

**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**FRATERNAL ORDER OF POLICE, OLC, INC.**

**AND**

**THE STATE OF OHIO, STATE UNIT 2, O.I.U.**

**Before: Robert G. Stein, Arbitrator**

**Grievance: Class Action  
Issue: Classification Review**

**Advocate for the UNION:**

**Paul Cox, Chief Legal Counsel  
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**Advocate for the EMPLOYER:**

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## INTRODUCTION

This matter came on for hearing before the arbitrator pursuant to the collective bargaining agreement (“Agreement”) (Joint Ex. 1) between the State of Ohio (“State” or “Employer”) and the Fraternal Order of Police, O.L.C, Inc. (“FOP” or “Union”). The Agreement which ran from 2009 through 2012 was in effect and includes the conduct which is the subject of the grievance under review herein.

Robert G. Stein was mutually selected by the parties to arbitrate this matter in compliance with the Agreement. A hearing was conducted at the offices of the Office of Collective Bargaining in Columbus, Ohio. The parties mutually agreed to a hearing date and location, and they were each provided with a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions.

The hearing, which was not recorded via a written transcript, was subsequently closed upon the parties’ submission of briefs. No issues of either procedural or jurisdictional arbitrability have been raised, and the parties have stipulated that the matter is properly before the arbitrator for a determination on the merits. The parties have also stipulated to the statement to be resolved in this matter and to the submission of three (3) joint exhibits. They include the Agreement, specifically Section 65.03, the Point Factor Manual (Joint Ex. 2), and the Classification Review Report (Joint Ex. 3). The parties made the additional stipulations:

- The FOP agrees with DAS (Department of Administrative Services) on the point factor assignment of all factors with the exception of Personal Contacts, Worker Characteristics, and Safety of others.
- The FOP disagrees with the salary survey comparables and DAS use of the salary survey in establishing the salary range.

## **ISSUE**

The parties agreed to the following statement of the issue to be resolved:

Did the classification review conducted by DAS on the Enforcement Agent classification result in a proper salary range assignment? If not, what shall the remedy be?

## **RELEVANT CONTRACT PROVISIONS**

Article 20    Grievance Procedure

Article 36    Section 36.05

Article 65    Section 65.03

## **BACKGROUND**

In 2009 the FOP requested a classification review for bargaining unit members who hold the classification of Enforcement Agent in the Ohio Investigative Unit (O.I.U.). Said request was made in accordance with the provisions contained in Section 65.03 of the Agreement. The dispute in this matter centers upon the claim of the FOP that the Department of Administrative Services (DAS) Office of Workforce Administration's Classification and Compensation section erred in its review and analysis of the classification of Enforcement Agent (Agent), resulting in the improper placement of the Enforcement Agents from pay range 11 to pay range 12. Using the Jacob Classification System DAS assigned a total of 82 points to the Agent classification, which kept the position in pay range 11. The Agreement provides the FOP with the right to appeal a classification review through the grievance procedure if it disagrees with the analysis, conclusions, and placement of the Enforcement Agents by DAS. The FOP disagreed with the DAS analysis and point factor assignments in the three areas: (A) Work Characteristics ("WC"), (B) Personal Contacts ("PC"), and (C) Safety of Others ("SO"). The FOP argued that DAS

underrated the classification of Agent by 4 points in the category of WC, by 6 points in the category of PC, and by 3 points in the category of SO. (Union brief, p. 1) As previously stated DAS rated the Agent position at 82 points and in order to move to pay range 12 the position must obtain a minimum point factor rating of 92 points.

Because the issue remained unresolved through the grievance procedure, it has been submitted to arbitration under the provisions contained in Article 20 of the Agreement.

### **SUMMARY OF THE UNION'S POSITION**

The Union's basic argument is that the Employer failed to properly assess and assign points to the classification of Agent when it conducted a review of the classification in 2011. The FOP argues that Article 65.03 of the Agreement requires the State to review the classification based upon "duties, responsibilities, education, and/or experience, certification and/or licensure, and working condition factors. Additionally, Article 65.03 provides that the review shall be based upon Position Description Questionnaires (PDQ's) of the affected employees. The FOP cites the testimony of its expert witness, Brenda Goheen, who it asserts was trained in the Jacobs Classification system and has extensive experience with point factoring. According to the testimony of Ms. Goheen, the DAS did not appear to take the PDQ's into consideration, undermining the accuracy of the analysis. The FOP points out that noticeably absent from the hearing was any testimony by Mr. Webb and Mr. Lucas, who conducted the audit and were responsible for examining the PDQ's. The only management witness was Mr. Audet, who stated that he did not conduct the review, but only reviewed the study in preparation for the arbitration. "Without so much as an offer of proof from the

Employer, there is **NO EVIDENCE** upon which to base the inference that the decision of DAS is entitled to deference in this matter”, argues the Union.

