1936

IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO
DEPARTMENT OF NATURAL RESOURCES

AND

FRATERNAL ORDER OF POLICE
OHIO LABOR COUNCIL, INC., UNIT 2

Before: Robert G. Stein

CASE#
25-17-20060926-0003-05-02

Grievant:
Watercraft Officer Jennifer Brown

Advocate for the EMPLOYER:

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Advocate for the UNION:

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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (herein "Agreement) (Joint Exh. 1) between The State of Ohio (herein "Employer") and The Fraternal Order of Police, Ohio Labor Council, Inc., Unit 2. That Agreement was effective from calendar years 2003 through 2006 and included the conduct which is the subject of this grievance.

Robert G. Stein was selected by the parties to arbitrate this matter as a member of the panel of permanent arbitrators, pursuant to Section 20.08(1) of the Agreement. A hearing on the matter was held on March 6, 2007 in Columbus, Ohio. The parties mutually agreed to that hearing date and location, and they were each provided with a full opportunity to present both oral testimony and documentary evidence supporting their respective positions. The hearing, which was not recorded via a fully-written transcript, was subsequently closed upon the parties' submissions of post-hearing briefs.

The parties have agreed to the arbitration of this matter and to the submission of three (3) joint exhibits. No preliminary issues of either procedural or jurisdictional arbitrability have been raised, and the matter is properly before the arbitrator for a determination on the merits.

ISSUE

Did the Employer violate the Agreement by awarding the Watercraft Officer Specialist position at the Springfield field office to an Established Term Irregular employee rather than to Jennifer Brown? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 4—Effect of Agreement/Past Practice
Article 5—Conflict and Amendment
Article 20—Grievance Procedure
Article 31—Selections, Promotions and Transfers

BACKGROUND

From July 17 through July 26, 2006, the Division of Watercraft (herein "Division") of the Ohio Department of Natural Resources posted a notice of an available job opportunity for a Watercraft Officer Specialist for its Springfield, Ohio field office. It was described as a full-time, permanent, bargaining unit, classified position subject to potential promotion, transfer, or demotion for interested applicants. (Employer Exh. A). Jennifer Brown (herein "Brown" or "Grievant"), who had been employed by the Division on a full-time basis since May 24, 1999, was one of five (5) candidates for that position who met the minimum qualifications. (Employer Exh. C). Those candidates were individually interviewed and ranked by a three-member interview panel or tribunal on September 8, 2006 after the panel

had previously met to formulate interview questions and the weight to be assigned to each question. (Employer brief p. 2). On September 26, 2006, Brown was notified that she had not been selected for the open position, which had been awarded to Craig Watson (herein "Watson"), based on total scores established for each candidate, which included both an actual interview score and applicable "seniority credits." (Employer Exh. D; Section 31.02 of the Agreement).

In response to the Grievant's non-selection for the Watercraft Officer Specialist position, a grievance was filed on her behalf by the Union on September 26, 2006. (Joint Exh. 2). Because the grievance remained unresolved after passing through the Step 1, Supervisory Level of the grievance procedure, as identified in Section 20.07 of the Agreement, the parties mutually agreed to waive Step 2 of the grievance procedure and to advance the matter to the arbitration level. (Joint Exh. 2). The matter is now before the arbitrator for final and binding resolution.

POSITION OF THE UNION

The Union's basic contention is that the Employer did not comply with the specific terms or provisions of the Agreement by awarding the posted position to Watson, who was, at the time of his application and interview for that job, currently working as an "Established Term Irregular" (herein "ETI") employee for the Division. A distinction has been made

between "Established Term Regular" (herein "ETR") employees, who work a standard forty-hour work week while actually performing their job function but with annual "starting and ending employment dates based on the previous season's work," and ETI employees, who "usually do not work a standard 40-hour work week and instead are provided an identified number of hours each fiscal year." (Employer Exh. M). The Union insists that ETI employees are actually part-time employees and, as such, are not entitled to all of the benefits available to full-time employees, especially with regard to competitive status in job bidding.

The Union also contends that Employer Exhibit F and Exhibit M, Section 8, both recognize the movement of an ETI employee into either a part-time or full-time permanent position as constituting a promotion. The Union specifically avers that the Employer has violated the requirements of Article 31 of the Agreement by filling the position with Watson, who was purportedly functioning as a part-time employee at the time of his reassignment, rather than awarding the position to Brown, who was at the time of her application a full-time Watercraft Officer. Article 31 specifically states:

> Full-time employees applying for a full-time vacancy shall be given preference over part-time employees. A vacancy shall first be offered for a permanent transfer by seniority. If the position is not filled by permanent transfer, it shall be offered for lateral transfer based upon the criteria pursuant to Article 31.02.

