#1975

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. 15-03-080129-0007-04-01

THE STATE OF OHIO, HIGHWAY PATROL	:	
The Employer	:	
and	:	OPINION AND AWARD
THE OHIO STATE TROOPERS ASSOCIATION, INC.	:	
The Union	:	

MARVIN J. FELDMAN
Attorney/Arbitrator
1104 The Superior Building
815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216/781-6100

Fax: 216/781-6119

Email: marvfeldmn@aol.com

LICENSED TO PRACTICE LAW IN THE STATE OF OHIO AND COMMONWEALTH OF KENTUCKY

APPEARANCES

For the Employer:

Lt. Charles J. Linek, Advocate
Marissa Hartley, 2nd Chair - Employer
Sgt. Kevin Miller, Ohio State Patrol
Kristen Rankin, General Counsel
Mike Duco, Associate Director - OCB

For the Union:

Herschel M. Sigall, Attorney
Wayne MGlone, Staff Representative
Larry Phillips, President
Elaine Silveria, Assistant General Counsel

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having been unable to resolve this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted at the conference facility of the employer on March 18, 2008, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn and sequestered and that post hearing briefs would be filed. It was upon the evidence and argument that this matter rose to arbitration for Opinion and Award.

II. STATEMENT OF FACTS

The parties stipulated to a statement of issue and signed off on that agreement. The issue as propounded by the parties revealed the following:

> "Does the language in Section 20.12 (E) require the Employer to call the investigating officer as a witness if calling two witnesses?"

The current agreement under which this matter arose deals, in part, with the system of mini arbitrations, i.e. disciplinary grievances involving suspensions of less than ten days. Paragraph E of Article 20.12 of the current agreement under which this matter arose, in that regard, contains the following language:

"E. Grievance presentation will be limited to a preliminary introduction, a short reiteration of facts and a brief oral argument. No briefs or transcripts shall be made. If witnesses are used to present facts, there will be no more than two (2) per side including the grievant and the investigating officer. In cases where there is an issue of procedural arbitrability, each party will be permitted two (2) additional witnesses."

A mini arbitration arose concerning a trooper by the name of Patrick Pfouts. The State of Ohio did not present the investigating officer as a witness but used two other persons as witnesses at the hearing. The union objected on the grounds that the clause at 20.12 (E) demanded that the investigating officer be one of the two witnesses. The controversy arose and it is because of that controversy that this matter is now before me.

The actual grievance statement revealed the following:

"A question of language intrepretation (sic) arose on Friday, January 25, 2008 regarding the witness language of the above cited contract provision. The OSTA believes that the language and its intent are clear. The grievant and investigating officer are automatic witnesses. The language was a change from the prior agreement and therefore, the contract proposals are relevant evidence of the intent behind the change. The effect of the language would limit each party to two witnesses: The Grievant plus one additional for the Union and the investigating officer plus one for the Employer."

The remedy requested stated the following:

> "For the language to be interpreted as requiring the attendance of the investigating officer as an Employer witness, much like the Grievant is a Union witness. For the grievance to be expedited and scheduled for arbitration soon as possible."

The associate general counsel of the union testified. She testified that she met with the general counsel of the Office of Collective Bargaining and queried her as to whether or not the contract language was meant to include the investigating officer as a mandatory witness if in fact two witnesses would be brought forth to testify by the employer. The associate general counsel testified that the general counsel of the Office of Collective Bargaining of the State of Ohio acquiesced as to such query and that the associate general counsel of the union felt satisfied that an agreement understood by both parties had been reached. The general counsel of the Office of Collective Bargaining denies such conversation, or at least did not remember any such conversation, and did not agree in any manner, according to her, with the union as to a mandatory use of the investigating officer if two witnesses at the mini arbitration were used by the employer. That evidence is as it is and there are no buttressing facts on either side to conclude that an agreement was reached in that regard.

Also placed into evidence was a writing by the Office of Collective Bargaining in which they attempt to explain the new language of the clause under review. That particular language of explanation revealed the following:

" **Section 20.12 Alternative Dispute Resolution**

The State and the Union wish to reduce the number of witnesses for mini arbitrations and include the investigating officer as one of management's two witnesses."

The evidence further revealed that the employer was the party who selected the language and wrote the language which was proposed and the final language reaching the written contract all as stated hereinabove.

It was upon that evidence that this matter rose to arbitration for Opinion and Award.

III. OPINION AND DISCUSSION

The exchange between the general counsel of the Office of Collective Bargaining and the associate general counsel of the union must be held to be in equipoise. The union avers and the employer denies that the investigating officer must be used as a witness. That being so, that evidence can hardly be held to be conclusive.

From all of this, it is clear that the parties did not reach an agreement. The union signed off on the language which is made part of this record, i.e. the language at 20.12 (E) of the contract. In that particular clause, the writings show that there will be no more than two witnesses per side including the grievant and investigating officer. In other words, if two witnesses are used, you don't get an extra slot in using the investigating officer also, nor an extra slot for the grievant. They must be part of the witness aggregate, two for each side and the two must include, on one side, the

investigating officer, and, on the other side, the grievant, if either of the people are called. It is clear from the reading that is the case, but the clause does not demand that the investigating officer be used, nor that the grievant testify. The language of the contract is void of such mandate.

An arbitrator must be careful not to legislate language in his interpretation of the meaning of the words on the written page. While an arbitrator may fill a gap, while an arbitrator may interpret, the arbitrator must be careful to determine what the written words are, not what they should have been.

While I am finding in favor of the employer in this regard, I might indicate to the employer that it is necessary to use the best evidence in the presentation of a grievance. Using the keeper of the record to determine what the record of an investigation is, is far less important than the use of an investigating officer in determining what the record is and what he meant to say at the time of his writing his investigative report. A hearing officer of that mini arbitration would be looking for the writer, not the keeper.

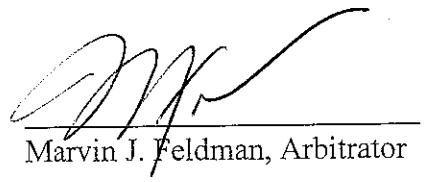
I forewarn the employer that it may be detrimental to their case to present the keeper of the record rather than the writer of the record.

It is clear that, in this particular case, the union sought to make it mandatory, upon the

employer to produce the investigating officer. The words of the contract clause do not make it mandatory in the manner that the union believed. However, the best witness rule best apply in the presentation of a matter.

IV. AWARD

Grievance denied for grounds stated.



Marvin J. Feldman, Arbitrator

Made and entered
this 24th day
of April 2008.

VOLUNTARY ARBITRATION PROCEEDINGS
GRIEVANCE NO. 15-03-080129-0007-04-01

THE STATE OF OHIO, HIGHWAY PATROL	:	
The Employer	:	
	:	FIRST SUPPLEMENTAL
and	:	OPINION AND AWARD
THE OHIO STATE TROOPERS ASSOCIATION, INC.	:	
The Union	:	

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A clarification by the union was sought on the initial award rendered in this matter under date of April 24, 2008. Since a retention of jurisdiction was not reserved by the arbitrator, the arbitrator had no jurisdiction to act. The employer conferred further jurisdiction on the arbitrator to decide the clarification request. The First Supplemental Opinion and Award is the answer to the union's request to clarify.

I have reread my notes, the Opinion and Award, the motion and response of the parties and find that the Motion for Clarification is not well taken. The Opinion and Award is clear and unambiguous on its face. A further clarification is not needed.

AWARD

Motion denied.

Marvin J. Feldman, Arbitrator

Made and entered
this 22nd day
of August 2008.