

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, Arbitrator
CASE# 15-03-20090205-0024-07-15

Grievant: Timothy Timberlake (transfer)

Principal Advocate(s) for the EMPLOYER:

Sergeant Anne R. Ralston
ODPS/OSHP
1970 West Broad Street, 2nd Floor
Columbus OH 43223

Principal Advocate(s) for the UNION:

Hershel M. Sigall, General Counsel
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INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement ("Agreement") (Joint Exh. 1) between the State of Ohio ("Employer" or "OSHP") and the Ohio State Troopers Association, Inc., Unit 1 and 15 ("Union"). That Agreement is effective from calendar years 2006 through 2009 and includes 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 umpires, pursuant to Article 20, Section 20.08 of the Agreement. A hearing on this matter was held on November 29, 2010 at 9:00 a.m. in Columbus, Ohio. The parties mutually agreed to that hearing date and location, and they were each given a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. The hearing, which was not recorded via a fully-written transcript, was subsequently closed upon the parties' submissions of closing briefs.

The parties have both agreed to the admission of four (4) joint exhibits. No issues of either procedural or jurisdictional arbitrability have been raised, and the matter is properly before the arbitrator for a

determination on the merits. The parties have also agreed to the statement of the issue to be resolved.

ISSUE

Did the transfer of Sergeant Michael Warner to the position of Criminal Patrol Supervisor for District 7 violate Section 30.03 of the Unit 15 labor agreement? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Section 30.03—Non-Field Transfers

BACKGROUND

The case before the arbitrator involves the selection of a Criminal Patrol Supervisor (a non-field position) to serve in District Seven of the Ohio State Highway Patrol (OSHP). There were a total of five sergeant applicants for the position. The position transfer was eventually awarded to a Sergeant Michael Warner, who the Employer determined was the most qualified candidate for the position. Sergeant Warner is also more senior than the Grievant. The Grievant in the instant matter, Timothy Timberlake ("Timberlake" or "Grievant"), who after not being selected for the position of Criminal Patrol Supervisor for District Seven sought the counsel of his Union because he believed he was the most qualified candidate.

The Union filed grievance number 15-03-20090205-0024-07-15 on behalf of Timberlake, alleging the Employer's violation of Section 33.03 of the Agreement. (Joint Exh. 1) Because the matter remained unresolved after passing through the preliminary stages of the grievance procedure, it has been submitted to the arbitrator for final and binding resolution.

SUMMARY OF THE UNION'S POSITION

The Union contends that the Grievant, a sixteen (16) year veteran of the Ohio State Highway Patrol was the most qualified candidate for the position of Criminal Patrol Supervisor for District Seven. The Union points to the Grievant's superior on-the-job experience that includes eight (8) years in drug interdiction and an instructor at the Academy on such topics as Search and Seizure and trends in drug interdiction.

The Union readily acknowledges the fact that Warner was more senior and was also well qualified for the position, but asserts that the Grievant was more qualified. The Union points to an Inter-Office Communication (IOC), dated December 24, 2008, that it claims was written by Major Christopher Minter, that pointed out Warner's lack of depth to some answers regarding the forfeiture process and his limited criminal patrol experience. The IOC went on to recommend Timberlake for the position. (Union Ex. 1) The Union further argues that a subsequent IOC was then written recommending Warner, and not Timberlake for the

position, raising suspicion as to the “carte blanche” nature of the selection process,

The Union concludes that based upon the totality of the evidence and testimony contained in the record, the Grievant should be awarded a Criminal Patrol Supervisor position with fifty (50) miles of his residence, as allowed by Article 31 of the Agreement.

SUMMARY OF THE EMPLOYER’S POSITION

The Employer argues that it complied with the Agreement in its selection of Sergeant Warner (hereinafter “Warner”) for the position of Criminal Patrol Supervisor for District Seven. The Employer avers that the language of Article 4, Management Rights and the language of Section 30.03 makes it clear that the Employer retains its rights to transfer employees and to determine qualifications of those it selects for transfer.