Based on Brown's full-time status at the time of the job posting, the Union argues that her movement to a Watercraft Officer Specialist position would have constituted a lateral transfer.

The Union specifically refutes the Employer's claim that the reassignment of Watson from his ETI position to the full-time posted position constituted a lateral transfer, even though Watson remained in the same pay range after assuming the new position. (Union brief p. 3). The Union contends that Section 31.01(3) precludes Watson's requested reassignment from being considered as a "lateral transfer" because he was not intending to move from one part-time position to another part-time position. (Union brief p. 3). The Union insists that Watson's job reassignment did constitute a "promotion" because he was "a part-time employee who was placed in a full-time position." (Union brief p. 3). The Union maintains that Brown, as a full-time employee, "was entitled to preferential consideration over any and all part-time candidates" regardless of whether the reassignment is viewed to be a transfer, lateral transfer, or promotion. (Union Exh. 4).

The Union also contends that the other Division reassignments documented in Employer Exhibits G and I, which involved employee placement decisions in Sandusky and Portsmouth, do not constitute any binding action or practice to be applied in the instant matter because those decisions occurred after Brown's application for the Watercraft

Officer Specialist position was denied. However, the Union insists that Exhibits G, I, and L support its position because each of the Division's open positions in each of those cases was filled by a current employee having full-time status.

The Union requests that its grievance be sustained, based on Brown's status as the most-senior full-time applicant for the posted vacancy, and that she be placed in that position by the arbitrator and made whole for any losses sustained.

POSITION OF THE EMPLOYER

The Division basically refutes all of the Union's claims and insists that the Watercraft Officer Specialist vacancy was properly awarded to Watson based on his superior interview score (Employer Exh. D), pursuant to the last paragraph of Section 31.02, after the assembled interview panel or tribunal conducted each of the candidate interviews and ranked the candidates from "lowest to highest for purposes of making a selection for the vacancy with the highest-ranking individual being selected." (Employer brief p. 3). The Division contends that it was also "mandated" to award the position to Watson pursuant to the provisions of Section 31.02, which requires that vacancies be filled in the following order:

1. Within the same agency, within the same classification;

2. Within the same division, within the say pay range;

3. By promotion;

    a. Within the division;

    b. Within the agency;

. . .

The Employer contends that Category 1, above, should be identified as "permanent transfers" and that Category 2 should be deemed to be "lateral transfers." (Employer brief pp. 2-3). On page 3 of its brief, the Division explains that, beginning with the 2003-2006 agreement between the same parties as involved in the current dispute, Watercraft Officers and Watercraft Officer Specialists were assigned to the same pay range and that the reassignment of an employee in the former category to a position in the latter category is viewed as a lateral transfer. Because Brown and Watson were purportedly both candidates seeking lateral transfers, the Division insists that the vacancy in dispute here was properly awarded to Watson, based on his superior interview score.

The Employer contends that, "on at least three (3) prior occasions, the movement of a Watercraft Officer to a Watercraft Officer Specialist [was] considered a Lateral Transfer" (Employer Exhs. F, G, and I) and that the Union "never objected or otherwise commented with regard to the consideration of an established term officer for each of the Watercraft

Officer Specialist vacancies. (Employer Exhs. E, H, and J)" (Employer brief p. 4). The Employer also maintains that the Grievant was properly awarded twenty (20) points toward the final point tally after the interview process based upon her seniority. (Employer Exh. B) and that "only the highest-scoring applicant in the Tribunal process is 'guaranteed' the vacant position." (Employer brief p. 5).

The Division insists that the 1999 Memorandum of Understanding (herein "MOU") (Employer Exh. M) is irrelevant in this matter because Watson "did not go from the established term appointment type to a part-time permanent position and that Watercraft Officers are eligible for Lateral Transfers in the same manner prescribed for full-time and part-time permanent Officers." (Employer brief p. 5). Because Watson attained the highest ranking at the conclusion of the interviews and was awarded the position, the Division requests that the arbitrator deny the instant grievance in its entirety.

DISCUSSION

Before proceeding to the merits of this dispute, it is clear to the arbitrator, as it must also be obvious to the parties themselves, that both Brown and Watson are each valuable contributors to the Division's success. There was absolutely no suggestion in the evidence presented to the arbitrator of any other than positive comments about both

employees' performance. There is also the natural inference to be drawn from the fact that they were both considered to be qualified to serve in the vacant position as a Watercraft Officer Specialist. The underlying issue, however, is whether the final selection of Watson to fill the vacant position did conform to the requirements of the parties' Agreement.

