

1756

IN THE MATTER OF ARBITRATION
BETWEEN
OHIO STATE TROOPERS ASSOCIATION

AND
STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY
DIVISION OF HIGHWAY PATROL

Before: Robert G. Stein
Case # 15-00-021114-0180-07-15
Grievant: Donald D. Ebie

Advocate(s) for the UNION:
Elaine N. Silveria, Esq.
OHIO STATE TROOPERS ASSOCIATION
6161 Busch Blvd., Suite 130
Columbus OH 43229

Advocate for the EMPLOYER:
Lieutenant Reggie Lumpkins
OHIO STATE HIGHWAY PATROL
Human Resources Management/Labor Relations
1970 West Broad Street
P. O. Box 182074
Columbus OH 43218-2074

INTRODUCTION

This matter came on for a hearing before the arbitrator pursuant to the terms of the Collective Bargaining Agreement (herein "Agreement") between the State of Ohio, Department of Public Safety (herein "Employer" or "Patrol") and the Ohio State Troopers Association, (hereinafter "Union").

The parties waived a hearing on the above referenced matter and instead submitted stipulated documents and briefs in lieu of making oral arguments. Both parties agreed to the arbitration of this matter pursuant to the Grievance Procedure contained in the Collective Bargaining Agreement. However, the parties are in dispute over the propriety of including management exhibits 1 through 9 in the record. There was no oral hearing in which the undersigned arbitrator could have determined the relevancy and propriety of including contested documents in the record. And, given the understanding reached by the Employer and the Union, it appears that the Union did not have the proper opportunity to challenge Management exhibits 1-9 by way of cross-examination or rebuttal evidence. Therefore, in a sense of fairness to the positions of both parties I will only rely upon what the parties have provided to me by way of stipulation in making a ruling on this case.

ISSUE

The parties agreed to define the issue as follows:

Did the promotion and transfer of Sergeant Terry Helton to the position of Criminal Patrol Supervisor for District 3 violate Section 30.03 of the labor agreement. If so, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

For reference see grievance and parties' briefs

BACKGROUND

The bargaining unit involved in this grievance is Unit 15, which is composed of Highway Patrol Sergeants (See Collective Bargaining Agreement, Article 5). The Grievant in this matter is Donald D. Ebie (herein "Grievant" or "Ebie"). At the time of the incident, October 2002, Ebie had held the position of Sergeant with the Employer for over five and one-half (5½) years. On October 15, 2002, Ebie electronically filed a transfer request for a recently vacated sergeant's position entitled "Criminal Patrol Supervisor" at the Massillon District Headquarters, also referred to as District 3 (herein "DHQ 3"). The position was open due to the retirement of Sergeant Joseph Weiland on October 11, 2002, four days preceding Ebie's filing. The request by Ebie was also filed prior to the Employer taking any personnel action on this vacancy.

There is no dispute that the position of Criminal Patrol Supervisor is a

non-field (specialty) position with the Patrol. In addition, the parties stipulated to the fact that in the past the Patrol has filled non-field (specialty) positions both by transfer and promotion. There is also no dispute that Ebie previously held a non-field specialty position on the Employer's Motor Vehicle Inspection Team and Trooper Terry Helton (herein "Helton") held a non-specialty position on the Employer's Traffic Drug Interdiction Team (herein "TDIT"). Additionally, the parties agree that Helton was a canine handler on the Employer's Criminal Patrol Team. In 1995, Ebie was selected as State Trooper of the Year.

The Employer received Ebie's transfer request and chose not to interview anyone for the position. Instead, the Employer promoted Helton (herein "Helton") to the position of Criminal Patrol Supervisor on November 7, 2002 (Joint Stip. 12). On November 1, 2002, the Grievant was notified the position was going to be filled through a promotion, and he filed a grievance on November 4, 2002, claiming the Employer violated Article 30.03 (Jx 2).

UNION'S POSITION

The Union argues the Employer violated Article 30.03 when it did not post the vacancy of Criminal Patrol Supervisor for a period of seven calendar days. The Union points out that Ebie gained valuable experience as a sergeant, which places him above Helton in terms of

qualifications. The Union argues that the Employer violated Article 30.03 of the Collective Bargaining Agreement and its own policy, OSP 502.08-03A-01, requiring it to establish specific qualifications and criteria for selection to the position of sergeants in non-field positions. Helton had no previous supervisory experience and was never interviewed before he was promoted as required by policy, asserts the Union. In contrast, the Union argues Ebie was clearly qualified for the Criminal Patrol Supervisor position and has an exemplary record of performance over his tenure with the Patrol.

