CONTRACTUAL
GRIEVANCE PROCEEDINGS

IN THE MATTER OF	)	
ARBITRATION BETWEEN	)	
	)	
OHIO DEPARTMENT OF PUBLIC SAFETY,	)	
DIVISION OF STATE HIGHWAY PATROL,	)	
OHIO INVESTIGATIVE UNIT	)	**DECISION IN:**
	)	
- AND -	)	**MANDATORY TESTING**
	)	**REQUIREMENT**
FRATERNAL ORDER OF POLICE,	)	**(STEVE J. STOCKER)**
OHIO LABOR COUNCIL, INC., UNIT 2	)	

GRIEVANCE NO: DPS-2016-04966-2

GRIEVANCE: The Grievance challenges the Employer mandating OPOTC Physical Fitness Testing as violating Section 31.05, Item B – "Physical Fitness Qualifications".

AWARD: The Grievance is denied.

HEARING: October 2, 2017; Columbus, Ohio

ARBITRATOR: David W. Stanton, Esq.

APPEARANCES

FOR THE EMPLOYER

Cassandra L. Brewster, Staff Lieutenant
Marty Fellure, Lieutenant
Robert Patchen, OCB-Policy Analyst
Morgan Murphy, DPS Observer
Kathleen Merrick, Human Capital Managment Manager

FOR THE UNION

Douglas J. Behringer, General Counsel
Richard Lear, Delegate-Associate
Renee Engelbach, Paralegal
Steve J. Stocker, Grievant

ADMINISTRATION

By email correspondence dated August 11, 2017, from Alicyn Carrel, MBA/MPH Arbitration/Mediation Liaison for the State of Ohio, Office of Collective Bargaining, the undersigned was notified of his mutual selection to serve as an impartial Arbitrator to hear and decide Case Number DPS-2016-04966-2 concerning mandatory testing obligations of the Grievant, Steve J. Stocker, then in dispute between these Parties. On October 2, 2017, at the Conference Center of the Office of Collective Bargaining, 1610 West Broad Street, Columbus, Ohio, an Arbitration Hearing was conducted wherein each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence supportive of positions advanced; and, where the Grievant appeared and testified in his own behalf. The evidentiary record of this proceeding was subsequently closed upon the Arbitrator's receipt and exchange of each Party's Post-Hearing Brief filed in accordance with the arrangements agreed to at the conclusion of the presentation of evidence. Accordingly, this matter is now ready for final disposition herein.

GRIEVANCE AND QUESTION TO BE RESOLVED

The Grievance, as set forth in the joint submissions, at Tab A, is identified as DPS-2016-04966-2 as follows:

Grievance No: DPS-2016-04966-2

Union Contract Article Link: FOP Articles assigned to: Krysten McElfresh

GRIEVANT INFORMATION

Member: Steve Stocker

Grievance Union: Fraternal Order of Police (FOP)

Grievant Name: Steve Stocker

Grievant Worksite: IUCLE

State of Ohio User ID: 10020686

Grievant Department Description: IU Cleveland Investigations

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Grievant's Classification No: 23511

Grievant's Classification Title: Enforcement Agent

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Grievant's Supervisor: AIC Greg Croft

Union Representative: Doug Behringer

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Statement of Grievance:

The Grievant's initial hire date was prior to January 1, 2004. In 2006, the Grievant left the Ohio Investigative Union for Afghanistan as a Police Advisor. When the Grievant returned in 2007, the physical fitness standard was not a condition of returning.

Originally, this Grievance was filed 11/17/2016 and withdrawn and refiled at the request of the Office of Collective Bargaining

Resolution Requested:

For the affected Member to be made whole, the Ohio State Highway Patrol should cease and desist from making the physical fitness mandatory.

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The issue for disposition herein is framed as follows:

Is the Grievant contractually required to complete mandatory fitness testing?

