

# 1785

**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 # 15-00-030919-0141-04-01  
Grievant: John J. Maxey**

**Advocate(s) for the UNION:**

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## **INTRODUCTION**

This matter came on for hearing before the arbitrator pursuant to the terms of the collective bargaining agreement (herein "Agreement") between the Ohio Department of Public Safety, Division of the State Highway Patrol (herein "Department" or "Patrol") and the Ohio State Troopers Association, IUPA/AFL-CIO (herein "OSTA"). This agreement is effective from 2003 through 2006. The matter was assigned to Robert G. Stein to arbitrate pursuant to Step Four of the grievance procedure, as defined in Article 20.07 of the Agreement. His chronological selection as the specific arbitrator to review the current grievance was completed in compliance with Article 20.08.

A hearing on the matter was held on June 22, 2004. The parties mutually agreed to that hearing date and were given a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing was closed on July 19, 2004 upon the parties' submissions of post-hearing briefs in lieu of making closing arguments.

The parties have both agreed to the arbitration of this matter pursuant to Article 20.08 of the Agreement. There are no issues of either

procedural or jurisdictional arbitrability, and the matter is properly before the arbitrator for a determination on its merits.

## **ISSUE**

The parties agreed to define the issue as follows:

Did the Employer violate Articles 7 and 30.01 of the Collective Bargaining Agreement when it denied the Grievant, John J. Maxey, a transfer to a Plainclothes Investigator position at District Two. If so, what shall the remedy be?

## **RELEVANT CONTRACT LANGUAGE**

For reference see grievance and parties' briefs.

## **BACKGROUND**

The Grievant in this case is John J. Maxey, (hereinafter "Grievant" or "Maxey"). He served as a State Trooper for over twelve (12) years, was promoted to road Sergeant in 1996 and has remained in that capacity until he voluntarily returned to the classification of Trooper. During his tenure as a road Sergeant, Maxey attempted to be transferred to a plainclothes Sergeant assignment. He discovered that the Employer prefers promoting Troopers into plainclothes Sergeant positions rather than laterally transferring existing road Sergeants into those positions. Based upon his testimony, the Grievant determined that he could not move into plainclothes work from his current position and took a voluntary demotion

to Trooper. Maxey, having considerable seniority, felt this move would increase his chances of being promoted to a plainclothes position with the Patrol.

In August of 2003 the Employer posted for a Plainclothes Investigator position assigned to the Bucyrus DHQ. Trooper Maxey was not interviewed for this position, and another bargaining unit employee received the position. The Grievant was told he was ineligible for the position because his brother, Captain Robert Maxey, was the District Two Captain, and the Patrol has a policy against assigning immediate family members to the same Patrol Post, District Headquarters, or General Headquarters component. The Grievant did not agree with the Employer's decision and filed a grievance.

#### **UNION'S POSITION**

The Union contends the Grievant did everything correctly in his application for the position of District Two Plainclothes Investigator. The Grievant was far more senior than the bargaining unit member chosen for the position, and there is no question as to his qualifications for the position, contends the Union. The Union concedes that Article 7 of the Collective Bargaining Agreement prohibits a situation where a bargaining unit member is supervised by a member of his immediate family, the definition of which is contained in the same article. Therefore, the central

issue in this case, according to the Union, is whether the Grievant's brother, District Two Captain, Robert Maxey, would directly supervise the Grievant, asserts the Union.

The Union's arguments in this case are succinctly stated in its brief as follows:

Trooper John Maxey followed all of the procedural steps necessary to qualify him for interview and selection to the position of Trooper plainclothes investigator in District Two. He filed an antecedent transfer request and upon a posting for his requested position, filed with the Employer his resume. There is no question but that Trooper Maxey was senior by many years to the chosen applicant. There is no question but that Maxey was highly qualified for the assignment he sought, having been identified by the Employer as among the outstanding Troopers in the state. (U-4) The issue then is why was he denied the assignment?

