#1833

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 # 15-00-040615-0058-04-01
Grievant: Allan L. Wheeler

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BACKGROUND

This matter came on for hearing before the Arbitrator pursuant to the terms of the Collective Bargaining Agreement (herein "Agreement") between Ohio Department of Public Safety, Division of The State Highway Patrol (herein "Employer" or "Patrol") and the Ohio State Troopers Association (herein "Union"). This Agreement is effective until 2006 and includes the conduct that is the subject of this grievance. Robert G. Stein was selected by the parties to arbitrate this matter pursuant to the terms of the Agreement.

A hearing on the matter was held on May 17, 2005 at the OSPH Training Academy in Columbus, Ohio mutually agreed upon by the parties. The parties were afforded a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing was recorded via a full written transcript and was subsequently closed upon the parties' simultaneous submission and receipt of post-hearing briefs on June 15, 2005, in lieu of closing arguments.

ISSUE

Did the Employer violate Articles 7 and 30 of the Collective Bargaining Agreement when it did not select the Grievant, Alan Wheeler, for helicopter training? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Articles 7 and 30 (as cited by the parties)

POSITION OF THE UNION

The Union makes several arguments in defense of the Grievant and they will be listed as presented in the Union's brief. In summary, the Union contends the Employer violated the spirit of the Collective Bargaining Agreement when it selected two less senior employees for helicopter training and bypassed the Grievant's application for such training. The Union argues that although there is no difference in pay, there are in essence two positions in the aviation section of the Employer's operation: pilot and helicopter pilot. The Union contends that the training opportunity provided by the Employer was tantamount to the position of helicopter pilot because once trained, employees selected for this training would become helicopter pilots for the Patrol.

The Union's arguments are contained in its written closing arguments/brief as follows:

Argument

If the issue before you is "Was Trooper Allan Wheeler treated fairly in the processes utilized by the Employer for selection as a helicopter pilot", surely there can be only one answer. He was not treated fairly. He didn't have a chance in hell of becoming the helicopter pilot to replace the retiring helicopter pilot, Trooper Steven Deere. That conclusion is a given, based upon the evidence and the testimony. Was his treatment impermissibly disparate under the collective bargaining agreement? (Joint #1, Article 7) If, as is stated in the collective bargaining agreement the rationale for the CBA itself is to create cooperative and harmonious relations between the Employer, the Employees and the Union, (Joint #1, Article #1) playing "three card monte" with Trooper Wheeler is the definition of "disparate" treatment.

When is a "position" not a position? When are "requirements" for a position not actually required? When are MOU's that obligate someone to remain on the job for years after receiving specialized training required antecedent to specialized training, actually required? The answers to the above are, as the Queen in "three card monte", are set to a shifting standard bent to meet the needs of some and defeat the claims of others. The answers are elusive because the definitions change depending upon who you are and what the circumstances permit.

Take the issue of "position", of helicopter pilot. On the one hand the Employer lists its compliment of officers within aviation in two categories. Fixed wing pilots and helicopter pilots. Aviation Commander Bryant noted in his initial posting that the Aviation Section intended to fill "The helicopter pilot vacancy left with the retirement of Trooper Deere". (Joint #3) After five applicants, all fixed wing pilots, from the Aviation Section applied; Commander Bryant announced, "interviews were conducted to fill the vacant helicopter position..." (Joint #4) He recited the process by which he concluded that instead of one selection, there be two applicants selected. He apparently was well aware of his own imminent departure from the ranks of the Section's helicopter pilots, and two positions would be filled. Even after Bryant retired, the newly upgraded Commander, Boggs noted that the return of a Trooper from "military leave will bring the Division back to its normal allotment of six helicopter pilots". (Joint #6). In his testimony before you, Mr. Stein, S/Lt. Boggs acknowledged that there was no fixed number of helicopter pilots assigned to the Section but that the number had been retained most of the time around six.

The Employer, following the filing of the instant grievance, adopted the stance that no "position" was involved at all. What really was at issue was "a training opportunity", according to the Employer. As a matter of fact both the advocate for the Employer and Employer's witnesses were careful and consistent in describing that it was simply a "training opportunity" that was given by the Employer. The Employer in adopting the "training opportunity" posture seeks to escape the import and effect of Article #30 of the CBA. While the Employer also did not comply with the language of Article #30 in posting the vacancy, it cannot use the fact that it limited applicants to current pilots in the Aviation Section to relieve it of the obligation to weigh both seniority and ability in filling the vacancy of a helicopter pilot within the Aviation Section.

The Employer takes the position that it can choose whom it wants without reference to the CBA for training. In fact the Employer pointed out that just months earlier, (but following the filing of the instant grievance) the grievant himself had been selected for a three day of training in a law enforcement seminar (ALEA) in Chicago. The inference was "you didn't hear him complain about the process when he was selected for this identified "training opportunity". The argument is both transparent and specious. It is the history of the Employer that people are selected for the position of helicopter pilot and then sent for the week's transitional training on the helicopter that they will be required to fly as a helicopter pilot. This "training opportunity" is synonymous with selection for the position and completes, not starts, the selection process. The Employer lists those individuals who have received the training on the Eurocopter as helicopter pilots. The pilots who have not received training on the Eurocopter are listed simply as pilots or fixed wing pilots. In the questions presented to the applicants for the position of helicopter pilot, the Employer asks each candidate:

1. How do you see your role as a member of the Aviation Section changing if your become a helicopter pilot?
2. Are you aware that frequent overtime call-outs and schedule changes are common with our helicopter pilots?