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CITED PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

The following provisions of the Collective Bargaining Agreement, Joint Exhibit-1, were cited and/or are deemed relevant herein as follows:

ARTICLE 4
EFFECT OF AGREEMENT

Total Agreement

This Agreement represents the entire Agreement between the Employer and the Union and unless specifically and expressly set forth in the expressed written provisions of this Agreement, all rules, regulations, practices, and benefits previously and presently in effect, may be modified or discontinued at the sole discretion of the Employer. This section alone shall not operate to avoid any existing or future ORC Statutes or Rules of the OAC and applicable Federal law.

ARTICLE 20
GRIEVANCE PROCEDURE

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20.09 Arbitration

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5. Limitations of the Arbitrator

Only disputes involving the interpretation, application, or alleged violation of a provision of this Agreement shall be subject to Arbitration. The Arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall the Arbitrator impose on either Party a limitation or obligation not specifically required by the language of this Agreement. Employees who are terminated and subsequently returned to work without any discipline through Arbitration, shall have the termination entry on their Employee History on Computer (EHOC) stricken.

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ARTICLE 22
HOURS OF WORK AND OVERTIME

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22.12 No Intimidation

No supervisor shall intimidate or unduly influence an Employee to waive his/her rights under this Article.

ARTICLE 31
SELECTIONS, PROMOTIONS AND TRANSFERS

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31.05 Physical Fitness Qualifications

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B. Minimum fitness standards shall be in the form of a work rule and the provisions of Article 21 shall be applicable. Management will provide voluntary testing and voluntary compliance of "OPOTC Basic Training Program Physical Fitness Standards" or other measurable standard to all Employees hired before January 1, 2004. Mandatory testing and mandatory compliance of "OPOTC Basic Training Program Physical Fitness Standards" or other measurable standards will be required for all Employees hired after January 1, 2004. Departments covered by this Agreement may, at their discretion, opt out from the proceeding mandatory testing requirement and offer voluntary testing.

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ARTICLE 34
SENIORITY

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34.01 Definitions

For the purposes of this Agreement, Seniority shall be defined as follows:

A. Bargaining Unit Seniority: The length of continuous service in a position or succession of positions with in Bargaining Unit Two (2) beginning with the last date of hire or transfer into the Bargaining Unit, as defined by Seniority Credits.

B. Classification Seniority: The length of continuous service in a single classification, beginning with the last date of hire or transfer into the classification as defined by Seniority Credits.

C. Seniority Credit: The total number of pay periods during which an Employee holds, or has a right to return to a Bargaining Unit position.

D. Service Credit: Service Credit shall be computed in years and days as is the past practice and shall be credited for all periods for which "Seniority Credits" are applicable.

34.02 Termination of Continuous Service

A. Continuous service shall terminate when the Employee:

1. Quits, resigns, or is otherwise separated from employment

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FACTUAL BACKGROUND

The operative facts which gave rise to the filing of this Grievance, challenging the Employer's requirement of the Grievant to complete mandatory fitness training as violating Article 31, Section 31.05, (B), of the Collective Bargaining Agreement are, except where otherwise indicated, essentially undisputed. The State of Ohio, Department of Public Safety, Division of State Highway Patrol, Ohio Investigative Unit, hereinafter referred to as the "Employer", is party to a Collective Bargaining Agreement, Joint Exhibit -1, with the Fraternal Order of Police, Ohio Labor Council, Inc., hereinafter referred to as the "Union", which sets forth the terms and conditions of employment for those Employees identified in Article 7, titled "Union Recognition and Security", including "…all permanently appointed full and part-time Employees employed in a classification or position listed in Appendix A…" as set forth at page 139 of the Collective Bargaining Agreement, "Enforcement Agent". The matter in dispute involves the Grievance of Steve J. Stocker, hereinafter referred to as the "Grievant".