The Union argues Article 30 does not grant the Employer the right to promote a trooper to fill a vacancy and points out the word "promotion" does not appear in Article 30. The Union argues, *"If the Employer intended to have the ability to fill non-field sergeant vacancies by promotion, it would have negotiated the language into the contract"* (Union's brief, p. 6).

The Union also asserts that the Employer has arbitrarily filled positions over the years by either transfer or promotion and again in the instant matter bypassing the seniority requirements of Article 30.03 when it promoted Helton over the transfer of the Grievant. The Union concedes that if the Employer had surveyed the active transfer file for the position of Criminal Patrol Supervisor in District 3, and had there been no candidates, the Employer would have had the right to promote Helton to the unfilled

vacancy. However, the facts in this case demonstrate the Grievant had properly filed an active transfer request that the Employer ignored, argues the Union.

The Union argues that the Employer's promotion process is flawed. It does not define a "top performance score," yet it relies upon it to rank candidates. Furthermore, the Employer's scoring policy lacks clearly defined criteria, argues the Union. Finally, the Union rejects the notion that prior arbitration awards have any conclusive or binding effect upon subsequent disputes involving the same language. It contends the Employer violated Article 30.03 and its own policy when it bypassed the Grievant for a position in which he possessed supervisory experience.

EMPLOYER'S POSITION

The Employer contends it followed the clear and concise language of the Collective Bargaining Agreement when it promoted Helton. The Employer asserts it has retained the exclusive right to promote employees under Article 4, Section 5 of the Collective Bargaining Agreement and that specific language governing promotional requirements or procedures was not negotiated with the Union since the first agreement between the parties in 1991 covering Unit 15. It asserts it has maintained a great deal of discretion in filling vacancies by promotion. In the case of

transfers, the Employer concedes it has negotiated language with the Union that addresses both field and non-field positions.

However, in the case of non-field transfers, the subject of the instant dispute, it has retained the exclusive right under Article 30.03 to determine how it will fill a vacancy. In support of its argument it cites the first sentence of Article 30.03, which reads:

"When the Employer determines that a vacancy in a non-field position will be filled by transfer, the position will be posted at all Highway Patrol facilities for a period of seven (7) calendar days"

The Employer argues that the language cited above clearly gives it the right to determine when it will fill a vacancy by transfer, and when it will fill a position by promotion. Given the fact there is no promotional procedural language contained in the Collective Bargaining Agreement, the Employer asserts it is free to promote employees instead of transferring them when it determines this is a proper course of action. The Employer also argues that over the years it has maintained a close balance between the number of non-field vacancies filled by promotions and the number filled by transfer. It contends during the approximately ten-year time period (January-February of 1993 to October-November of 2003) it filled 99 positions by transfer and 74 positions by promotion.

The Employer does not dispute the fact that Ebie is a fine officer with

considerable experience. However, in the instant matter, the Employer argues it exercised its unrestricted right to fill the vacancy of District 3 Criminal Patrol Supervisor by promotion with a well-qualified candidate, as it has on many occasions during the past several years.

DISCUSSION

When confronted with plain contract language that conveys a straightforward course of conduct, arbitrators assume that the parties knew what they were doing when they drafted their agreement incorporating the language used. The arbitrator's primary role in interpreting a written instrument is to determine the true intent of the parties from the document as a whole. *Dayton v. Fraternal Order of Police*, 76 Ohio App. 3d 591, 597, 602 N.E.2d 743 (1991). Ohio courts have consistently held that "[t]he overruling concern when construing a contract is to ascertain and effectuate the intention of the parties." *Aultman Hosp. Ass'n v. Community Mut. Ins. Co.*, 40 Ohio St. 3d 51, 544 N.E.2d 244; *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374 (1974).

In Article 4 of the Collective Bargaining Agreement, the parties have agreed that except as modified by other provisions of the Collective Bargaining Agreement, management "reserves exclusively all of the inherent rights and authority to manage and operate its facilities and

programs.” In subsection 5 of Article 4 the parties specifically list the right to promote and transfer. Except for a mention of promotion as it relates to Appendix B Drug Free Workplace Policy, the Collective Bargaining Agreement appears to contain no other language that modifies the Employer’s rights to promote under Article 4 (See Jx 1 index, p. 130). The Collective Bargaining Agreement contains far more language related to transfers, which modify management’s rights under Article 4. The focus of this case is Article 30.03, which specifically deals with Non-Field Transfers. In carefully examining this language and comparing it with the Field Transfers language (Article 30.02), it is clear the parties have negotiated very specific procedures for filling Field Position Vacancies. Field vacancies are to be filled by transfer if at all possible, and the most junior (least senior) sergeant can be involuntarily transferred if no bid is received. There is no question that seniority rights are controlling in the filling of field positions.