The Employer asserts that Trooper Maxey was properly disqualified from consideration. In the Step Two written response to the Grievant, Captain John Bistor, writing for the Employer relied upon a DAS directive that states "no public official or employee shall supervise any person closely related by blood, marriage or other significant relationship including business association." (M-2). The Employer subsequently, and for the first time, added at the arbitration hearing an additional justification for its actions. The Employer stated that it was following a policy that denied immediate family members assignment to the same post, district or general headquarters component". (Employers Opening Statement)

Lets examine the Employers initial position. The DAS directive does not use the word "direct" in indicating restricted supervision. The directive, of course cannot supercede the negotiated CBA. Article 7 of the CBA declares, " no employee shall be **directly** supervised by a member of his immediate family". (Emphasis mine)

The simple issue before the Arbitrator is whether or not Captain Maxey "directly" supervises the Grievant. Although OHP Colonels have great power and final authority over personnel actions, they have not been considered to directly supervise their children who have in substantial number sought employment with the Ohio Highway Patrol. In the instant case, while Captain Maxey signs off on the annual evaluations of the district plainclothes officers, his action is as a reviewer and is pro forma. The District Captain

neither interacts with plainclothes investigators nor directs their daily activities. Further, it is clear that the District Staff Lieutenant can and does act for the District Captain in the District Captains absence and is available to sign-off on an annual review.

The chain of command within a road assignment is Trooper, Sergeant, Post Lieutenant, two District Staff Lieutenants, and District Captain. The chain of command within the reporting structure for a plainclothes trooper is Trooper, Sergeant, two Staff Lieutenants, and Captain. The chain is a little more complicated for plainclothes officers as there is within the Patrol an Office of Investigative Services headed by Major in Columbus. It was, in fact, Major B. Booker who posted the plainclothes assignment and it was to Major Booker that resumes were to be addressed. Plainclothes Trooper Kevin Smith testified that questions arising related to investigations undertaken by plainclothes investigators are first directed to the plainclothes Sergeant and then on to Major Booker's office in Columbus.

Trooper Smith, a senior plainclothes investigator, works out of District Two. His testimony was that his contact with the District Two Captain is tangential and according to him social. He runs into a District Staff Lieutenant or the Captain only once or twice a month and then only in social interaction over coffee. His work assignments do not initiate from the Captain and the District Captain does not direct his work. **The basic characteristics of direct supervision are the assignment of tasks; the observance, review and evaluation of performance.** Trooper Kevin Smith, a plainclothes investigator, out of District Two is not directly supervised by the District Captain and neither would be Trooper John Maxey.

I should further point out that the DAS directive relied upon by the Employer would expand the "immediate family" provision of our CBA to include those "closely related by blood, marriage or other significant relationship", which it defines as including "aunts, uncles, and various step-relatives. Whether "significant relationships" expand to include significant relationship in-laws is not made clear. What is clear is that the bargained CBA says no such thing.

Perhaps the best indication of the selective nature of the Employer's enforcement of its claimed policy against employees being supervised by family members of whatever definitions is that it has made no effort to determine who is related to whom. The Union requested by way of discovery any list that the Employer or data base that the Employer maintains that establishes employees by family relationship. We were told that the Employer has no such database. Captain Young the Exec of HRM testified that no such database or listing exists.

So, clearly, if one employee's name is Brown and his uncle, or brother-in-law, or for that matter father in law's name is Jones, there is no obvious indication of immediate family relationship. Further, the transfer request form initiated by an employee contains no reference to who his/her relatives might be. Additionally, the posting that referenced the submission of resumes makes no reference to family members or family status that should be announced by the Trooper seeking transfer.

It was impossible for the Union to determine in what circumstances the Employer has found or permitted family members to directly or indirectly supervise other immediate family members. **More importantly, it is impossible for the Employer to know what family members are in what employment relationship to other family members.** The Employer has elected not to know.

The Grievant pointed out situations known to him from personal contact where family members were in an arguable supervisory, relationship to one another. The Grievant testified that the District Three Staff Lieutenant is the father of a Trooper assigned to a Post within that District. The Grievant pointed out that a Sergeant McClain and Trooper McClain, husband and wife, both report to and are carried the roster of the Van Wert Post. (U-5) Both are instances where the individuals share the same last name. The Grievant also pointed out that as a Trooper, he was promoted to Sergeant and transferred into the District where his brother was then serving as District Staff Lieutenant.