The case before the Arbitrator concerns the issue of mandatory physical fitness testing versus voluntary physical fitness testing as both are recognized in the Collective Bargaining Agreement. The evidence of record demonstrates the Grievant began his career within this Unit approximately 20 years ago in 1998. The Grievant, in a November 13, 2006 Memorandum to Executive Director, Kevin Page, acknowledged his formal resignation from his position, as Enforcement Agent, at the Wage rate of $23.50 per hour, effective February 10, 2006, to take a

position in Afghanistan serving as a civilian contractor; and, requested to be “rehired” on or about February 4, 2007 (*See,* Union Exhibit -1 and Management Exhibits – 1 and 2, respectively). Prior to leaving for Afghanistan, Stocker alleges he spoke with Scott Pohlman, Deputy Director of the Ohio Investigative Unit, and obtained the assurance of the Employer that if an opening existed upon his return from Afghanistan, he would be "rehired". Union Exhibit - 2 represents a November 15, 2006 Email from Pohlman with the “subject” indicated as “Rehire Request” indicating, “I have no problem rehiring Steve”. A “Personnel Action Form”, Union Exhibit – 3, indicates the “rehire” of the Grievant, at Grade 11, Step 1, with a pay rate of $19.15 per hour, representing Step 1 of the Wage Scale at the time.

On or about February 12, 2007, the Grievant was indeed rehired to the Ohio Investigative Unit. In January, the Grievant allegedly spoke with Supervisor in Charge, (AAG) Paul Rapp, about the Employer's requirements to be rehired with this Unit. The Grievant contends he was advised there was in fact an opening within the Unit and all he would have to do is take a drug test as soon as he returned. He alleges there was no mention of any physical fitness testing during that conversation. He testified he had maintained his commission during his absence through the Huron County Sheriff's Department with his commission date beginning in 1998 and, according to the record, is currently still in effect.

The Parties' Collective Bargaining Agreement at Article 31, titled, “Selections, Promotions and Transfers”, at Section 31.05(B), indicates Management will provide “voluntary” testing and voluntary compliance of OPOTC basic training program physical fitness standards, or other standards, to all Employees hired before January 1, 2004. “Mandatory” testing and mandatory compliance of the afore-referenced standards, or other measurable standard, would be required for all Employees hired after January 1, 2004. The Parties are seemingly in agreement

with respect to Article 31 wherein it requires mandatory testing for all Employees hired after January 1, 2004. The record indicates the Employer acknowledges that prior to leaving for Afghanistan to pursue his civilian endeavor, the Grievant was exempt from the mandatory testing requirement.

Upon his return, he was advised that indeed an opening existed for which he would be rehired. The documentation attendant therewith characterized him as a “rehire”. However, the Employer contends that given his new hire date, which was clearly beyond January 1, 2004, that would otherwise exempt him based on his initial hire date of 1998, would no longer be applicable to him. The Employer addressed the implications attendant with the “OAKES” or “OAKS” System through the testimony of Human Capital Management Manager, Kathy Merrick, who testified the Grievant was in fact treated as a “new hire” when he was hired by the Agency on February 12, 2007 as an Enforcement Agent for the Ohio Investigative Unit. He was hired at Step 1 of the pay grade. She indicated the term "rehire" as relied upon by the Union, was only used as a “coding” mechanism since the Grievant was previously assigned an OAKES or OAKS number. The system would only use the term rehire as a forced computer coding issue since the Agency has to use the previously assigned OAKES or OAKS Employee number.

She went on to testify the Grievant resigned from his previous employment within the Agency on February 10, 2006 as set forth in the personnel action forms contained in Management Exhibit 2. Moreover, the Memorandum authored by Chief Dwight Holcolmb, Executive Director of the Ohio Investigative Unit, as set forth in Management Exhibit 2 at page 2 also references the Grievant's resignation. Merrick testified further the Grievant's Peace Office commission was terminated upon his resignation effective February 10, 2006 by the Ohio Peace

Officer Training Commission as evidenced in Management Exhibit 3, referencing "Resigned" as the "Reason for Termination".

As the record demonstrates, the Grievant applied for an open Enforcement Agent position and was hired by the Agency on February 12, 2007. Such is evidenced in his application submitted by the Grievant, a personal action for the Grievant, and a Supplemental Employment Agreement. Merrick went on to testify the Grievant received his Oath of Office and Peace Officer Commission effective February 12, 2007 as set forth in Management Exhibit 5. The Peace Officer Appointment and Oath of Office from the Tri-C Cleveland Heights, was signed on February 12, 2007 as set forth in Management Exhibit 6. A Notice of Peace Officer Appointment was made to the Ohio Peace Officer Training Commission with the Office of the Attorney General dated February 12, 2007. Such are all set forth in the Grievant's personnel file.