Based upon the questions actually asked the applicant/candidates, it would certainly seem that the Employer is treating the "opportunity for training" as tantamount to identification within the Aviation Section as holding the position of helicopter pilot. Additional and separate duties attach to such a position. Technically, within the OHP, there are only "Troopers". Some hold the position of Plain Clothes Investigator, some CMV Troopers. Others may be in the position of "Dog Handler". But, all are Troopers and can be returned to the road. Within the Aviation Section it is clear that there are Helicopter Pilots and Pilots. Their assignments vary although the Helicopter Pilot may fly some fixed wing assignments; he/she will fly helicopter assignments and will receive updated training and enough flight time to remain sharp.

Trooper Allan Wheeler had twenty-four years of seniority when he applied for the vacant position created with the retirement of Trooper Deere. Troopers Bess and Brooks combined had a total of sixteen years of seniority in service to the OHP. Trooper Wheeler is qualified for his position as a pilot and has received good annual performance evaluations as a pilot. His resume is remarkable. He has served the Employer successfully in many areas of high-level responsibility. He served in the select group of men and women charged with protecting the Governor and other dignitaries. He has been an investigator and has worked in criminal background investigations; has been trained as a hostage negotiator. He is one of a very limited number of Troopers who have been certified as a firearms instructor. In fact he taught as an instructor at the Ohio Highway Patrol Academy. He is a master instructor in the M-26 Taser, has worked as a special agent within the Ohio Organized Crime Commission Task Force. As he put it on the resume he submitted, (Joint #6) "During my 24 year career, I have worked as a road trooper, motor vehicle inspector, executive protection officer, special

agent instructor, pilot and supervisor." His mastery of wide and challenging areas of law enforcement speaks to his ability and his proficiency. He was technically qualified to be a helicopter pilot. He was already a helicopter pilot, having privately spent the time and the money to become both a pilot and a helicopter pilot. If the position was to be filled on the basis of ability and seniority, it would be impossible to deny him the position.

S/Lt. Boggs testified that the IOC (Joint #3) contained a misstatement in the heading where it specifies that the "Subject" of the IOC is "Helicopter Position". I imagine if asked he would testify to the same error in Joint Exhibit #4. As a matter of record, S/Lt. Boggs, the successor to Captain Bryant also testified that the reference in the Joint #3 to the position being open to all members of the Aviation Section was also wrong. His testified that applicants had to be helicopter rated to be considered. Just why he said nothing about this prior to, or during, the interviews of two pilot applicants who were not helicopter rated was left unexplained in his testimony. He testified that Allan Wheeler was asked if he would sign a MOU that would guaranty that he not retire for three years following the transitional training, under penalty of having to pay the Employer back a prorated share of the expense of the transitional training. Trooper Wheeler had nearly enough years in service, at the time of the interview, to retire. S/Lt. Boggs testified that he was aware that Trooper Bess, at the time of the arbitration hearing, at the Eurocopter School, had not signed such a MOU. But, declared Boggs, he would be asked to do so upon his return. He testified that he didn't know if Trooper Brooks had signed such an MOU. S/Lt. Boggs testified that he was aware the Employer had in the past used the expression that it wanted "more bang for the buck" in its selection processes. A potential retiree gives less bang for the bucks spent in transitional training antecedent or attendant to receiving a new position. Trooper Wheeler had responded to the question "would he sign an MOU", with the recorded statement "I'll give you five years if you want". (Joint 12).

Retired Captain James Bryant was the key witness to this arbitration and to the disparate treatment alleged by the grievant and the Union. As Commander of Aviation at all times relevant to the selection process, it was "his show". His boss, Major Walker, couldn't remember much about the process. Walker testified that the IOC (Joint #3) came across his desk for approval because he approved all IOC's. But about the process his memory is poor. He testified that he believed that the Interview Committee contained one or two identified additional members than actually were present. He remembers little of the event other than it didn't take very long. It was clearly then Captain Bryant who, as Commander of Aviation, called the shots. Bryant listed Trooper Wheeler as finishing 5th among the applicants. Walker joined suit. Boggs, gave Al Wheeler a fourth place finish while testifying that applicants were limited to those with helicopter ratings and only three of the applicants had helicopter ratings. To finish 5th or even 4th, in a race of three is quite a feat.

However, if you follow the testimony of Commander Bryant, it becomes easier to understand. Bryant testified that he found many negative things in the Wheeler interview. As an example, all of the applicants lived within the 30-mile requirement of the airport. It was a condition contained in the CBA. Since, however, the position of helicopter pilot would require emergency callouts, each Trooper was asked how long it took them to reach the OSU Airport from their homes. Brooks had responded that he lived 20 to 25 minutes from the airport. Bess had responded that he lived 25 to 45 minutes from the airport. Trooper Wheeler lived 15 to 20 minutes from the airport. Each was asked if they had any intentions of moving form their current addresses. Wheeler had already provided as part of his resume package a written statement of his intention to move within 5 minutes of the hangar within one to six months following selection as a helicopter pilot. This would place him in a position to respond almost immediately to the additional demand that might be placed upon helicopter pilots to respond to emergency situations. Captain Bryant testified that Trooper Wheeler's answer and stated willingness to move closer to the airport negatively impacted upon Wheeler as a candidate for the position. He also cited better schools and a young son approaching school age as additional reasons, but he intended to move within five miles of the airport. Trooper Wheeler told Bryant that he would be willing to take any emergency calls day and night. He stated that should such calls create premium time status he would be willing to sign a "blanket HP-30" that would relieve the Employer from additional cost in his being called. Bryant testified that Trooper Wheeler's willingness to agree to the respond whenever called and his stated willingness to sign the HP-30 impacted negatively upon Wheeler as a candidate for the position. Al Wheeler stated in writing that he would be willing to fly, without overtime, on his days off to build hours and enhance proficiency. He said that he would agree to handle all the public appearances (static displays), should he be selected. This also, Captain Bryant interpreted as negatively impacting his selection for the position. Bryant came close to saying that he just didn't believe Trooper Wheeler. However, Bryant had no reason not to believe Allan Wheeler. Bryant testified that Wheeler's statements were detrimental, negative and unreasonable. His offer to make himself available 24/7 was according to Bryant, "outrageous". Wheeler had asked through S/Lt. Boggs to be permitted to attend Eurocopter ground school (without cost assessed to the OHP by the Eurocopter) and on his own time. Trooper Wheeler had already talked to the company instructor and had been told he could sit in the half-day course. Wheeler made clear to Captain Bryant that he would attend using his vacation hours or using comp/time. Captain Bryant denied the request citing that it would give Trooper Wheeler and unfair advantage in the selection process upcoming for helicopter pilot. None of the other candidates had made a similar request. It seems simple enough. In truth, Captain Bryant seriously disliked Trooper Allan Wheeler.