The Employer in its written Step Two response distinguished the case of a Trooper assigned to the District where his immediate family member was a Staff Lieutenant by stating that as a Sergeant, John Maxey's "immediate supervisor was the Post Commander and not his brother". (Joint Ex) Here, wrote Captain Bistor, Captain Maxey could sign off on Trooper Maxey's annual evaluation. I would submit that the relationship between the District Staff Lieutenant and a Post Sergeant is, if anything, more direct than that of the District Captain and a Trooper assigned to that district.

Don't misunderstand, the Union does not believe that the relationship of a Sergeant to his brother would preclude him serving in a district where his brother, or uncle, or in-law or father was the District Staff Lieutenant. It is clear that such a situation does not constitute direct supervision and is not precluded by the CBA any more than is the instant case. It is to the picking and choosing of when, to whom, what restrictions to apply that the Union vociferously objects. The Employer when faced with examples of how there was not uniformity in its application of restrictions simply looked for whatever factual differences it could find and announced that these situations were not identical to that of the Grievant and therefore not applicable.

I think that the Employer knew full well the weakness of the argument advanced during the grievance process. It knew that the CBA spoke of direct supervision and that relying upon a DAS directive could not be successfully and persuasively maintained. So, it created the argument that the Grievant should be denied the assignment because it immediate family could not serve in the same building. The argument is that both family members might be called out to the same dangerous situation and the actions of one would be clouded by concern for the other. The Union negotiated a provision of the CBA whereby spouses do not serve at the same post irrespective of supervision for that very reason. The following language is contained in Article Seven of the CBA: "Married members of the Highway Patrol will be assigned to adjoining posts".

No restriction was negotiated that prohibits family members from working in the same building or facility. There are in all probability scores of immediate family members who work together. The Employer keeps no list or database that would disclose or permit the discovery of just how many such situations exist. Nor is there any logical reason to deny such a situation from taking place. It was pointed out, purely as an example, at the arbitration hearing that Captain Charles and her stepson both work at General Headquarters. To make the argument that some concern with immanent danger should restrict Trooper Maxey from being assigned to a district headquarters is ludicrous. Even if there were such a general policy it would not relate the instant facts. Plainclothes Trooper Smith testified that he is technically assigned to the district headquarters but actually works out of a penal facility. He has no office at the district headquarters and not even a desk. He is 'officed' at the facility where he works. He only visits the district headquarters occasionally.

What degree of contact is there between the District Captain and a Trooper plain-clothes investigator? Kevin Smith testified that the District Two Headquarters is in Bucyrus. He physically goes to District on the average of once a month. He calls in, talks to his plain-clothes Sergeant and then drives to the Richland penal facility where he shares an office with the Institutional Investigator. His contact with District staff, with the exception of his Sergeant is tangential at best. He characterizes it as about two hours a month and then only socially. He shares a cup of coffee with one of the Staff Lieutenants or with the Captain. His plain-clothes Sergeant evaluates him. The District higher ranks don't know what he does or how well he is doing the job.

Further, the Employer has neither a requirement nor even a consistent pattern of having the plainclothes investigators physically assigned to the building where the District staff is assigned. In three Districts, Captain Young acknowledged, the plainclothes personnel are housed in buildings located at other than the District Headquarters. In Districts, 8,9, and 10 such is the case. In reality, the only argument that can be made by the



Employer is that because in the normal course, the district Captain signs off as a reviewer of the annual evaluation, he directly supervises the Trooper who reports to a Sergeant, Two Staff Lieutenants and a mixed assortment of officialdom out of the Office of Investigative Services out of Columbus. This one procedural as opposed to substantive act can be completed by one of two Staff Lieutenants who often act for the District Captain for extended periods of time.

It is true that Trooper Maxey could wait for another opening to come available in some District located in elsewhere in Ohio. One of the reasons he opted to voluntarily take a reduction in rank was the belief that the position at issue would open in District Two. Why should he have to face the potential of moving his family if such a position should come open in Columbus, or Cleveland or Cincinnati, or elsewhere. Why should he face driving long distances to get to work without benefit of a patrol vehicle what would be available to him with the District Two assignment. He is not seeking promotion. He is seeking a lateral transfer. He will make not a dime more in the new assignment. It is however important enough to him that he has taken additional course designed to make him a better investigator.