Merrick went on to testify that the term rehire, as relied upon by the Union, was used as a forced coding caption since the Grievant already had an OAKES ID number which had to be utilized for processing his hiring. The Grievant did not serve a probationary period or receive a probationary evaluation. No evidence regarding evaluations for the Grievant covering this time period were introduced. The Grievant did receive a Step increase in his pay and progressed a step through the pay range at the one-year mark, effective February 8, 2008. That was when his probationary period ended.

When the Grievant returned to the Ohio Investigative Unit, he received assistance from a Field Training Officer for a two-week period for the purpose of updating him on the laws that had changed since his departure in 2006. The Grievant himself, worked with a new hire as a Field Training Officer shortly after he completed his updates as noted. He submitted a recommendation to hire the trainee he oversaw as an OIU Agent.

Ultimately, the Grievant was advised he would become a “mandatory tester” in accordance with Article 31 of the Parties' Collective Bargaining Agreement, which led to the filing of the Grievance challenging the Employers requirement thereof. The Grievance was processed through the Negotiated Grievance Procedure without resolution. When the Parties' efforts to resolve this matter through the course thereof proved unsuccessful, the mandatory versus voluntary testing Grievance of Steve J. Stocker was appealed to Arbitration hereunder.

CONTENTIONS OF THE PARTIES

UNION CONTENTIONS

The Union contends Article 31, Section 31.05(B), indicates mandatory testing will be required for all Employees hired after January 1, 2004. It insists the Grievant took a temporary leave with the expectation of not only himself, but the Employer, to returning to the Ohio Investigative Unit. Despite the Employer's insistence the Grievant returned as a “new hire” versus a “rehire”, all associated paperwork indicates the Grievant as a rehire. Contrary to the Employer's assertion based on the requirements of the "OAKES System", its own witness, Merrick, indicated it had to list him as a rehire based on his prior ID number. The Employer advised the Grievant he would be returning as a rehire and not a new hire before he even left for Afghanistan. He applied for the open position and had already been assured he would be placed in that position upon his return. He possessed adequate knowledge and training to perform the job in question to the benefit of the Employer.

There is nothing in his paperwork, nor in the testimony of record, indicating the Grievant was placed in a probationary status upon his return. Merrick testified she found nothing in the Grievant's personnel file to demonstrate he was characterized as a probationary Employee. He did not receive any form of probationary evaluation and was moved to Step 2 on February 3,

2008 without any indication he had served in a probationary status. Moreover, it is important to note the Employer referred to the Grievant as a "Senior Agent" upon his return. Upon his return, he was place with a Field Training Officer for the purpose of updating him on the laws that had been changed since his departure in 2006. Shortly thereafter, he himself was placed in that position with respect to a Trainee who he ultimately submitted a recommendation for hire which was accepted by the Employer.

The Employer does not challenge the fact the Grievant had worked for the Agency from 1998 to 2006, left for Afghanistan and returned as a rehire in 2007. Nothing in his personnel file indicates mandatory physical fitness testing would be required upon his return to duty. There is nothing in writing requiring the Grievant to take mandatory fitness training. The Union insists it was not involved in the discussions, as testified about by the Grievant, concerning his resignation and possible return, and had it been so, it would have been required the assurances, as described by the Grievant, be in writing.

The evidence of record demonstrates the Ohio Investigative Unit opted out of mandatory testing for physical fitness under Director Cathy Collins approximately 10 years prior. No Employee since that time was tested under the mandatory requirement. Had the Grievant been deemed a mandatory tester, he would have to take the annual test during his first year of his return. The Employer contends it opted back in to mandatory testing in 2017 therefore requiring the Grievant to participate in mandatory testing based on his most recent hire date. The Union insists there is no MOU or any provision in the Parties' Agreement permitting the Employer to "opt in" to mandatory testing in 2017. Even if it did decide to do so, the Grievant was not required under the Contract to participate.