Yet Wheeler had a long history of accomplishments within the Patrol. He was not just talk. Trooper Wheeler had become a pilot by virtue of his own dedication and the lessons were paid for, not by the military, but out of his own pocket. Wheeler had wanted to become a helicopter pilot and had done so out of his own determination and with his own funds. Wheeler's history of service includes proficiency in many areas of law enforcement where his zeal and dedication were obviously employed. His evaluations were good. He wrote that he wanted the opportunity "to fulfill my dream of flying helicopters for the Ohio State Highway Patrol". Captain Bryant viewed all of this negatively.

I should point out that Captain Bryant's reasoning is not always that cloudy or hard to logically explain. Prior to his promotion to Captain, Bryant was the S/Lt. Deputy Commander of the Office of Investigative Services. In this capacity Bryant was intimately familiar with the myriad of rules and regulations of the OHP. Then S/Lt. Bryant was 48 years old when he assumed command of Aviation and received the promotion to Captain. He retired less than four years later. He retired with thirty years of service. The retirement pay is calculated upon the top three years of base pay received by the retiree. His top three years would be as a Captain. The only exception to base pays being the sum from which the retirement is calculated is that of pilots. Pilots receive a 10% pay supplement or stipend and that additional 10% is added to the base pay in calculating retirement. At the time of his promotion to Captain and Commander of Aviation, Captain Bryant did not meet the qualifications for Command. Captain Bryant testified that prior to being promoted to Command the Aviation Section, he had never read or examined the job description for the position. That was fortunate for him in that Patrol Policy 9-502.03-03 and 9-502.03-03A (Union #1) both stated in the Special requirements Section that the Aviation Commander and the Assistant Aviation Commander were required to hold a valid federal Aviation pilot's license with at least an Instructor's rating. These procedures were current from 1994 forward. When he arrived Captain Bryant had a private pilot's license only. After his arrival the policy was changed so as to delete all requirements related to flying.

Captain Bryant, however, did not allow his lack of certification upon assuming command to interfere with accruing as much credentialing as possible once having arrived in command. In his brief tenure as Commander, Captain Bryant secured an instrument rating, and both helicopter and commercial helicopter ratings provided by the OHP. Apparently, no prior helicopter rating was necessary to be the successful candidate for transitional training to the position of Eurocopter helicopter pilot, as Captain Bryant sent himself to the training while Trooper Brooks was already a fixed wing pilot with helicopter rating. Shortly thereafter, and apparently without benefit of an MOU, Captain Bryant retired with his top three years including his pilot's stipend in its calculation. He took his aviation credentials assembled in the final two years of his tenure with him and became Aviation Administrator for the Department of Transportation, State of Ohio. His new position is located on the same floor of the same building he was working in prior to retirement. He used the final three years of his employment with the OHP as a springboard to at least double the income he had been earning, without changing a parking space. I don't fault him for it. I simply note that his thought processes are sharp and his ability to fashion requirements in a favorable fashion to what he wants to do, are amply demonstrated.

In the instant case what he clearly wanted to do was to deny Trooper Allan Wheeler access to the helicopter position irrespective of his seniority and/or ability. What he did was as effective as it was clever. He not only denied Wheeler the Deere vacancy, but knowingly set out to deny him the next vacancy as well. Knowing that he was going to retire he put in place the selection of another Trooper, then not even available to replace him on the roster.

In attempting to shore up reasons, other than the obvious, for keeping Trooper Wheeler from the transitional training that would have designated him a helicopter pilot for the OHP, the advocates for the Employer raised the issues of Trooper Wheeler not being instrument rated or having a commercial license. Neither instrument rating nor a commercial rating has any relationship to the job requirements of being a pilot or a helicopter pilot for the OHP. It was Trooper Brooks who really was selected in the May 10, IOC from Captain Bryant and sent to school in June. In comparison to Trooper Brooks, Trooper Wheeler has more overall flight time, by over 1,500 hours, than does Trooper Brooks. He also is more qualified in a variety of other areas, as seen by his career history of attainments. Trooper Brooks only had approximately 70 hours more flight time in a helicopter than Trooper Wheeler and was twelve years his junior in seniority.

All of the past and present Helicopter Pilots, with the exception of, Bess and Brooks did not have a Helicopter Rating when they were placed in the Helicopter Pilot position. They all received their training after being assigned to the position. Most of the training that Trooper Bess had received, prior to the selection for the position, was with the Military. Most of the training was directed at Military type operations that would have nothing in common with flying a helicopter for the Patrol.