The instant grievance arises from a disagreement between the parties regarding the interpretation and application of Articles 31 of the Agreement, subtitled "Selections, Promotions and Transfers." The arbitrator here is bound by the specific language of Section 20.08(5), "Limitations of the Arbitrator," which specifically provides that the arbitrator "shall have no authority 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." As noted by The Supreme Court of Ohio in *Skivolocki v. East Ohio Gas Co.* (1974), 18 Ohio St.2d 244, paragraph one of the syllabus, "The Agreement must be given a just and reasonable construction which carries out the parties' intent, as evidenced in the contractual language." The arbitrator here is a creature of the contract from which he derives his authority. Although he may use his expertise in interpreting and applying the contractual provisions, the arbitrator cannot substitute his own sense of equity and justice because his award must be grounded in the Agreement's terms. An arbitrator is a creature of the

contract from which he derives his authority. He is limited thereby and must, therefore, confine his decision as directed or prescribed.

Neither party should be able to gain through arbitration what it was unable to assert in prior negotiations between them. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifest. The arbitrator's sole duty is to find out what was intended by the language in the Agreement. If that language is clear and unambiguous, an arbitrator is bound to give it no meaning other than that expressed. Even though the parties to an agreement may disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce its clear meaning. *Southern Council of Indus. Workers and Johnstone-Tombigbee Mfg. Co., Inc.*, 00-1 Lab. Arb. Awards (CCH) P 3378 (Hovell 2000).

The arbitrator here also has determined that, in this specific controversy, he must also include the interpretation and application of the MOU, which was mutually adopted by both parties in December 1999 at least in part to clarify the status of both ETR and ETI employees.

> The general approach in contract interpretation cases is to ascertain whether there is a particular provision which the parties have negotiated which unambiguously resolves the controversy at hand. If so, the arbitrator has no choice but to apply the provision as written and resolve the matter on that basis.

PPG Indus., Inc., Chem. Div. and Int'l Chem. Workers, Local No. 45C, 02-1 Lab. Arb. Awards (CCH) P 3012 (Fullmer 2001). Articles 4 and 5 of the

parties' Agreement expressly provides for such supplemental agreements as the 1999 MOU included in the evidence in this matter. The fourth paragraph of Article 5, entitled "Conflict and Amendment," states: "Amendments and modifications of this Agreement may be made by mutual written agreement of the parties to this Agreement, subject to ratification by the Labor Council and the General Assembly." The 1999 MOU satisfies those requirements. "The parties mutually agreed to the terms of the memorandum of understanding and memorialized those terms in writing. It is a change of the provisions of the collective bargaining unit in that it reflects particular terms and conditions of employment not contemplated or agreed to when the collective bargaining agreement was negotiated." *Peoria Fed'n of Teachers, AFT?IFT Local 780 and Bd. of Educ. of The City of Peoria, Dist. 150,* 00-1 Lab. Arb. Awards (CCH) P 3304 (Kenis 1999). Because the MOU is the result of the concurrence of both parties, achieved after discussions and meetings between them, absent evidence that either party lacked the proper authority to enter into such an agreement, the MOU is entitled to enforcement on a par with the parties' Agreement. *Peoria Fed'n of Teachers*. In that latter decision, arbitrator Kenis also concluded that an MOU is enforceable as a binding supplement to a CBA.

> A memorandum of understanding is a side or collateral agreement. By definition, it is a supplement to the collective bargaining agreement. After a collective bargaining agreement is negotiated and agreed upon, circumstances may arise when it is

> thought necessary or desirable to clarify, add to, or change the collective bargaining agreement in some manner. That is what a side agreement does. So long as it meets definitional standards, a side agreement is honored on the same basis as the collective bargaining agreement itself.

Peoria Fed'n of Teachers, citing to *Cyclops Corp.*, 76 LA 76 (Spavec 1981); *Litton Precision Gear*, 107 LA 53 (Goldstein 1996); and *Gen. Tire and Rubber Co.*, 71 LA 813 (Richman 1978).

> It is generally recognized that the primary function of an arbitrator in construing [negotiated agreements] is, of course, to find the substantial intent of the parties and to give effect to it. Presumptively, the parties' intent is expressed by the natural and ordinary meaning of the language employed by them . . . to the end that a fair and reasonable interpretation will result.

NSS Enters., Inc. and Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am., Local 12, 114 LA 1458 (2000). When confronted with plain contract language, which conveys a straightforward course of conduct, arbitrators assume that the parties knew what they were doing when they drafted their Agreement and MOU incorporating the specific language they elected and eventually ratified. When the language of a collective bargaining agreement is clear and unequivocal, an arbitrator generally will enforce its plain meaning. *Guernsey County Dist. Pub. Library (Cambridge, Ohio) and Ohio Ass'n of Pub. Employees/Am. Fed'n of State, County, and Mun. Employees, Local 26*, 107 LA 435 (Sergent 1995).