The three categories in which the Union is challenging the point factoring totals by the State in the classification review of Agents are: (A) Worker Characteristics (WC) (4 point difference), (B) Personal Contacts (PC) (6 point difference), and (C) Safety of others (SO) (3 point difference). A complete articulation of the Union’s specific arguments regarding each of these categories can be found in its brief and in the evidence and testimony presented at the hearing. However, in summary the Union avers that in regard to WC, the Agents write and edit a variety of scientific or technical materials, requiring them to possess knowledge of business accounting, computer science, various areas of the law, etc. In regard to PC, the FOP argues that because Agents must work with confidential informants, that often places them in very dangerous and very difficult situations. They also must work with a variety of other agencies, prosecutors, as well as the public, who present their own sets of professional and personal challenges. Finally, in regard to the category of SO, Agents perform work that can result in injury to themselves, informants, and other members of the public, where perpetrators are frequently impaired, intoxicated or are under the influence of illegal substances. The FOP points out that Wildlife Officers are rated a degree 3, based upon their training in the use of firearms, training which is similar if not identical to what Agents receive. The FOP asserts that Agents, who are also armed and similarly trained in firearm proficiency, should receive at least the same point factor in this category. The FOP also points out that the comparable salary data offered by the State, albeit sparse, supports the Union’s case in this matter, with the top salary in each of the states considered being higher than what is paid to Agents in Ohio.

In summary the FOP characterizes the State's actions in this matter as "careless, unreasonable and not objectively applied," and asserts that the State failed to consider the PDQ's and erred in its assignment of point factors in three areas that if properly analyzed would have justified placement of the Agent classification in pay grade 12.

As its proposed remedy, the Union requests that its grievance be granted.

### **SUMMARY OF THE EMPLOYER'S POSITION**

The Employer points out that in this matter Agents were assigned a total of 82 factor points placing them in a pay grade 11. In order for Agents to achieve a pay grade 12, they must have a minimum of 92 points per the Jacobs Model. In the three factors that are in contention in this case: WC, PC, and SO, the difference between the Employer's position and the Union's position on the three factors are WC +4, PC +6, and SO +3, which result in a 13 point difference between DAS's analysis and that of the FOP. The Employer argues that setting compensation rates for classifications is based upon both objective and subjective criteria and is "not an exact science." It contends that DAS must be given the "presumption of correctness" in this matter due to the fact there was no evidence presented that DAS, other than having a differing judgment on three factors out of a total of thirteen, violated its own process and "committed some gross error" in its analysis.

A comprehensive articulation of the Employer's specific arguments regarding each of these categories can be found in its brief and in the evidence and testimony presented at the hearing. However, in summary the Employer argues that in regard to SO, the difference between degree 2 (which as assigned by DAS) and degree 3 (which the Union argues should

have been assigned) is a matter of responsibility for the Safety of others. It contends that although Agents have considerable responsibility, supervision has a greater overall responsibility. In regard to WC, the Employer argues that this category relates to what a candidate for employment must have completed prior to becoming an Agent, and not what they are expected to learn on the job. In a previous point factoring of the classification of Agent performed in 1999, Agents were required to complete a two year undergraduate core program in criminology or related social or behavioral science, but this classification specification requirement was amended by the parties (Management Ex. 1) to only require a High School Diploma or GED. It contends that DAS lowered the point factor from a Degree 9 to a Degree 8 because of this change and because the “expertise required in the Worker Characteristics” was developed after and not prior to employment. In regard to PC, the Employer in summary argues that a degree 4 (which was awarded by DAS) is appropriate here rather than a degree 5 because an Agent while having to handle and/or manage **difficult** personal relationships he/she does not have the level of responsibility for personal contacts that are addressed in degree 5. Moreover, the Employer points out that a degree 4 is also what a Wildlife Officer has as a rating regarding this factor thereby “keeping the internal equity.” Finally, in regard to SO, the Employer argues that while an Agent has considerable responsibility for safety and health of others, the Agent in charge would have a higher level of responsibility consistent with a degree 3 rating. Moreover, the Employer points out that DAS may have erred in 1999 and was overly generous when it then rated this factor as a degree 3, instead of the degree 2 DAS gave it in the instant case. The Employer, in regard to the market data points out that the language of Section 65.03 “merely requires that DAS combine salary

survey data to determine the appropriate salary range.” It does not require DAS to gather data, it simply states DAS “may also gather” comparable data. The Employer emphasizes that internal equities are “more important than perceived external equities.”

Based on the above assertions, the State requests that the Union’s grievance be denied in its entirety.

