

IN THE MATTER OF ARBITRATION BETWEEN

OHIO STATE TROOPERS ASSOCIATION

AND

STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY

DIVISION OF HIGHWAY PATROL

Before: Sarah Rudolph Cole

Case No. 15-03-20100315-0024-07-15

Grievant: Eric Short

Union Advocate: Elaine N. Silveria

Ohio State Troopers Association

6161 Busch Blvd, Suite 130

Columbus, Ohio 43229

Employer Advocate: Lt. Heidi Marshall

Ohio State Highway Patrol

1970 Broad Street

Columbus, Ohio 43223

Pursuant to the Collective Bargaining Agreement (CBA) between the State of Ohio, Department of Public Safety (Employer) and the Ohio State Troopers Association (Union), and in conformance with Article 20, Section 20.08 (8) of the CBA, the parties agreed to submit Sergeant Eric Short's grievance to arbitration. The parties waived a hearing on the grievance and, instead, submitted fact stipulations, documents and briefs to the arbitrator for consideration.

Issue: The parties agreed to submit to arbitration the following issue: Did the promotion of Trooper Molly Clemens to the GHQ/NW OH AIU Sergeant position violate Section 30.03 of the Unit 15 labor agreement. If so, what shall the remedy be?

Relevant Contract Provisions

Article 4 – Management Rights: The Union agrees that all of the function, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.

Accordingly, the Employer retains the rights to: 1) hire and transfer employees, suspend, discharge and discipline employees; 2) determine the number of persons required to be employed or laid off; 3) determine the qualifications of employees covered by this Agreement; 4) determine the starting and quitting time and the number of hours to be worked by its employees; 5) make any and all rules and regulations; 6) determine the work assignments of its employees; 7) determine the basis for selection, retention and promotion of employees to or for positions not within the bargaining unit established by this Agreement; 8) determine the type of equipment used and the sequences of work processes; 9) determine the making of technological alterations

by revising the process or equipment, or both; 10) determine work standards and the quality and quantity of work to be produced; 11) select and locate buildings and other facilities; 12) transfer or sub-contract work; 13) establish, expand, transfer and/or consolidate, work processes and facilities; 14) consolidate, merge, or otherwise transfer any or all of its facilities, property, processes or work with or to any other municipality or entity or effect or change in any respect the legal status, management or responsibility of such property, facilities, processes or work; 15) terminate or eliminate all or any part of its work or facilities.

Article 21 – Work Rules: The Employer agrees that existing work rules, and directives shall be reduced to writing and be made available to affected employees at each work location. To the extent possible, new work rules and directives shall be provided to the Union two (2) weeks in advance of their implementation. In the event that the Union wishes to present the views of the bargaining unit regarding a new work rule or directive, a time will be set aside at the regularly scheduled Labor/Management Committee meeting. The issuance of work rules and directives is not grievable. The application of such rules and directives is subject to the grievance procedure.

Article 30.03 – Non-Field Transfers: For the purpose of this Agreement, a "Non-Field" position is defined as any sergeant's position other than those assigned to one of the fifty-five (55) Patrol Post installations located throughout the state that work in a continuous (round the clock) operation. A District Headquarters position is not considered a "Field" position.

When the Employer determines that a vacancy in a non-field position shall be filled by transfer, the position will be posted at all Highway Patrol facilities for a period of seven (7) calendar days. The posting will include the specific qualifications and criteria required of the position. Any sergeant who meets the specific qualifications and criteria may bid for the

position. 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.

If the above transfer results in a vacancy in another non-field position, the Employer shall survey the "active transfer file", to determine if any incumbent is interested in filling the position. If so, the Employer may select from the most qualified of the members with active transfers in file. If all qualifications and criteria are determined to be equal, seniority shall be considered for selection to the position. If this process fails to fill the position, the Employer shall post the vacancy as noted above if the decision is made to fill the position by transfer.

If the above transfer(s) results in a vacancy in a field position, the Employer may fill any new field position vacancy created by this initial transfer in accordance with Section 30.09(B)(2) above.

The Employer may involuntarily reassign bargaining unit members in non-field positions to a field or other non-field position for just cause. Any transfer initiated by the Employer for this purpose shall not result in the transferred employee having to relocate.

The Employer agrees to establish specific qualifications and criteria for the selection of sergeants to non-field positions. Where specialized training is required to meet the criteria for these non-field positions, the opportunity for training, if offered or paid for by the Employer, will be posted at all Highway Patrol facilities for a period of seven (7) calendar days. The specific qualifications and criteria for selection will be included in the posting.

