arbitrator