The Union relies upon Union Exhibit 3 indicating the Grievant was returned to active status in 2007 as a "rehire". It provides a date of continuation and not a date of hire and the Employer did not check any of the boxes indicating the Grievant was a "new hire". He was listed as a rehire. None of the categories listed under the rehire section would have changed his status as a voluntary tester to a mandatory tester. By agreement, the Grievant returned to Step 1 as a rehire. He was advised prior to his departure to Afghanistan he would be a rehire and he was further advised prior to his return he would be a rehire. He had every reason to believe that what he was told was accurate because no one advised him otherwise. The Grievant testified he received a phone call from Paul Rapp suggesting he might become a mandatory tester for physical fitness; however, he also contacted the Grievant subsequent thereto indicating he would not become a mandatory tester.

The Grievant did not take the physical fitness test upon his return in February 2007 and from 1998 through 2017, the Grievant did not have to take a mandatory fitness test due to the language contained in Article 31.05 (B). Such is consistent based on that articulated to him by Mr. Paul Rapp. Moreover, the record clearly demonstrates the Grievant maintained his commission while away in Afghanistan with the Huron County Sheriff throughout this time and remained in effect upon his return. It is clear the Grievant is exempted from mandatory testing under the clear and unambiguous mandates of Article 31.05 (B).

For these reasons, the Union requests the Grievance be sustained.

EMPLOYER CONTENTIONS

The Employer contends the Union has failed to meet its burden of proof based on its allegation it had somehow violated Article 31.05 (B), titled, "Physical Fitness Qualifications", when it required the Grievant to complete mandatory fitness testing upon his return from

Afghanistan following his resignation tendered on February 10, 2006. The Employer emphasizes the Collective Bargaining Agreement is clear and unambiguous requiring mandatory testing for all Employees hired after January 1. 2004. The Grievant in this matter was previously employed in the Ohio Investigative Unit, but resigned from his position as an Enforcement Agent on February 10, 2006 to seek private employment in Afghanistan. His Peace Officer Commission was revoked upon his resignation as set forth in the documentary evidence of record. Upon his return from Afghanistan, he was rehired by the Employer on February 12, 2007. He was treated as a new hire and commissioned as an Enforcement Agent on February 12, 2007. It is clear from the evidence of record the Grievant clearly resigned from his position and was treated as a new hire when he applied for an open Enforcement Agent position more than one year after his resignation.

Human Capital Management Manager, Kathy Merrrick, testified the Grievant was treated as a new hire when he was hired by the Agency on February 12, 2007. He was hired as an Enforcement Agent at Step 1 of the pay grade. He started at the "new hire" Step of that pay grade. Moreover, the term rehire was only used in "coding" since the Grievant was previously assigned an OAKES Employee number and the system would only use the term rehire as a forced computer coding issue since the Agency has to use the previously assigned OAKES Employee number. It is clear the Grievant resigned from his position as evidenced in the personnel action forms regarding the Grievant. A Memorandum authored by then Chief Dwight Holcolmb, Chief Executive Director of the Ohio Investigative Unit, also confirms the Grievant's resignation. He signed the resignation provided to the Employer and Management Exhibit 3 indicates the Grievant's Peace Officer Commission was terminated upon his resignation.

The Grievant applied for an open Enforcement Agent position and was hired by the Agency on February 12, 2007. Such is evidenced by the application submitted by him, a personnel action form for the Grievant, and a Supplemental Employment Agreement. The Grievant received his Oath of Office and Peace Officer Commission on February 12, 2007 from Tri-C Cleveland Heights as set forth in Management Exhibit 6. A Notice of Peace Officer Appointment was made to the Ohio Peace Officer Training Commission with the Office of Attorney General dated February 12, 2007. Merrick testified the afore-referenced documents were all part of the Grievant's personnel file. The term rehire as relied upon by the Union was only used as a forced coding caption since the Grievant already had an OAKES ID number which had to be utilized for processing his hiring in February 2007. The Union failed to introduce any evidence concerning any evaluations for the Grievant covering the time period and he received a Step increase in his pay as he progressed to Step 2 of the pay range after the one-year mark on February 8, 2008 when his probationary period ended.