Any sergeant who meets the specific qualifications and criteria for the training opportunity shall have a right to bid for the training. Selection of the person to receive the

training will be based on seniority from among those bidders who meet the qualification and criteria requirements.

Factual Background

Eric Short, the Grievant, is a Sergeant in Unit 15, a bargaining unit that includes Highway Patrol Sergeants. Sergeant Short began working for the Ohio State Patrol on June 25, 1993 and was promoted to sergeant on October 5, 1998. He has held assignments at the Milan and Sandusky Posts. In 2010, the Employer created four regional Administrative Investigation Unit (AIU) positions, located in the Northeast, Northwest, Southeast and Southwest areas of Ohio. Each AIU includes a Staff Lieutenant, Lieutenant, and four sergeants. The Employer intended to fill the AIU position at issue with an employee who had attained the rank of sergeant. This position is a non-field position. Responsibilities of this position include conducting administrative investigations and complaint investigations involving officers accused of policy, procedure, rules and regulations violations. An employee serving in this position also reviews all patrol car crashes and cases involving response to resistance, to ensure that patrol officers follow appropriate guidelines. Officers selected to this position must demonstrate comprehensive knowledge of rules, procedures, regulations and policy, as well as the ability to conduct investigations and interviews. Finally, these officers must have strong written and interpersonal communication skills.

Rather than post the Northwest AIU position as open for a transfer, the Employer decided instead to fill the post through promotion. At the time the Employer announced the promotional opportunity for the Northwest AIU position (Joint Ex. 4), the Grievant was a sergeant assigned to the Sandusky post, had twelve years' experience as a field supervisor, and had an active transfer

request on file for the Northwest AIU position. The Employer filled the Southwest area position through transfer rather than promotion. The Employer placed Sergeant Molly Clemens in the Northwest AIU position. The Employer hired Sergeant Clemens on April 2, 1999 and promoted her to sergeant on March 17, 2010. Sergeant Clemens has held assignments at the Medina and Ashland Posts, and has also worked as an instructor at the Training Academy and Employee Development Unit.

Union Position

The Union contends that the Employer violated the CBA when it posted the AIU position as a promotional opportunity rather than posting the position for transfer. The Union emphasized that the Grievant's extensive experience as a sergeant, a position of great stature and importance, qualifies him for the Northwest AIU position. By comparison, the Union states, Sergeant Clemens has no supervisory experience and no experience conducting administrative investigations. Both of these skills, which the Grievant developed during his twelve years as a sergeant are, the Union argues, essential to successful performance in the AIU position.

The Union argues that the CBA does not provide the Employer with the discretion to fill non-field positions by promotion. Based on the Union's interpretation, the Employer should have moved the Grievant into the position, rather than Sergeant Clemens, because he has greater seniority. In addition, the Union contends that the Employer's decision to fill some of the AIU positions by transfer and some by promotion violates Article 21 of the CBA, which requires uniform application of work rules. The Union acknowledges that the CBA language at issue in this grievance has been at issue in two previous grievances (*Dolak* and *Ebie*, joint exhibits 2 and 3). In these grievances, the arbitrators held that the Employer had the right to use promotion

rather than transfer to fill positions and, under those circumstances, to make the decision based on factors other than seniority alone. The Union emphasizes that those decisions should have no precedential value in this case because those disputes were decided 15 and 9 years ago, respectively, and that arbitral decisions do not have precedential effect. Moreover, the Union states, those decisions involved promotions into different types of positions and promoted troopers with much more experience when compared to the grievants in those cases than Sergeant Clemens has, in comparison to the Grievant, in this grievance.

Employer Position

First, the Employer argues that the grievance is not procedurally arbitrable because the Grievant failed to submit his Step 1 grievance in a timely manner. Under CBA Section 20.07, an employee with a grievance must notify his immediate supervisor within fourteen days from the date when the grievant knew or should have known of the event giving rise to the grievance. Here the Northwest AIU position was posted on February 25, 2010 and the posting stated that it was a promotional opportunity. The grievant did not, however, file his grievance until March 15, 2010, 18 days after he should have known the position was going to be filled by promotion rather than transfer. Thus, the grievance is untimely and therefore inarbitrable.