## **DISCUSSION**

The issue in this matter focuses on three factors of a classification review conducted on the classification of Enforcement Agent in Unit 2, represented by the FOP. There was no substantial evidence or testimony to demonstrate DAS failed to follow its own procedures in the conduct of this classification review. Furthermore, the arbitrator finds that the state complied with the provision of Section 65.03 which in pertinent part state:

*“The classification review shall be combined with salary survey data to determine appropriate salary range assignment.”*

Based upon the content of Report and Recommendations of the Office of Workforce Administration/DAS, the arbitrator finds the State sent out data requests to fourteen states and only four states responded to the survey and four states were utilized based upon cost of living. (Joint Ex. 3) While a greater sample size may provide more meaningful data, the general requirements contained in Section 65.03 regarding the inclusion of salary survey data were complied with by the DAS, and from the evidence it appeared DAS made a good faith effort to obtain a larger sample size. Therefore, the arbitrator finds DAS did not violate the agreement in its use of comparative data regarding the classification review of Agents. However, the Union, particularly through the testimony of Union witness, Brenda Goheen, raised considerable doubt



about the thoroughness and completeness of DAS's reliance upon Position Description Questionnaires or PDQs.

The presence of the individual DAS employees who actually conducted the classification review at the hearing certainly may have shed light on the findings in this matter, and either party could have subpoenaed these individuals to be present at the hearing. In a prior case involving SEIU the arbitrator indicated DAS should be given deference as to its expertise. This is still the case, providing the Employer can demonstrate that the individuals who conducted the review carefully, consistently, and reasonably adhered to DAS defined procedures in a non-arbitrary fashion and providing the provisions of the collective bargaining agreement language addressing this matter were not violated. Therefore, consideration of whether the PDQ's were or were not reasonably considered in the analysis could not be readily substantiated by the Employer, and therefore, Ms. Goheen's testimony must be considered in reviewing the three factors in question in this case. The arbitrator can only base his award on what is in the record, and based upon a careful review of the evidence and testimony the arbitrator in this matter finds the Union provided convincing evidence and testimony to upgrade the factors of Safety of Others and Personal Contacts, but did not provide sufficient evidence and testimony to overturn the classification review and findings of DAS regarding Worker Characteristics.

(A) **Worker Characteristics:** The parties agreed to reduce the entry level requirements for the position in March of 2009, dropping the minimum requirements of the completion of an undergraduate core program in criminology and substituting a high school diploma or GED. This change is a distinction with a difference in terms of the requirements for being

employed in the position. The introduction to the factor of Worker Characteristics reads as follows:

*Refers to the requirements to read and/or hear and understand instructions; to interpret the meanings involved in a range of material and to take actions accordingly; to use numbers and mathematical concepts; to apply physical dexterity to the operation of equipment; and to possess skill or technical knowledge.*

*The determinants of the degree is based upon the extent and complexity of the concepts interpreted, the field of knowledge being applied, the problem being solved or the equipment operated.*

In consideration of the above, the dropping of the previous undergraduate core curriculum requirement to a High School Diploma or GED, lowers the qualifications for employment and reasonably impacts the degree rating of the position. Degree 9 under this factor states:

*General knowledge of an undergraduate core program of a field of study; basic knowledge of trigonometry, calculus, or statistical analysis; able to define problems; collect data, establish facts and draw valid scientific or technical conclusions; able to write and/or edit a variety of scientific or technical materials.*

The degree 8 level reads:

*Able to define problems, collect data, establish facts and draw valid conclusions; able to comprehend a variety of technical material (e.g. books, periodicals, manuals); able to write and/or edit a variety of materials; basic understandings of algebra and geometry; ability to operate a variety of machines, tools or equipment requiring extensive physical dexterity and/or considerable formal training in their operation.*

The conclusions reached by DAS indicated that without the completion of an undergraduate core curriculum in criminology as a minimum requirement for employment into the classification of Agent, the degree 8 level was more appropriate than the degree 9 level. While an associate's degree or even a bachelor's degree in criminology is no guarantee that an individual will make a good

Agent, a candidate for employment who took his/her coursework seriously in earning an associates" degree has demonstrated sufficient discipline and ability to independently complete a curriculum, bringing with it formal exposure to core criminal course work and elective course work that theoretically improves critical thinking, writing skills, discipline, organizational skills, communication skills, and exposes individuals to psychology or sociology as a matter of expanding their understanding of human behavior. The arbitrator concurs with the Employer's position that there is insufficient evidence to determine that DAS erred when they assigned degree 8 instead of degree 9 in their classification review.