The Employer insists the Collective Bargaining Agreement is clear and unambiguous where it defines “continuous service” and termination thereof occurs when an Employee "quits, resigns, or is otherwise separated from Employment." It emphasizes the Grievant's testimony wherein he indicated he did not keep his Bargaining Unit seniority or his classification seniority when he was hired by the Agency as an Enforcement Agent on February 12, 2007. He was treated as a new hire based on his date of hire -February 12, 2007. As such, based on the clear and unambiguous language of Article 31, Section 31.05 (B), he is therefore deemed a mandatory tester and is required to complete the annual fitness testing.

The Employer emphasizes the entire Ohio Investigative Unit previously opted out of the mandatory annual fitness testing under former Director Cathy Collins-Taylor. Not only was the

Grievant not tested, but all Enforcement Agents working for the Ohio Investigative Unit were not required to participate in the mandatory testing. When the Ohio State Highway Patrol became responsible for the oversight of this Unit, it was decided to opt back in to the mandatory fitness testing under Section 31.05 of the Parties' Agreement. It emphasizes Article 4 of the Parties' Agreement permits the Employer to opt back into the mandatory fitness. There is no language that would prohibit the Employer from opting back into the physical fitness testing. When the Grievant resigned his position, he voluntarily forfeited his right to be a voluntary tester. Based on his hire date of February 12, 2007, he is now a mandatory tester and subject to compliance with those requirements. Clearly, the Union has failed to meet its burden of proof since the language at issue is clear and unambiguous and therefore its plain meaning should be applied.

For these reasons, the Employer requests the Grievance be denied.

DISCUSSION AND FINDINGS

The disposition of this matter hinges upon a determination of whether the Employer violated Article 31, Section 31.05 (B), titled "Physical Fitness Qualifications" when it required the Grievant to complete mandatory fitness testing. The Union emphasizes that based on the documentary evidence of record, the Grievant was recognized as a “rehire” versus a “new hire” and as such would maintain his initial hire date of 1998 thereby preventing the Employer from requiring him to undergo annual mandatory physical fitness testing. It insists, based on the assurances he received both prior to his resignation and upon his return from Afghanistan, the Grievant clearly maintained his status as a voluntary tester. It insists he never lost his Commission as a Law Enforcement Officer, was promised his position so long as an opening existed, never served any probationary period, was hired in 1998 and rehired in 2007, and was

specifically advised he was not a mandatory tester when he returned from Afghanistan. As such, he is exempted from mandatory testing under Article 31 of the Agreement. The Employer insists that indeed based on the documentary evidence of record introduced, the Grievant did indeed resign from his position and upon his return that documentation indicates: 1) he resigned, 2) he reapplied, submitted an Application and was hired, 3) he was placed at the starting rate for new hires, 4) he went through a one-year probationary period, and, 5) when the Unit elected to opt back into mandatory testing as permitted in Articles 4 and 31 of the Parties' Agreement, the Grievant, now hired after January 1, 2004, became a mandatory tester. It submits that indeed the Collective Bargaining Agreement is clear and unambiguous with respect to voluntary versus mandatory testers based on the effective hire date thereof.

The Collective Bargaining Agreement, under which the Arbitrator's authority is conferred, sets forth at Article 31, Section 31.05 titled, “Physical Fitness Qualifications”, at Paragraph B, indicates, "[d]epartments covered by this Agreement, may, at their discretion, opt out from the preceding mandatory testing requirement and offer voluntary testing." That provision has an effective date designating the difference between mandatory and voluntary testers – those hired after January 1, 2004 are designated “mandatory testers” – those hired before are grandfathered as “voluntary testers”. The question becomes one of dates as to when the Grievant was initially and subsequently hired and what effect did his resignation have on whether he is a voluntary or mandatory tester based on those hire dates?