There would not have been even the whisper of favoritism had he have been assigned to a lateral position where he was the senior applicant by more than six years. If he is not to be rewarded in any part for being related to a higher-ranking member of the Patrol, what sense does it make to punish him for that same relationship?

This case more than anything else turns on the fact that the Employer does not keep track of who is related to whom. It also does not require self-reporting on transfer requests. Both of the foregoing facts speak to the actual importance the Employer places on what it alleges to be a policy that would restrict related individuals from either supervising one another or serving in the same locations. Whether or not the actions of the Employer in the instant case reflect retribution for the Grievant voluntarily reducing his rank or in some manner was directed against his brother, I do not know. I do know that the position of the Employer is not supported by the CBA, its own practice, or logic.

The Employer violated the provisions of the Contract when it failed to interview and transfer the Grievant. The evidence discloses he was senior to the Trooper transferred. The Employer acknowledges his ability. He must be transferred to the assigned position of Trooper Plainclothes Investigator in District Two.

## EMPLOYER'S POSITION

The Employer argues that it has had a long established practice of not assigning immediate family members to the same Patrol Post, District Headquarters, or General Headquarters. The Employer gave several examples of how this practice has been followed over the past two decades. There have also been specific policies and general orders (e.g. OSP Policy 500.08 and General Order #8) that have prohibited immediate family members from working in the same Patrol Post, District Headquarters, or General Headquarters.

The Employer's arguments are clearly stated in its brief and are as follows:

**I. The Employer was consistent in following a well-established past practice.**

The practice of not assigning immediate family members to the same Patrol Post, District Headquarters, or General Headquarters component has been around for several years. Trooper Kevin Smith, who also has a brother on the patrol, S/Lt. Joel P. Smith, are both assigned to different districts. Kevin Smith is assigned to District Two Headquarters as an investigator and Joel Smith is assigned out of District Three Headquarters as part of the command staff. Kevin Smith, who has been a trooper since 1980, testified that his father was a Captain with the Patrol upon his graduation from the Academy. Neither he nor his brother, Joel Smith were permitted assignment to their father's district. This did not just merely mean the District Headquarters; it meant any location within the **entire** district. Captain Young testified that he also came from a Patrol background. His father was a sergeant assigned to the Lima Post when he graduated from the Academy in 1983. He was told upon graduation, even though his father's supervisory role was limited to the operations of the Lima Post, that he would not be permitted assignment anywhere in District One where the Lima Post is located.

Captain Young also identified several documents that disallowed the assignment of immediate family members to the same Patrol Post, District Headquarters or General Headquarters Section (Management Exhibit 6). General Order #8, which was later merged into OSP Policy 500.08, was in effect in December of 1989. The Order stated, "Due to the unique nature of our operations, no sworn officer and their spouse, parent, child, **brother** or sister, shall be assigned to the same Patrol Post, District Headquarters or General Headquarters Section." Keep in mind, this General Order was in effect before Grievant even graduated from the Academy in 1990.

The Department of Administrative Services issued a directive (Nepotism Policy) that agencies are expected to follow (Management Exhibit 2). This policy states in pertinent part that "no public official or employee shall supervise any person closely related by blood, marriage or other significant relationship including business association." According to Section 4117 of the Ohio Revised Code, the definition of supervisor means, "any individual who has authority, in the interest of the public employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other public employees."

Additionally, Article Seven of the labor agreement states, "No employee shall be directly supervised by a member of his/her immediate family." The Union would have you believe that because Grievant's brother would not be his "immediate" supervisor, if he were awarded the investigator's position, that it would not violate Article Seven. They are trying to equate directly supervised to "immediate supervisor." A basic tenet of contract interpretation is that once parties to an agreement know how to be specific about a term in one part of the contract, they know how to be specific about the same term in other parts of the contract. Thus, if a term is included in one section of the contract and not in another section, it was not meant to apply in the other section. However, when the parties meant "immediate supervisor" in other parts of the labor agreement, those specific words were used. Section 20.07 of the labor agreement is one example where the parties used the term "immediate supervisor." It states, "An employee having a grievance shall present it to his/her **immediate supervisor** within fourteen (14) days of the date on which the grievant knew or reasonably should have had knowledge of the event giving rise to the grievance."