Trooper Brooks' and Trooper Bess' Commercial and Instrument ratings should have no weight in the selection process. The Patrol's Aviation Section does not fly for hire, nor do they allow their pilots to fly during IR conditions. The Patrol's Aviation Section Administrative –Operations and Policy (03.03.002) Flight Safety states on Page1 of 9 that "Should adverse weather conditions be encountered that cannot be avoided, the pilot shall remain in Visual Flight Rules (VFR) conditions and land at the nearest airport". Also on page 5 of 9 it states

that "Routine flights are not to be scheduled during the hours of darkness unless unusual circumstances exit and then only with prior approval of the Aviation Section Commander. S/Lt. Boggs testified at the arbitration hearing that the Eurocopters used by the OHP are not instrument qualified.

Trooper Wheeler may have been denied the position and the attendant training, or the converse of same, for fear that he would retire before the maximum benefit of the $7,000.00 worth of training could be recovered. Or, he was denied the position/training because of the demonstrated animus of the man with the power to determine just who would receive the position and training. In either event he was treated so as to avoid the spirit of the collective bargaining agreement. The "training opportunity" in this case is tantamount to the "position". You can't have one without the other. The Employer violated Article #30 of the CBA in awarding the position admittedly with no weight given to seniority. On the basis of seniority, demonstrated ability, and simple equity, Allan Wheeler should be awarded the transitional training and then should be carried on the Employer's roster as a helicopter pilot.

EMPLOYER'S POSITION

The Employer's argument is straightforward. It contends that the evidence clearly finds Trooper Bess and Brooks to be the best-qualified candidates to receive helicopter training. Seniority should play no role in this decision due to the fact that the Grievant is less qualified than Bess and Brooks, argues the Employer. The Employer also points out that flying a helicopter presents more of a safety concern than does flying a fixed wing aircraft. The selection of pilots for training in helicopter operation is not the filling of a position, nor is it a transfer under the Collective Bargaining Agreement, asserts the Employer.

ARGUMENT

A. The Employer was not required to post this helicopter training pursuant to the Collective Bargaining Agreement.

According to Article 23 of the Collective Bargaining Agreement (CBA), a pilot in the Patrol is considered a specialty position. Specifically, Section 23.01 provides that the pilots will receive an additional ten percent (10%) of the minimum rate of their classification base rate pay as a professional achievement pay supplement. Thus, the Grievant being a pilot in the Aviation Section of the Patrol, is already receiving this additional pay supplement. Section 23.01 does not specifically provide any additional base rate compensation or professional supplement for a helicopter pilot. Likewise, even if we were to assume that this training should have been posted, the CBA does not provide for a selection process for pilots, let alone helicopter pilots. If such were the intent of the contract negotiators, such a process would have been implemented as found in Section 23.02 for Dog Handlers, which is also a specialty position. Therefore, there is no provision in the Collective Bargaining Agreement (CBA), and there never has been, that dictates how the Employer is to select employees for training opportunities. This is the Employer's inherent right and authority to manage and operate its facilities and programs pursuant to Article 4 of the CBA.

B. The Employer's selection for this helicopter training did not constitute a "transfer" pursuant to the Collective Bargaining Agreement.

Pursuant to Article 30 of the CBA, when the employer determines that a position shall be filled by transfer, the active transfer file shall be used to fill the position. Likewise, when the Employer creates a new position, to be filled by transfer, the position will be posted at all Highway Patrol facilities for seven (7) days. As to specialty positions, the Employer has the right to transfer members out of any non-field position at its discretion. This is not a situation where an active transfer file would be used as it is not a "position" as contemplated in the CBA. As Staff Lieutenant (S/Lt.) Boggs testified, an active transfer file would be used in a situation where there is a vacancy and an employee wants to transfer between posts or to a Specialty Position. In the Grievant's case, as stated above, he is already in a Specialty Position. Thus, the Employer is not required to examine the active transfer file when selecting individuals for training opportunities.

C. The Employer developed and conducted the selection process for the helicopter training in a fair and indiscriminate manner.

In an effort to provide the Columbus aviation pilots with a fair and consistent procedure to be selected to receive the helicopter training, the Employer developed a new process. In the past, individuals were chosen to receive this training at the discretion of the Employer. Contrary to what the Union argued, any procedures used in the past are irrelevant to the current grievance and in no way affected whether the Grievant was selected for training or not. Although the Employer is not required to do more than it had previously, the Employer wanted to make the process as fair as possible and to ensure that the employees have an equal opportunity to participate and to pick the most qualified applicant. Such actions mean consistency in the future. In so doing, an IOC was sent in March of 2004 to the Columbus location pilots requesting that any interested party was to submit a resume outlining qualifications and any information relating to experience, hours, and recent flight information. *See* Joint Exhibit 3. In response to the request, Troopers Bess, Brooks, Wheeler, Hartge, and Sizemore requested the training. *See* Joint Exhibit 6. All applicants participated in each step of the process. A three-member panel was established to conduct interviews. The interviews involved a series of questions, developed prior to the actual interviews, which were asked of all the applicants. *See* Joint Exhibits 12-14.