The evidence of record demonstrates the Grievant did indeed tender his official, un-coerced resignation effective February 10, 2006 to, as he characterized, take a civilian-based, private security, position assisting military activities in Afghanistan. He contends he was assured he would be able to return if a position was available and be considered rehired when he

returned from Afghanistan. There is no evidence of record to dispute that assurance. Indeed, he was apparently afforded preferential consideration for the open Enforcement Agent position; however, he was placed at Step 1/Year 1 of the Wage Scale at the time. There is no evidence of record indicating the Grievant challenged his Wage Scale placement or any other contractual considerations/entitlements upon his return. Nor does this matter involve a determination of whether the Contract permits "opting into" mandatory testing after a Unit has "opted out". This matter, as the vast majority of Arbitration Cases demonstrates, is "fact-driven" based on how the Grievant's voluntary resignation impacts the Employer's contractual right to require, and the Grievant's contractual obligation to subject himself to, mandatory physical fitness testing as addressed in Article 31 for those Employees hired after January 1, 2004.

This matter involves the determination of whether the Grievant is deemed a mandatory or voluntary tester based on either his original hire date or that hire date following his voluntary resignation of employment to seek other employment. The Collective Bargaining Agreement speaks of "continuous service" with respect to Seniority, and how and under what circumstances is that continuous service broken and one's Seniority is severed or terminated. The very concept of employment severance necessarily would include one's resignation therefrom. In order to do so, that individual voluntarily and without undue influence, elects to sever the employment relationship based on his own accord without any consideration of any adverse action of the Employer. Clearly, this does not involve any adverse employment action; simply, a question involving the ramifications of an Employee's voluntary resignation and the impact such has with respect to physical fitness testing requirements under the Agreement. In other words, the very act of severing employment by resignation does not require any further act of the Employer or is predicated upon any procedural compliance by the Employer with respect thereto, other than

typical internal filings and recordkeeping endeavors. The Employer may elect to, or not, consider a previously employed applicant for an open position; here, it afforded the Grievant preferential consideration to apply for, and be hired to fill, the available Enforcement Agent position.

The Grievant, by his own volition, tendered his resignation and such was, according to this record, accepted by the Employer. The very act of submitting his voluntary resignation indicates that indeed he was severing the employment relationship with the Employer, voluntarily terminating the rights and obligations under the Collective Bargaining Agreement; and, thereby subjecting himself to whatever ramifications that may exist and/or occur if he chose to return. Whether or not he was assured verbally by anyone with managerial authority simply does not override the documentary evidence of record. It is indeed overwhelming evidence of record indicating the Grievant tendered his resignation, was hired at the "first rung on the pay scale ladder" and was moved to the second step thereof after completion of one year. No evidence exists indicating the Grievant challenged as improper, his Wage rate or his placement at Step 1 upon his hiring effective February 12, 2007. While indeed the Grievant possessed the qualifications and experience as an Enforcement Agent, and was, as apparently assured, provided preferential consideration to fill, and was hired to, the open Enforcement Agent position, he nonetheless severed his employment voluntarily with the Employer and is now subject to the contractual provisions with respect to mandatory versus voluntary physical fitness testing. It is clear based on his most recent date of hire - February 12, 2007 - he is no longer "grandfathered" as a "voluntary tester" and is now, under Article 31, deemed a mandatory tester and is subject to the requirements thereof.

The clear and unambiguous language of Article 31, Section 31.05 indicates any Employee hired after January 1, 2004 shall be subject to mandatory testing. Unfortunately for

the Grievant, when he voluntarily severed his employment, he also voluntarily relinquished his ability to be considered, and designation as, a voluntary tester. While the Arbitrator is indeed mindful of the magnitude and implications this determination bestows upon the Grievant, the Parties' Collective Bargaining Agreement, under which the Arbitrator's authority is conferred, is clear and unambiguous and therefore its enforcement based on the plain meaning of those provisions concerning voluntary versus mandatory testing must be enforced. Technically, the Grievant's most recent hire date, following his voluntary resignation, is after January 1, 2004 and therefore subjects him to mandatory testing.

Based on the totality of the evidence as presented, it is clear the Grievant voluntarily severed the employment relationship and relinquished his designation as a voluntary tester and now based on his hire date of February 12, 2007, he is clearly beyond the January 1, 2004 grandfathering provision, if you will, concerning mandatory versus voluntary testing. As such, the Grievance must be, and therefore is, denied.

AWARD

The Grievance is denied.

David W. Stanton

David W. Stanton, Esq.
NAA Arbitrator

December 14, 2017
Cincinnati, Ohio