As Captain Young testified, the District Commander has the power to issue discipline in the form of verbal and written reprimands. He also has the responsibility to sign off as the reviewer on performance evaluations, and according to the Union's own witnesses, he has the ability to make changes to the rater's evaluation. Union Exhibit Three shows that Grievant's current Captain has signed off as the reviewer on every one of Grievant's performance evaluations for the past three years. Likewise, Management Exhibit One shows that Captain Maxey signed off as the rater on Tpr. Smith's performance evaluation. The Captain of the District is also responsible for issuing the statement of charges when discipline at the suspension level is recommended. Captain Young also stated that the promotion board, which is composed of eight majors and two lieutenant colonels, relies heavily on a District Commander's recommendation when determining which employee to promote.

The Union was given ample opportunities to voice their concerns over the policy concerning relative assignments. This was brought to the forefront in 2001 when cadets that were married or engaged to troopers were graduating from the Academy. Grievances were filed by these cadets because the Employer was going to base their assignment on their class rank as it has done in the past instead of where their spouses were assigned pursuant to Article Seven. However, after discussing the issue with the Union in depth, a change to the policy was made (Management Exhibit 4). This was an extensive revision to the residency requirements policy, specifically the relative assignments section and the Union made no recommendations for any other changes. The Union was on clear notice of the existence and application of the policy.

Additionally, Captain Young testified that the Union has failed to recommend any changes to Article Seven in the last two rounds of negotiations covering a span of six years. Clearly, a past practice has been established for many years. "One of the most important standards used by arbitrators in the interpretation of ambiguous contract language is the custom or past practice of the parties. Indeed, use of past practice to give meaning to ambiguous contract language is so common that no citation of arbitral authority is necessary . . . Where practice has established a meaning for language contained in past contracts and continued by

the parties in a new agreement, the language will be presumed to have the meaning given it by that practice." <sup>1</sup>

In addition, Article 21 of the OSTA agreement requires the Employer to give the Union two weeks to review new or revised policies. Any concerns about these policies can be brought to the attention of the Employer at a Labor Management Committee meeting. The Union has yet to bring any concerns to the Employer about the policy. The contract also states that if there is a conflict between a work rule and provision of the agreement that the agreement shall prevail. Captain Young was asked on direct examination if there was a conflict between the contract and the policy and he stated "no." The Union offered no testimony or evidence to the contrary. It is the Employer's contention that the policy, over the last several years, simply clarifies the language in the contract.

Captain Young stated he has worked in HRM for the last ten years and the Employer has been consistent in adhering to the policy and General Orders, which again are a reflection of the language in Article Seven of the contract. The Union brought forth no examples of instances where the Employer has assigned immediate family to the same Patrol Post, District Headquarters or General Headquarters component. Kevin Smith was never assigned to the same facility as his brother or father. Grievant has never been assigned to the same facility as his brother. The Union questioned Captain Young about the McClains, but as you will notice as outlined in the Employer's Step Two response, Michael McClain was assigned to the Van Wert Post and his wife Jana was assigned to District Headquarters in Findlay (Joint Exhibit 2). She is **not assigned** to the same facility as her husband nor does he supervise her. She simply reports to that location.

The Union's argument that the Employer violated its policy when Grievant was a sergeant assigned to the Norwalk post and his brother was a staff lieutenant assigned to District Headquarters makes little sense. When the two brothers held this assignment they were not assigned to the same post, district headquarters or general headquarters component or Section. One was assigned to a patrol post while the other was assigned to the District Headquarters.