It is also a basic principle of contract interpretation that a more specific provision should control over a more general provision. Because

the parties chose to amend their Agreement by authoring and adopting the very specific provisions of the MOU, the arbitrator finds that he has no choice but to apply the provisions as written and adopted and to resolve the issue on that basis. "Such specificity was intentional and does apply in this matter." *Paper, Allied-Indus., Chem. and Energy Workers Int'l Union, Local 3-1864 and Georgia Pac. Corp.*, 04-2 Labor Arb. Awards, (CCH) P 3984 (Holley, Jr. 2004).

As noted in the Employer's claims, *supra*, applicants Brown and Watson were both included within the Category 2 provisions of Section 31.02 of the Agreement because they were, at the time of the new position posting, "within the same division, within the same pay range." Based on the Agreement language included in Section 31.01(3), the Grievant, as a permanent, full-time employee, was seeking to make a "lateral transfer" by attempting to move "to a different job classification within the same pay range within the same division." A very significant and controlling provision is included in the last paragraph of Section 31.01. It states: "**Full-time employees applying for a full-time vacancy shall be given preference over part-time employees**." (emphasis added)

The arbitrator finds that the provisions of the MOU specifically addressing the relative status of ETR and ETI employees, especially in comparison to permanent, full-time employees such as the Grievant, are controlling in this matter. The second paragraph of the MOU specifically

states: "Established Term Irregular Hours Employees . . . do not work a standard 40 hour work week and instead are provided an identified number of hours each fiscal year." Items 4, 5, 7, and 8 specifically recognize the status of ERI employees, in comparison to other Division part-time and full-time employees, with regard to seniority, health insurance, and layoffs. Those sections specifically include the following language:

4. Established Term Irregular Hour employees will have leave accrual and seniority pro-rated in the same manner as part-time permanent employees.

5. All Established Term employees will also be offered health insurance, but the employer contribution will cease with the employee's interruption/termination date.

. . .

7. In the event of a layoff, Established Term employees shall be laid off prior to permanent employees . . .

8. It shall be considered a promotion to go from an established term (ET) appointment type to a part-time permanent (PTP) appointment type.

Clearly, the logical and reasonable conclusions or inferences to be drawn from these provisions is that the seniority, health care, lay-off, and promotion rights of ETI and ETR employees, such as Watson, are **inferior** in all regards to permanent full-time employees, such as the Grievant. Specifically with regard to new appointment opportunities, it is reasonable to conclude that an ETI or ETR employee's status is less than that of a permanent, part-time employee, just as their lay-off rights are less than

those of part-time employees. By clearly indicating in Section 8 that a job change involving an ETI or ETR's placement in a permanent part-time position constitutes a **promotion**, it can be reasonably inferred from the MOU provisions that a change involving an ETI or ETR employee's placement in a permanent full-time position would, therefore, also be deemed to be a promotion.

Based on those inferences or conclusions, the arbitrator finds that the language included in the last paragraph of Section 31.01 is controlling in this matter. That language clearly indicates that it was the mutual intent of the parties that the Grievant, as a **"[f]ull-time employee applying for a full-time vacancy [should] be given preference over part-time employees**." (emphasis added) Section 31.01 also established the preferential status of competing applicants for new positions in the order established by these terms:

- "A vacancy shall first be offered for a permanent transfer by seniority."
- "If the position is not filled by permanent transfer, it shall be offered by **lateral transfer** based upon criteria pursuant to section 31.02." ("2. Within the same division, within the same pay range")
- "If the vacancy cannot be filled by lateral transfer, it shall then be posted for **promotional bid**." (Emphasis added)

These rankings clearly indicate that the parties agreed that a permanent, full-time candidate's rights pursuant to a lateral transfer were to be

considered superior to those of a competing part-time candidate seeking a promotion, thereby recognizing that Watson's position as an ETI was considered to be lower than that of Brown as a permanent, full-time employee.

Based on the fact that the Division employee reassignment decisions memorialized as Exhibits F, G, and I were made after the decision being challenged in this matter, the arbitrator finds that they are not controlling here and are not within his jurisdictional purview. By not specifically challenging any of those decisions, the Union clearly did not waive its right to grieve the Division's decision denying the Grievant's placement in the Watercraft Officer Specialist position under review here.

Based upon a thorough review of the parties' arguments, all of the evidence submitted in this matter, and, in particular, the language included in both the Agreement and the MOU, the arbitrator finds that the Employer did violate the negotiated terms when it denied the position of Watercraft Officer Specialist to candidate Brown. She shall be permanently assigned to that position within two (2) pay periods after the date of this decision. Because her lateral transfer does not result in any pay increase, her retroactive placement shall only include an award of retroactively-established seniority at the new position, effective from September 25, 2006, and any other benefit(s) specifically related to the Watercraft Officer Specialist position.

AWARD

The grievance is granted.

Respectfully submitted to the parties this 29th day of May, 2007.

Robert G. Stein, Arbitrator