Additionally, an examination was developed to assess the applicant's basic knowledge and skills. The examination was developed by taking a series of questions from the Private Pilot Test Prep 2004, which is published by Aviation Supplies & Academics, Inc. This book is used as a study guide for the Federal Aviation Administration's examination. The Union argued that the Grievant did not receive notification that an examination would be conducted or what material would be tested. The Union's argument is irrelevant. The Employer acknowledges that he was not given such information, but notes that none of the applicants were given notification. Each applicant had the same advantage, or disadvantage, going into the process. The Employer simply wanted to assess the applicant's *basic* skills. The examination achieved this goal. Specifically, Trooper Bess scored a 70 %, Trooper Brooks scored a 70 %, Trooper Hartge scored a 45 %, Trooper Sizemore scored a 55 %, and the Grievant scored a 55 %. The Grievant clearly tested below Troopers Bess and Brooks and scored the same as Trooper Sizemore. Although this examination was not the sole determining factor in the Employer's decision, the examination scores strongly support that Troopers Bess and Brooks were more qualified than the Grievant.

Finally, the process included the examination of the resume and qualification materials submitted by the applicants. Reviewing the application materials, Trooper Sizemore indicated that he has flown a total of 4,453 hours and Trooper Hartge has flown a total of 6,500 total hours. Neither applicant indicates any rotorcraft experience. Trooper Brooks noted that he has a total of 2,250 hours of flight time including 117.7 hours of rotorcraft experience. Examining Trooper Bess' flight hours, he reported that he has flown a total of 1,500 hours in rotorcraft alone, including 120 hours in the preceding year. In comparison, the Grievant stated that he had a total of 3,800 hours of flight time with only 46 helicopter hours. Thus, just looking at the amount of experience flying helicopters alone, Troopers Bess and Brooks have more experience. Furthermore, at the Arbitration, we heard testimony by Retired Captain Bryant that even though the Patrol does not fly such helicopters as Cobra, Apache, and Blackhawk, they are superior aircrafts and are much harder to fly. Trooper Bess not only indicated that he had experience flying these crafts, but he had 200 hours flying Hueys, 600 hours flying Cobras, 450 hours flying Apaches, and 600 hours flying Blackhawks. Therefore, as you heard at the Arbitration, the experience Trooper Bess gained flying these complex, high performance aircrafts equates to advanced skills and numerous flying hours, which is invaluable to the Patrol. Likewise, the Union also contended that since the Patrol did not require an instrument and commercial rating, Trooper Bess was not more qualified than the Grievant. Although the Employer admits that an instrument and commercial rating are not required to perform the duties of a helicopter pilot, S/Lt. Boggs testified that such ratings mean more flight time and thus, more experience. So, while it is not required, it is an indicator of the level of experience and qualification. This exact

situation was analyzed by Arbitrator Brookins in September of 1999.1 In that case, to be discussed in further detail below, Arbitrator Brookins was asked to determine whether the Employer had discriminated against the Grievants when they were not selected for this exact training back in 1998. He specifically stated that "[t]hese advanced certifications are not required for admission into helicopter pilot training; nevertheless, they indicate a relatively high level of initiative and motivation, neither of which is irrelevant in assessing applicants for any position or program."2 Therefore, while the Grievant is correct in that these certifications are not a requirement to be sent to the training, they are an important factor in determining the qualifications and abilities of an individual.

Furthermore, Trooper Bess has participated in one rotation at the National Training Center in Ft. Erwin, California and several rotations at the Joint Training Center in Ft. Polk, Louisiana. He was also assigned (at the time of the selection process) to the Alpha Company 1-137th Aviation Battalion as a Pilot in Command of a UH 60 Blackhawk. As previously stated, the Grievant had 46 hours of experience flying in helicopters. There simply is no comparison.

D. The Employer did not discriminate again the Grievant in any manner during the selection process for this training.

The Grievant contends that the Employer violated Article 7 of the CBA by not selecting him for the training. Pursuant to Article 7 of the CBA, the Employer will not discriminate against any member of the bargaining unit on the basis of age, sex, marital status, race, color, creed, national origin, religion, handicap, political affiliation, sexual preference, veteran status, or to evade the spirit of the Agreement. Although the Grievant listed Article 7 on the grievance form, he never stated what protected class he was a member of as set forth in the first paragraph of the Article. In fact, at the Step 2 hearing, the Union contended that they were *not* arguing that the Grievant was discriminated against on the basis of his age. Even assuming that the Grievant intended to claim age discrimination, he did not provide any evidence or testimony to substantiate such a claim.

The Employer refers the Arbitrator to the September 1999 arbitration decision rendered by Arbitrator Robert Brookins, as initially described above. Brookins' decision deals specifically with the Patrol's selection of pilots for helicopter training. According to Brookins, federal law states that the plaintiff retains the ultimate burden of persuasion in an employment discrimination case. He further stated that the Union must demonstrate that the Grievants' ages were the "determining" or but-for factors in rejecting their applications for the helicopter pilot training.3 In order to prove discrimination, the Union must either provide direct or circumstantial evidence. Throughout the course of the grievance procedure and arbitration hearing, the Union did not provide any direct evidence proving discrimination. Thus, the Union has the burden of proving discrimination based on circumstantial evidence. Accordingly, the United States Supreme Court stated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) that in order to prove discrimination based on circumstantial evidence, the plaintiff must show the following: (1) membership in a protected class, (2) an adverse employment action, (3) that he/she was qualified for the position in question, and (4) that he/she was rejected in favor of a person outside a protected group.

Analyzing these factors, the Grievant clearly has not proven discrimination in any form. First, age is the only protected class that the Grievant could be a member of, being approximately 50 years old. Although the Grievant is protected under the Age Discrimination in Employment Act (ADEA), he has not shown that he was the subject of an adverse employment action. This was a training opportunity. None of his duties were taken away, none of his benefits were taken away, he did not lose any pay supplements or additional base rate compensation, and he is still a pilot in the Aviation Section of the Patrol. If the Grievant had been selected for this training, he would still be a pilot in the Aviation Section of the Patrol, with the same base rate of pay, and would still be doing the same duties he is currently doing. The only difference is that he would not be able to fly the Patrol helicopters. I highly doubt this is what the legislatures intended an "adverse employment action" to be under federal law.