## **II. Nature of the Work**

Captain Young testified that the Highway Patrol has always been an organization that has encouraged family tradition in law enforcement. However there is a limitation as far as the assignment of immediate family members. This limitation is in place for two reasons. One reason is because of the nature of the work that troopers perform. There is an inherent danger in law enforcement work, as you well know. Officers respond to critical incidents and, at any given moment, can be part of a critical incident such as a shooting or patrol car crash. The Patrol wants to prevent a situation where two or more members of an immediate family would be responding to the same critical incident. (Especially a critical incident which could result in troopers getting killed or seriously injured.) Obviously, we do not want any of our troopers losing their life or suffering some traumatic injury. However, if it did happen, it would be a much greater burden on loved ones if members of the same family were injured or lost their lives. The Employer also wants to prevent situations where immediate judgment is required and could be clouded by involvement of family relationships.

The second reason for the limitation on assignment of family members concerns the appearance of impropriety or the actual impropriety of the employees. This is not to say that any improprieties would occur with the Maxeys, but the whole intent of the nepotism directive is to take that opportunity or appearance away. The sergeant, who is the plain clothes investigator's immediate supervisor, may feel undue pressure from the Captain to rate his relative artificially high on the performance evaluation to remain in the Captain's good graces. The sergeant may also

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<sup>1</sup> Elkouri & Elkouri, *How Arbitration Works*, at 648 (5<sup>th</sup> ed. 1999).

feel the need to dole out better case assignments to the Captain's brother. This in turn may cause a morale problem with the other investigators. They in turn may feel the Captain's brother is receiving special treatment by receiving what they deem to be better case investigations. The Captain is also responsible for filling out the promotional evaluation on employees within his District (Management Exhibit 8). As you know by evidence of Union Exhibit Four, Grievant is eligible for promotion as of April 12, 2004. Given that Grievant is eligible for promotion, this may place the Captain in a precarious position since he is responsible for completing the promotional evaluation. The Union's simple answer to this would be to have one of the Staff Lieutenants to sign off as the reviewer. Once again, the same problem may occur, that being a staff lieutenant rating the Grievant artificially high in order to please his/her Captain. A promotion for the Captain's brother may cause other investigators to scream nepotism with the Union **fanatically** backing their claims. However, if the Captain is aware of the morale problems a promotion for his brother could cause, he may evaluate him artificially low, thus not giving his brother a fair shake. It does not make sense to assign Grievant to the same District Headquarters when his brother is in command of the District. His brother is the top authority figure in the District and the allegations of impropriety would be easy to allege and almost impossible to overcome.

### III. Grievant's Numerous Options

Grievant testified that one of the reasons he took a voluntary demotion was for the opportunity to get an investigator's position at District Two headquarters. He was not guaranteed this position and it was his personal decision to take the demotion. As you recall another reason he took the voluntary demotion was to have the opportunity to work a better schedule.

Grievant is not limited to a District Two investigator's position. He could apply for an investigator's position in any of the other nine districts in the state. He could also apply for an investigator's position in the Office of Investigative Services. There are no restrictions in place that would keep him from obtaining a position in any one of these locales. Grievant is not limited from interviewing for any other investigator positions in the state. In fact, Management would interview him for any and all positions not in the direct chain of command of his brother or any other immediate family. The only restriction would be use of the state vehicle if he were outside of the 30-mile radius. Of course, if Grievant changed the location of his residence to within 30 miles, he would then have commutation privileges.

### IV. Conclusion

The Union has the burden of proof in this case and has failed to carry that burden. The Union provided no witnesses or evidence to show that the Employer's interpretation of Article 7 violates the labor agreement. The Employer has in fact followed the contractual language by not allowing Grievant assignment to the same District Headquarters as his brother thus eliminating him from the direct chain of command. The Employer has made a past practice of not assigning immediate family members to the same patrol post, district headquarters, or General Headquarters component. The Union has failed to bring even **one example** where the Employer has not followed this practice.

The Union failed to present any evidence relating to how the Employer violated Section 30.01 of the labor agreement. The Employer has followed a past practice in conjunction with the language in the labor agreement. In doing so, they have never wavered in following their own policy or the DAS directive. However, should you decide that the Employer violated the Collective Bargaining Agreement; only one employee may remain in the investigator position and Redden, who received the slot, must be returned to field so that Grievant can fill the position. Accordingly, the Employer requests that the grievance be denied in its entirety.