Article 4 can be found in Joint Ex. 1 and 30.03 states in pertinent part:

*“When the Employer determines that a vacancy in a non-field position be filled by transfer, the position shall be posted for seven (7) calendar days.....The Employer retains the right to determine and select the **most qualified** from among the bidders. If all qualifications and criteria are determined to be equal, seniority shall be considered for selection to the position” [emphasis added]*

The Employer acknowledges that its decision in this matter was not an easy one with both the Grievant and Warner being two well qualified candidates. And, the Employer readily acknowledged the fact that the

Grievant had more experience in drug interdiction than Warner. However, the Employer points out that Warner is more senior to Timberlake, had more time in-grade as a sergeant, has extensive knowledge in search and seizure and evidence handling cases and at the time of his candidacy had investigated far more cases (1, 354 cases) than the Grievant had investigated (730 cases). Of particular note, however, is the Employer's determination that Warner possesses superior communication skills to that of the Grievant and has had experience in establishing positive rapport with prosecutors' offices and local courts. The Employer placed added emphasis on this skill set, based upon past problems in this area that it felt needed to be rectified with the individual who would be chosen for this position.

Based on these claims, the Employer requests that the Union's grievance be denied in its entirety.

DISCUSSION

As the grieving party in this matter, the Union has the burden of proof to demonstrate by at least a preponderance of the evidence that the Employer's decision or action in denying the position of Criminal Patrol Sergeant to the Grievant was in fact in violation of the Agreement.

An established principle in labor arbitrations is that the party alleging a violation of a collective bargaining agreement bears the responsibility of proving by persuasive evidence that there has been a violation. There is no rigid formula stating the amount or degree

of evidence that is necessary to sufficiently prove a contract violation. An arbitrator should evaluate all of the circumstances surrounding the alleged contract violation and weigh the relative worth and relevance of all the evidence presented in relation to the terms of the collective bargaining agreement.

Am. Std., Paintsville, Ky. And United Steelworkers of Am., Local 7926, 05-2 Lab. Arb. Awards (CCH) P 3213 (Allen 2005).

Pursuant to the provisions of Article 30.03, the parties agreed in their negotiations that the "The Employer has the right to determine and select the most qualified among the bidders." (Emphasis added) (Joint Exh. 1, p. 33).

In addition to Article 4 of the Agreement, employer and employee rights of public employees in Ohio are also identified in Ohio Revised Code § 4117.08, which lists areas that remain the exclusive right of a public employer unless a public employer agrees otherwise in a collective bargaining agreement. *Lane v. Cincinnati Civil Serv. Comm'n*, 122 Ohio App. 3d 663, 671 (1977). Specifically, the Public Employees' Collective Bargaining law in § 4117.08 recognizes the Employer's rights to:

- (2) Direct, supervise, evaluate, or hire employees;
- (3) Maintain and improve the efficiency and effectiveness of governmental operations;
- (4) Determine the overall methods, process, means or personnel by which governmental operations are to be conducted;
- ...
- (8) Effectively manage the work force;

The Employer has clearly retained those vested management rights so long as its exercise of its discretion is not unreasonable, arbitrary, or capricious, or motivated by improper means. *Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264*, 115 LA 190 (Landau 2001).

Arbitrary conduct is not rooted in reason or in judgment but is irrational under the circumstances. It is whimsical in character and not governed by any objective standard or rule. An action is described as arbitrary when it is without consideration and in disregard of facts and circumstances of a case and without a rational basis, justification, or excuse. The term "capricious" also defines a course of action that is whimsical, changeable, or inconstant.

City of Solon and Ohio Patrolman's Benevolent Ass'n, 114 LA 221 (Oberdank 2000).

The Employer does have the right to establish reasonable, acceptable thresholds of skills and abilities to determine which applicants or bidders do qualify for a job. *Dunlop Tire Corp. and United Steelworkers of Am., Local 915*, 99-1 Lab. Arb. Awards (CCH) P 5462 (Heinsz 1998) However, "[w]here contracts make the employer the sole judge, in determining the fitness and the ability of employees for bid positions, management's actions must not be capricious, arbitrary, or unreasonable." *Hussman Corp. and United Steelworkers of Am., Local 9014*, 84 LA 23 (1984).

In this specific case, the Employer clearly provided all candidates with full information regarding the qualifications it deemed to be critical

for success in the Criminal Patrol Supervisor position. In addition to the employer's right to determine the qualifications of all job bidders is the corollary management right that permits the employer to establish the standards and qualifications for each job to be performed. *United Textile Workers of Am., AFL-CIO, Local No. 231 and Wilson Sporting Goods Co.*, 94-1 Lab. Arb. Awards (CCH) P 4173 (Hart 1993). "Unless it can be shown that the Union has negotiated a restriction upon the right of the employer to establish reasonable qualifications, the right of the employer to do so should not be restricted." AAA Case No. 54 30 1720 72 (Jones 1973).