Moreover, the Employer has shown that he was *not* the most qualified to attend this training. As previously stated, the Grievant only had 46 hours of helicopter flight time compared to 1,500 for Trooper Bess and 117.7 for Trooper Brooks. Likewise, Trooper Bess' experience has been flying sophisticated helicopters in the military with advanced skills and abilities. Furthermore, Troopers Bess and Brooks both scored significantly higher on the examination than the Grievant. While the Grievant may be the most senior employee, he was clearly not the most qualified.

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1 Grievance # 15-00-980503-0061-04-01 and 15-00-980503-0062-04-01, enclosed with this Brief.

2 *Id.* at pg. 13.

3 *Id.* at pg. 9.

Finally, the Grievant must show that he was rejected in favor of a "substantially" younger employee. According to Arbitrator Brookins, "substantially" younger would require the Grievant to demonstrate "at least a 10-year age differential" between himself and his successor."4 In the Grievant's case, he is approximately 50-years old and Troopers and Bess and Brooks are both approximately 40-years old. Given this approximate "10-year differential," this factor is certainly debatable. While the Grievant is at least 10-years older, the evidence taken as a whole does not establish any form of discrimination. Had the Grievant brought forth any proof of discrimination, such an age difference may encourage further inquiry. However, the evidence speaks for itself. The process was fair and consistent. Each applicant had the opportunity to submit their qualifications, take an examination, and participate in the interview process. If age really was a factor, and qualifications were not taken into consideration, the Employer would have selected Trooper Sizemore for the training since he was only 35-years old. Thus, any argument that the Grievant has regarding discrimination is absurd.

Additionally, even if the Employer were to take the Grievant's allegation one step further and shift the burden back to the Employer to prove there was a legitimate basis for its decision, the Employer has clearly met this burden. According to Arbitrator Brookins' decision, if the Grievant has proven a prima facie case of discrimination, the burden then shifts to the Employer to show evidence of a legitimate basis for the decision to select Troopers Bess and Brooks for the training.5 Specifically, Arbitrator Brookins held that this is a burden of "production" not "persuasion." The evidence produced by the Employer at the arbitration hearing clearly meets this standard. Stated once again, examining the resumes and qualifications of the applicants undoubtedly shows that Troopers Bess and Brooks were the most qualified.

The Employer also offered the examinations of the applicants into evidence to objectively show that Troopers Bess and Brooks had more knowledge of the basic skills required to fly a helicopter. This examination was developed in a fair manner and all applicants were asked the same set of questions. These examination scores do not lie and provide tangible documentation of the applicants' basic abilities. Therefore, without even analyzing the interview process, the Employer has substantially produced evidence that the Employer had a legitimate basis for its decision to send Troopers Bess and Brooks to the training. Arbitrator Brookins' decision states that in that case, "the record shows that although the Grievants were qualified for helicopter pilot training, Trooper Bender was the most qualified applicant in the group which included the Grievants."6 This is exactly the case here. While the Grievant was qualified to attend the training, the Employer has produced evidence that Troopers Bess and Brooks were more qualified.

Furthermore, the Grievant presented no evidence, or "pretext," to discredit the Employer's legitimate reason for selecting Troopers Bess and Brooks. According to Arbitrator Brookins, the Union can establish a pretext by showing that a discriminatory reason more likely than not caused the Grievant's nonselection or by demonstrating that the Employer's "legitimate reason" is unworthy of belief.7 The Grievant, through the Union, provided no evidence to support either of these contentions. As explained by Arbitrator Brookins, the Union could show that similarly situated, unprotected employees received the training or that it is more likely than not that the Grievant's age was the motivating decision. The Employer has already established that this is not case. Not only has the Union failed to prove that discrimination took place, but the Employer has provided evidentiary support for its decision. Such evidence is clear on its face and does not leave much room for interpretation. Thus, any argument on behalf of the Union regarding pretext must fail.

E. Although the Employer was concerned with the practicality of the Grievant's stated goals, this was not the determining factor in the selection process.

The Union argued at the arbitration hearing that the Employer's assessment of the Grievant's stated goals was ridiculous. Specifically, we heard testimony from Captain Bryant that he was concerned by the Grievant's statements that he would volunteer to take all calls day and night, sign a blanket HP-30, and volunteer to fly on his days off to build hours with no overtime. While the Employer commends the Grievant's dedication and certainly wishes more employees had his drive, his statements concerned Captain Bryant from a safety perspective, ultimately leading to question the Grievant's decision-making ability. Although Captain Bryant questioned these statements, he testified that the applicant's qualifications and examination scores were more important than the stated goals. Therefore, the relevance of this argument is minimal at most.

F. The Employer's selection of Trooper Brooks as the second most qualified individual for the training was fair and appropriate.

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4 *Id.* at pg.12.

5 *Id.*

6 *Id.* at pg. 13.

7 *Id.* at pg. 14.