## DISCUSSION

Article 30.01 in pertinent part addresses the procedures to be followed by an employee who is seeking a transfer, and outlines his/her contractual rights in securing a position. Although cited by the Union in the grievance, Article 30.01 is not the primary basis for the Patrol's denial of the Grievant's transfer requests to the position of Plainclothes Investigator. I agree with the Union's contention that the central focus of this case is contained in one sentence found in Article 7 of the Collective Bargaining Agreement. It states:

*"No employee shall be **directly supervised** by a member of his/her immediate family"[emphasis added]*

The Employer has also promulgated rules regarding nepotism that complement this contract provision. The evidence and testimony demonstrate that these rules have existed for many years and have not been challenged by the Union. The Union argues the bolded portion of the above-cited sentence should be narrowly interpreted to mean that a family member cannot be in a position where he/she would be directly managed or supervised by an immediate family member as defined in Article 7. The Union asserts that in the nature of a District Captain's duties he *"neither interacts with plainclothes investigators nor directs their daily activities"*. The Union further states, *"The basic characteristics of direct supervision are the assignment of tasks; the observation, review and*

*evaluation of performance"* (See Union's brief). It asserts District Two Captain Robert Maxey (Grievant's brother) would not perform these duties if the Grievant were in the position of District Two Plainclothes Investigator.

The Employer argues that although the District Two Captain is not the immediate supervisor over the Plainclothes Investigator, he has several duties that directly impact an employee in this position. The District Captain is required to make promotional recommendations, sign off as a reviewer of annual evaluations, and has the power to issue discipline to employees at the level of verbal and written warnings. It is noted that the parties are contractually committed to utilizing progressive discipline (Article 19.05), thereby indicating a District Captain would be required to be involved in such matters. The District Captain is also responsible for issuing the statement of charges required as a basis for suspension.

Bureaucracies are noted for their multiple layers of authority. Management employees in the direct chain of command exert supervisory authority in tandem over the multi-dimensional aspects of an employee's career. In complex organizations, particularly public ones, important and seemingly routine decisions (e.g. promotions, discipline, awards, layoffs, leave approvals, etc.), require the review and or approval of administrators above the employee's direct supervisor. Depending on the subject, supervisors may only possess the authority to recommend a

course of action and are only one part of the direct determinations made by management (e.g. discipline, leaves of absence, evaluations,). I find that when chain of command decisions involve serious matters of evaluation, promotion, or discipline, as opposed to more mundane matters such as leave approval; the issue of nepotism takes on greater significance. The Employer's argument that the Article 7 prohibition is applicable to those in the direct chain of command is particularly persuasive for those managers who are required to approve weighty matters of evaluation, discipline, and promotion.

This complexity of the Patrol is recognized by the parties and is reflected in the Collective Bargaining Agreement as a whole. For example, an employee does not have to accept an evaluation from his immediate supervisor, but has the contractual right to appeal the evaluation to other managerial team members (60.09). And, it is an accepted practice for evaluations to have two or more levels of approval before becoming an official part of an employees' record. In Article 19 the Collective Bargaining Agreement uses the all-encompassing term Employer, and not merely the immediate supervisor in the context of imposing discipline.

I find the Employer's liberal interpretation of the phrase "*directly supervised*" to be more consistent with the way the command structure of the Patrol is organized. While an employee has specific rights under Article

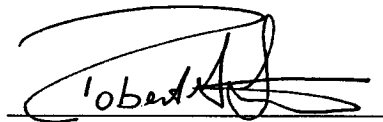


30 in terms of transfer, such rights must be exercised in conjunction with the mutually agreed upon limitations contained in Article 7. Based upon the language of Article 7 and the practice of the parties, I find an employee is not permitted to be transferred into a position where he/she will be directly supervised by immediate family members who are in his/her direct chain of command, and who are required to play an official role in his or her performance evaluation, issuance of discipline, and recommendation for promotion. This decision does not extend to the Employer's argument regarding the assigning of immediate family members to the same organizational entity, in order to avoid having two family members involved in the same critical incident. The facts in this case did not require such an analysis.

## AWARD

The grievance is denied.

Respectfully submitted to the parties this 2nd day of September, 2004.

A handwritten signature in black ink, appearing to read "Robert G. Stein", written over a horizontal line.

Robert G. Stein, Arbitrator