(B) **Personal Contacts:** The difference between the parties regarding this factor appears to boil down to the difference between dealing with "difficult personal relationships" and "very difficult personal relationships." It is also noted that in viewing Appendix B of the 1999 (Union Ex. 7) vs Appendix B of the 2011 classification review recommendations (Joint Ex. 3) different traits are listed. In the 1999 rating, which garnered a degree of 4 and a point factor of 8 it states:

*"Handles difficult personal relationship when making arrests or issuing situations; establishes and maintains positive working relationship with other enforcement agencies and educates public, law enforcement officers & government personnel on liquor control and food stamp laws and procedures"*

In the 2011 rating, which garnered the same degree 4 and point factor of 8 it states:

*"Works with other enforcement agencies & educates the public, law enforcement officers & government personnel. Works with the court system & makes difficult public arrests."*

I concur with the FOP's findings that DAS, while emphasizing contact with court, other agencies and the legal system, ignored or missed the central importance of

covert work performed by Agents, which in substantial part involves extensive work with informants and making arrests while undercover. This is some of the most dangerous and psychologically hazardous work that any law enforcement officer can perform. I do not agree with the Employer that Agents are in a position of power over informants thereby lessening the difficulty of the relationships that must be established. The essence of working undercover is developing relationships and then betraying them. Working with informants is a highly unpredictable and dangerous undertaking that requires being accepted as a criminal, thinking like a habitual offender, with the knowledge that one mistake could place an Agent, the informant and others in serious danger. At a minimum, working with informants in an undercover capacity is frequently relied upon and is nothing less than very difficult and dangerous work. (Union Exs. 5 and 6) The psychological toll that results from undercover work on Agents and their families has been the subject of many studies and in a study of 271 federal undercover agents, it was found that the duration of the undercover experience increased rates of self-reported alcohol and drug use. (Gordio, M (1991) "Drug Corruption in Undercover Agents: Measuring the Risk", *Behavioral Sciences and the Law*, Vol 9, pp. 361-370)

It is also noted that in this factor, Wildlife Officers received a degree factor of 4, which is the same as the Agents were rated. (Union Ex. 8) And, while there may be some similarities in dealing with other law enforcement agencies, the determination of the degree according to the DAS Point/Factor Evaluation Manual is:

*“...based on the extent, frequency and regularity of establishing and maintaining contacts; the purpose and importance of contacts; and the importance of resulting actions and the level or importance of persons contacted....” (Joint Ex. 2)*

The evidence supports the FOP’s position that Agents manage and must frequently and regularly rely upon personal contacts with informants that can only be reasonably categorized as “very difficult relationships.” The evidence demonstrates that DAS did not reasonably consider the PDQs in its rating of this factor.

**(C) Safety of Others:** The DAS Point/Factor Evaluation Manual states under this factor:

*“The determination of the degree and the point rating for safety of others responsibility is based upon the kind and extent of care which must be exercised and the probability and severity of accidents attributable to carelessness or negligence of the employee, presuming that others are exercising reasonable prudence in the interest of their own safety, and on the amount of responsibility for supervision of others in carrying out this responsibility.” [emphasis added] (Joint Ex. 2)*

The evidence demonstrates that in 1999, DAS determined that the degree under this factor should be a 3, which resulted in 6 points being assigned. (Union Ex. 7) In 2010 DAS gave the same degree rating of 3 to Wildlife Officers (Union Ex. 8) The Employer argues that DAS “may have erred on the side of generosity in 1999 in assigning its degrees at that time.” (Employer brief, p. 2) However, the arbitrator finds no evidence of error and in fact the Employer supports DAS’s 1999 findings regarding the factor of Personal Contacts and stresses the importance of “internal equity.” (Employer brief, p. 5) Independent of these arguments, the arbitrator concurs with the FOP’s argument that the PDQ results clearly demonstrate that the convert undercover status of Agents requires them to be responsible for their confidential informants (CI), partners, patrons, and the public. (Union Ex. 2, binder) As previously

established, this work is often unpredictable and dangerous and involves maintaining the safety of CIs, partners and the public in settings where it is not uncommon for people to be under the influence of alcohol or drugs. Moreover, undercover work often does not have the accompanying security of radio contact, visible police back-up, and does not benefit from any deterrent effect that can accompany a uniformed presence. The arbitrator finds that the totality of the evidence supports the FOP's position that the degree assignment should be a 3, which is the same rating that is assigned to Wildlife Officers. Once again, the arbitrator finds that in rating this factor, DAS did not reasonably base its determination on the PDQs as required by Article 65.03.

## **AWARD**

The grievance is granted and the FOP's position is granted regarding the degree and the number of points that should have been awarded under the factors of Personal Contact and Safety of Others. Therefore, under Personal Contacts the degree shall be changed to degree 5 (+ 6 points) and Safety of Others shall be changed to a degree 3 (+ 3 points).

The grievance is denied and the Employer's position is granted regarding the degree assigned by DAS under the factor of Worker Characteristics.

Respectfully submitted to the parties this 5<sup>th</sup> day of December, 2012,

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

**Robert G. Stein, Arbitrator**