At the arbitration hearing, the Union brought up the issue that Trooper Bess was selected to attend the training as the most qualified applicant even though he was to be deployed shortly after such selection. At the time of the selection process, the Aviation Section needed one more pilot to attend the training in Texas to be able to fly the Eurocopter. As stated above, Trooper Bess was the most qualified. Captain Bryant further testified that in case another trooper retired or left in the future, they would go ahead and train another individual to cover that loss. Since Trooper Bess was going to be deployed, they went ahead and sent Trooper Brooks to such training to cover his absence. Once Trooper Bess returned, Trooper Brooks would already be trained if another pilot left. The decision to send Trooper Brooks was as legitimate as the decision to send Trooper Bess. As previously stated, Trooper Brooks had more flying experience in helicopters than the Grievant and scored significantly higher on the examination. The Union provided no evidence as to how this decision was inappropriate other than the fact that the Grievant was more senior. The seniority factor has already been established as being irrelevant and has no bearing on this issue. Under federal law, the Employer could not have made any employment decision on the basis of Trooper Bess' military status, as that would have clearly been discrimination. The simple fact still remains that should the Aviation Section need another pilot trained in flying the Eurocopter, the Grievant can apply again and go through the same process. At that time, the determination would again be based on qualifications, experience, the examination score, and the interview process. In the future, the Grievant may or may not be the most qualified applicant, and the Employer will again be indifferent to such factors as seniority and age.

CONCLUSION

After examining the evidence in the record, Trooper Bess and Brooks were clearly the most qualified candidates to receive the helicopter training. With regard to Trooper Bess in particular, his experience was unmatched and his examination score was significantly higher than the Grievant's. Flying a helicopter entails safety sensitive abilities and skills. Seniority was not, and should not be, required to play a role in the selection process for this training unless all factors are equal. The Aviation Section is a highly scrutinized division of the Patrol. Not only do the helicopter pilots fly dignitaries, provide presidential security, and involve high-profile marijuana eradication, the flying and landing environments present more of a safety concern than flying a fixed-wing aircraft.

The training at issue is not a "position" or a "transfer" as contemplated by the CBA and its negotiators. Helicopter pilots still perform fixed-wing duties and do not receive additional base rate compensation. In this case, the Grievant is still considered a pilot in the Aviation Section and suffered no adverse employment action as a result of not attending this training. The Grievant was unable to point to any Contractual language to support his contention that seniority is the controlling factor. Even Arbitrator Brookins treated the situation as a training opportunity in his decision, which is factually very similar.

Similarly, all of the applicants were subjected to the same selection process and the most qualified individuals were chosen without discrimination in any manner. The Grievant was unable to articulate and support how the Employer discriminated against him by selecting Troopers Bess and Brooks. The evidence shows that he did not have the level of flying experience as Troopers Bess and Brooks and he scored significantly lower on the examination. The Employer took into account all of this information and made an objective and fair decision. The Eurocopter training is expensive and the Aviation Section does not have a need to have any more pilots trained in this area. Should the need change in the future, the Employer encourages the Grievant to go through the selection process at that time. Therefore, the Employer respectfully requests that you deny the grievance in its entirety.

DISCUSSION

A grievant must produce sufficient evidence to furnish a reasonable basis for sustaining a claim. *Kata v. Second Nat'l Bank of Warren*, 26 Ohio St. 2d, Paragraph 2 of syllabus, 273 N.E.2d 292 (1971). The burden of proof responsibility imposes upon the one who must prove the existence of facts

the obligation to do so with a preponderance of the evidence. *Kennedy v. Walcutt*, 118 Ohio St. 442, 161 N.E. 336 (1928).

Among the well-established standards of contract interpretation adopted by labor arbitrators is the practice of using an objective approach, rather than a subjective one, to interpret disputed contract language. The objective test is based on how a reasonable person in similar circumstances would interpret disputed contract language. The objective approach is rooted in a common-sense policy that contract language should be based on objectively verifiable information, rather than on one party's subjective intent that cannot be objectively examined or established. Using an objective approach to contract interpretation lends greater stability and predictability to labor-management contract disputes. *South Peninsula Hosp., Inc. and Int'l Bhd. Of Teamsters, Gen. Teamsters Local 959*, 114 LA 1234 (Landau 2000).

The first rule in interpreting contract language is the "plain meaning rule." According to this rule, if a writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of an instrument itself without resort to extrinsic evidence of any nature. *Colonial Baking Co. (Chattanooga, Tenn.) and Bakery, Confectionery & Tobacco Workers, Local 25*, 110 LA 1071 (Holley 1993). If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation, and arbitrators will

ordinarily apply the clear meaning. *Colonial Baking*. If the language of a contract is free from ambiguity, an arbitrator should effectuate the clearly expressed intent of the parties. *Duluth (Minn.) City and County Employees Credit Union and AFSCME Council 96, Local 3558*, Befort 2002). In those circumstances, there is no need for an arbitrator to go beyond the face of a contract to resolve a dispute. *QUADCOM 9-1-1 Pub. Safety Communications System (Carpentersville, Ill) and Local 73, Serv. Employees Int'l Union*, 113 LA 987 (Goldstein 2000). An arbitrator may not add to or subtract from a written document and must consider if the words used are, or can be, subject to different meanings and whether they are clear and unambiguous. *PPG Indus., Inc., Chem. Div. (Natrium. W.Va.) and Int'l Chem. Workers Union, Local 45*, 96 LA 1029 (Ghiz 1991).

Arbitrators apply the principle that parties to a contract are charged with full knowledge of its provisions and of the language they chose to include. Any "equity" arguments advanced cannot be used as a substitute for express contractual language. *Los Angeles School Dist.*, 85 LA 905, 908 (Gentile 1985). The parties are assumed to have adopted the language used in their Agreement as fully representing their intentions. An arbitrator's decision cannot be made on the basis of competing equities or sympathies but rather on the basis of the contract that the parties have written and adopted to govern their relationship. Arbitrators cannot

search for inferences or intentions that are not apparent and not supported by words documenting that intent.