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

The Union in this matter was unable to meet its burden of demonstrating that the Employer's decision in not awarding the Criminal Patrol Supervisor position to the Grievant was, in fact, done in violation of the Agreement. Arbitrators generally have recognized that management has broad authority and discretion to control its operations, provided that, in exercising that authority, it does not abuse its discretion and, by so doing, violate any of the individual or collective rights of the employees

under a collective bargaining agreement. *PACE Locals 7-0087/96 and Kimberly Clark Corp.*, 01-1 Lab. Arb. Awards (CCH) P 3725 (Knott 2001).

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

Municipality of Anchorage (Alaska) and Int'l Ass'n of Fire Fighters, Local 1264, 115 LA 190 (Landau 2001). "While it is not an arbitrator's function to second-guess management's determination as to a grievant's qualifications, he does have an obligation to make certain that a determination was reasonably fair and non-arbitrary." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 1, Local 1699*, 92 LA 1209 (2002).

Although the Employer recognized that both Timberlake and Warner were qualified for the position in question, the Employer made the judgment that in terms of supervisor experience in grade and a very good track record in establishing relationships with local prosecutors and courts. Warner was the most qualified candidate. Warner was the more senior candidate in this matter, raising the standard of proof for the Union to have to convincingly demonstrate that Timberlake's candidacy was superior to Warner's candidacy.

After carefully considering all of the evidence submitted into the record and after reviewing the parties' respective arguments, the

arbitrator concludes that the Employer complied with the Agreement in its selection of Warner over the Grievant for this particular position. The Agreement clearly states: *"The Employer retains the right to determine and select the most qualified from among the bidders. If qualifications and criteria are determined to be equal, seniority shall be considered for selection to the position."* The evidence in the record here supports the legitimacy and reasonableness of the Employer's decision.

The record indicates that following the completion of a lengthy questionnaire, the candidate interviews were conducted by Staff Lieutenant Mark Evans and Lieutenant Scott Demmitt. The Union case in substantial part relied upon the content of Union Ex. 1, the IOC recommending Timberlake for the position and the questionable nature of the subsequent IOC, Union Ex. 2, which recommended Warner for the position. However, during the hearing Major Christopher Minter provided convincing testimony that he did not recognize Union Ex. 1, nor did he author it, or approve it. He also testified that he did not approve Union Ex. 2 and that it did not contain his recommendation. Subsequent testimony by Captain George Williams, and Lieutenants Demmitt and Evans, established that Union Ex. 2 was authored by Captain Williams as a recommendation for the selection of Warner and Union Ex. 1, authored by Lt. Demmitt, was an initial draft that was subject to further investigation of the candidate Timberlake's experience on the job, particularly as it

related to communications with prosecutors. Additional evidence to suggest Union Ex. 1 was anything more than an initial draft subject to further review was not placed into the record. Based upon the sum of the testimony regarding Union Ex. 1 and Union Ex. 2 there is insufficient evidence to substantiate the Union's implications regarding arbitrary or "carte blanche" conduct on the part of the Employer.

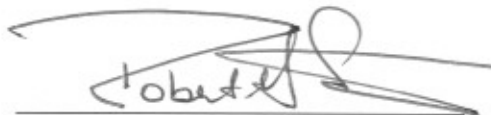
The testimony by both the Union's witnesses and the Employer's witnesses and the evidence in the record support a legitimate operation concern expressed by the Employer to select a candidate for the position of Criminal Patrol Supervisor who in addition to being qualified, demonstrated particular interpersonal skills and was an effective communicator who, based upon past experience, possessed the skills to improve the relationship between the OSHP and local law officials. From the information submitted into the record, it appears both Timberlake and Warner displayed particular, but different areas of strength. As pointed out by the Union, Timberlake has considerable experience in drug interdiction and was an instructor at the Academy regarding this subject. Warner had particularly strong communication skills, and had considerable investigation experience. After a careful review of all the evidence and testimony, I concur with testimony of Captain Williams that "...this was a close call between two qualified candidates." And in making that call, the Employer, through the introduction of evidence and

testimony in the hearing, demonstrated that it made its decision to select Warner after it took the additional reasonable step of researching each candidate's past performance as it related to communication effectiveness. Based upon the fact that communication skills were specifically identified in the Job Posting the arbitrator in this matter finds the Employer's actions did not violate the Agreement.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 18th of February 2011.

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

Robert G. Stein, Arbitrator