In contrast, the parties have taken a very different approach to filling non-field or specialty vacancies. This is the position in question in the instant matter. First and foremost, is the first sentence of the second paragraph of Article 30.03. It states:

“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.”

Whereas in Article 30.02 the Employer must first fill a field vacancy by transfer, the filling of non-field vacancies by transfer is in Article 30.03 at the Employer's option. This interpretation is further reinforced by the last phrase contained in paragraph three of Article 30.03, which states, "...if the decision is made to fill the position by transfer." Here the parties are reemphasizing the fact the Employer retains the right to determine whether a non-field vacancy will be filled by transfer. The Grievant in this matter submitted a transfer request that presumably was placed in the "active transfer file." However, the first time the parties even mention the "active transfer file" it is in conjunction with a situation in which there is a subsequent non-field vacancy resulting from the Employer's decision to fill the original vacancy by transfer. It is also clear from the language of Article 30.03 that unlike field position vacancies where seniority plays a pivotal role, the Employer, in filling non-field vacancies, has firmly retained the right to choose the most qualified candidate among those who submit transfer requests; seniority only comes into play when candidates are equal in qualifications.

Contract language that is seemingly unambiguous can be rendered ambiguous through the operation of another provision of an agreement (See Prasow & Peters, *Arbitration in Collective Bargaining: Conflict Resolution in Labor Relations* 100-101, 2nd ed., 1983). However, it

is the opposite case in the instant matter. I find the language of Article 30.03 is unequivocal in its meaning and it is made even more definitive by the absence of language restricting the Employer's rights under Article 4.

The Employer is not required to fill non-field vacancies by transfer, and it is not restricted from exercising its rights under Article 4 to fill non-field vacancies by promotion when it so determines. In the exercise of management rights, however, each employer is governed by the rule of reasonableness, and the exercise of management rights must be in the absence of arbitrary, capricious, or unreasonable discretion. *Southern California Edison and Int'l Bhd. of Elec. Workers, Local 47*, 117 Lab. Arb. 1066 (2002). "Where contracts make the employer the sole judge, in determining fitness and ability of employees for bid positions, management's actions must not be capricious, arbitrary, or unreasonable." *Hussman Corp., IC Indus. Co. and United Steelworkers of America, Local 9014*, 84 Lab. Arb. 23 (1984). "While it is not an arbitrator's intention to second-guess management's determination as to a grievant's qualifications, he does have an obligation to make certain that a determination is reasonably fair and non-arbitrary." *Ohio Univ. and American Fed'n of State, County, and Mun. Employees, Ohio Council 8, Local 1699*, 92 Lab. Arb. 1167 (1989).

After reviewing the actions of the Employer in this case, within the

context of its negotiated managerial rights under Article 4 and 30.03, I find no reason to second guess the Employer's actions in promoting Helton instead of honoring the transfer request of the Grievant. I can understand that Ebie may have been frustrated, given his exemplary record and his long tenure with the Patrol. If all the desirable non-field assignments are denied to sergeants who desire a transfer, it is easy to speculate how such conduct would affect morale. However, there was no evidence introduced in the joint stipulations or joint exhibits to suggest that the Employer has acted in this singular fashion in the past.

One can reasonably assume that when experienced negotiators draft contract language, they know what they are doing and carefully choose words to convey a specific intent (Oklahoma Steel Castings Co., 84 LA 1215, 1218, Allen 1985; City of Brooklyn, Ohio, 85 LA 799, 801, Graham 1985). The plain fact is that the language of the Collective Bargaining Agreement gives the Employer the latitude to promote employees to the rank of sergeant, instead of transferring current bargaining unit members first, as is the case with field position vacancies.

In essence, the Employer has maintained the right to introduce "new blood" in its supervisory ranks when it determines such a move would be beneficial to the Patrol. And, in terms of the arbitrary and capricious standard, there was no evidence to suggest that the Employer

acted unreasonably or unfairly. In fact, the parties introduced in the jointly agreed upon record evidence suggesting Helton was an experienced, qualified and capable officer. Whether Helton could have performed as well as Ebie is not a relevant question, given the rights the Employer has retained in the Collective Bargaining Agreement.

AWARD

The grievance is denied.

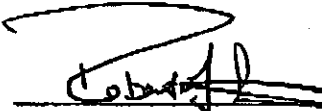
Respectfully submitted to the parties this ____ day of April, 2004.

Robert G. Stein, Arbitrator

AWARD

The grievance is denied.

Respectfully submitted to the parties this 12th day of April, 2004.


Robert G. Stein, Arbitrator