The plain language of Article 23.01 of the Collective Bargaining Agreement identifies the classification of pilot as a distinct Specialty position. This language does not distinguish between types of pilots, nor does it address pilots with ratings that allow them to fly different types of aircraft. The Union correctly points out that the Patrol lists in its compliment of officers within aviation two categories: fixed wing pilots and helicopter pilots. While there may be a sound argument that helicopter pilots are distinct and sufficiently different from fixed wing pilots, the parties made no such a distinction in the language of Article 23. In contrast, the parties devote several paragraphs of language to another specialty position, Dog Handler. When Article 23 is viewed in conjunction with Article 30, the parties are consistent in their contractual approach to this issue. Article 30 identifies special positions as being eligible for transfer by virtue of ability and seniority and Article 23 defines specialty positions to be limited to one broad category of pilot. In as much as the Grievant is already in the specialty pilot position, I find there is no contractual basis to support the contention that the instant matter qualifies as a transfer under the Collective Bargaining Agreement.

Article 20.01 of the Collective Bargaining Agreement defines a grievance to be, "...an alleged violation, misinterpretation or

misapplication of a specific article(s) or section(s) of this Agreement." In viewing the Collective Bargaining Agreement as a whole, absent any contractual language that establishes two types of pilot specialty positions, Article 4 Management Rights, provides the Employer with the right to, "Determine the overall methods, process, means, or personnel by which governmental operations are to be conducted" [emphasis added]. The parties' dispute here involves a conflict regarding the Patrol's legitimate interest in operating its aviation unit in the most efficient and economical manner. Management may exercise this right and others contained under Article 4, so long as the exercise of its discretion was not unreasonable, arbitrary or capricious, or motivated by improper reasons. *Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264*, 115 LA 190 (Landau 2001).

> In reviewing an employer's exercise of discretion . . . , it is not the arbitrator's function to substitute his independent judgment for that of the employer. Rather, an arbitrator is limited to determining only whether the employer's decision was within its reasonable range of discretion, was not arbitrary or capricious, and was not motivated by anti-union animus.

Municipality of Anchorage. While one of the most firmly established principles in labor relations is that management has a right to direct its workforce, the Union and Grievant(s) have a reciprocal right or duty to challenge managerial actions perceived by the latter to have been ill-founded, arbitrary, or capricious. *Minnesota Mining and Mfg. Co. and Local 5-517, Oil, Chem. and Atomic Workers Int'l Union*, 112 LA 1055 (1999).

The burden of proof, therefore, was on the Union to demonstrate that the Patrol's challenged actions were, in fact, a violation of the Patrol's duty or the Union's rights under the Agreement.

After reviewing all of the evidence included in the record and giving careful consideration to the arguments of both parties, the arbitrator hereby concludes that the Employer had ample and legitimate justification to select Trooper Bess and Brooks for helicopter training. Even if Article 30 was applicable in this matter, a great number of arbitrators specifically construe the "relative ability/modified seniority" clause, as included in Article 30.01 of the Agreement, as placing the burden of proof on the employee/union to prove bad faith, arbitrariness, capriciousness, or discrimination on the part of an employer or to prove that the employer's evaluation of employees' abilities was wrong. *Lehigh Portland Cement Co. (Leeds, Ala.) and United Paperworkers Int'l Union Local 108* , 105 LA 860 (1996). The evidence presented demonstrates that Troopers Bess and Brooks were chosen based upon superior test scores and more flying time in helicopters. The fact that both Bess and Brooks have commercial ratings and are IFR certified certainly goes to the issue of safety. In Ohio, weather conditions can suddenly go from a VFR to IFR environment; just ask any pilot who has suddenly found him/herself in "white out" conditions during winter flying. In spite of the fact that the Patrol does not allow their pilots to fly during adverse weather marginal

weather is possible for several months each year, making occasional instrument flying a possibility.

Arbitrators recognize that economic justifications must be taken into consideration in reviewing challenged management decisions, along with the impact on the Union or bargaining unit. *Fed. Wholesale Co. and Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of America Local 377 (AFL-CIO)*, 92 LA 271 (Richard 1989). The helicopter training is expensive and helicopters are costly to purchase and maintain. In its reasoned opinion the Employer's need to have the most qualified personnel operating them is not unreasonable, absent any contractual obligations that requires seniority to trump superior ability. In the main, the arbitrator finds that the Patrol acted in good faith and for sound economic and safety reasons in selecting Bess and Brooks over the Grievant for helicopter training. Based upon these two selections, I found evidence to conclude that the Grievant was not discriminated against. However, the testimony of retired Captain Bryant called as a hostile witness on direct-examination raised an initial question of bias. Yet, after all the facts were carefully considered the Employer's decision remained sound and defensible.

Bess and Brooks demonstrated more knowledge about helicopter flying through their test scores, and they have more helicopter flying experience than the Grievant. Brooks, who logged 117. 7 hours flying

helicopters, had more than twice as many hours as did the Grievant. Moreover, both Bess and Brooks demonstrated competency that comes with higher-level skill training and certification in commercial and IFR helicopter operation.

The Union did a very credible job of demonstrating that Trooper Wheeler is an outstanding and dedicated officer. Given all of his individual accomplishments with the Patrol, he should be encouraged to complete his aviation goals outlined in Joint Exhibit 6. This should place him in a good position to be chosen for future helicopter training.

AWARD

The grievance is denied.

Respectfully submitted on this _____ day of July, 2005

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Robert G. Stein, Arbitrator

AWARD

The grievance is denied.

Respectfully submitted on this 31st day of July, 2005

Robert G. Stein, Arbitrator