If it is arbitrable, the Employer emphasizes that this grievance involves a question of contract interpretation and that, as a result, the burden of proof lies with the Union. The Employer argues that the contract language permits the Employer to fill non-field positions by either promotion or transfer. According to the Employer, the language “[w]hen the Employer determines that a vacancy in a non-field position shall be filled by transfer . . .”, gives the Employer the discretion to fill the non-field position either by promotion or transfer. The

Employer emphasizes that the CBA does not address promotions and, thus, the right to decide how promotions should be made is an Article 4 Management Right. In addition, the Employer argues, its long-standing past practice is to fill some positions by transfer and others by promotion. Past arbitrators have upheld the Employer's right to make this decision using its discretion. Finally, the Employer asserts that Sergeant Clemens, the promoted trooper, is well qualified for the position. She has experience working with people, as well as providing and recommending training for employees with disciplinary issues. The Employer notes that it is irrelevant that Grievant might have performed the position better than Sergeant Clemens. The Employer had the discretion to decide how to fill the position and determined that Sergeant Clemens would be the best candidate for the job.

Opinion

The Employer bears the burden of proof on the first issue, whether the Grievant satisfied the procedures for filing his grievance in a timely manner. The Union bears the burden of proof on the second issue, whether the Employer violated the contract when it filled the Northwest AIU position through promotion rather than transfer, because it is matter of contract interpretation.

The first issue is whether the Grievant satisfied the procedures for filing his grievance in a timely manner. The Grievant did not violate CBA Section 20.07 when he submitted his Step 1 grievance 18 days after the Employer posted the position. The Employer's claim that the Grievant reasonably should have had knowledge of the event giving rise to the grievance when the position was posted as a promotional opportunity rather than as a transfer does not make sense. The posting of the position did not create a grievance. The grievant could not have

known that someone other than himself would receive the promotion until someone else actually did receive the promotion. To hold otherwise would encourage employees to file grievances before adverse decisions have been made, an outcome that would be inefficient and would result in a dramatic increase in the number of grievances filed. Thus, the grievance is timely as the clock did not begin to run on grievance filing until the grievant knew he was not chosen to fill the Northwest AIU position.

With respect to the second issue, the Employer did not violate the CBA when it promoted Sergeant Molly Clemens to the Northwest AIU position. When a collective bargaining agreement is clear and unambiguous on an issue, arbitrators follow the "plain meaning" doctrine, limiting their interpretation to the four corners of the document and barring the admission of all extrinsic evidence that may be in conflict with the language of the agreement. *See Atlas, Inc.*, 102 LA 69, 71 (Daniel 1993); *Stein Printing Company*, 103 LA 255, 262 (Byars 1994); *Bard Manufacturing Co.*, 92 LA 616, 619 (Daniel 1989). The arbitrator's goal in interpreting contractual language is to determine the parties' intent. Here, the plain language of the CBA indicates the parties' intent to permit the Employer discretion to use promotion or transfer to fill non-field positions. Article 30, Section 30.01 states, "When the Employer determines that a vacancy in a non-field position shall be filled by transfer . . ." This language anticipates that the Employer may decide to fill a position by transfer and, if so, must follow certain procedures. But, by the very words, the CBA anticipates that the Employer might fill the position in another way. As the Employer notes, the CBA does not address the issue of promotions. Thus, the only article relevant to determine whether the Employer has the discretion to make this choice is Article 4, the Management Rights provision. That provision reserves "all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and

business and the direction of its workforce, which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provisions of the Agreement are, and shall remain, exclusively those of the Employer.” Because the CBA does not alter the Employer’s rights regarding promotion, the Employer retains the right to decide if and how it will promote employees.

Even if the language were not plain, the parties’ past practices support the Employer’s contract interpretation. The parties stipulated that Major Teaford, who has worked for over ten years in Human Resources and has been on the Employer’s negotiating team for three contracts, would testify that the Employer’s practice is to use its discretion whether to promote or transfer when filling non-field positions based on the Employer’s needs. The parties also stipulated that the Employer makes reasonable efforts to rotate postings for promotion or transfer equitably. Supporting that assertion, the parties put forward evidence that from 2009 to the present, the Employer has transferred 58 people into non-field positions and promoted 20 people into specialty positions.¹ Thus, it would appear that the Employer maintains a long-standing and uncontested practice of using either promotion or transfer to fill non-field positions.

Finally, the Union argues that Article 21 requires uniform application of work rules and that the Employer’s use of discretion to fill non-field positions by transfer or promotion violates this Article. Moreover, the Union argues, the Employer has acted arbitrarily and capriciously in choosing to fill some positions by transfer and others by promotion. Article 21 states that “[a]ll work rules and directives must be applied and interpreted uniformly as to all members.” The

¹ The two arbitration decisions, *Ebie* and *Dolak*, (joint exhibits 2 and 3) offer further support to the Employer’s decision here. While not binding on the arbitrator in this case, that both arbitrators interpreted the same language of the contract that is at issue in the instant case in the same way, supports the decision in this case to uphold the Employer’s interpretation of the contract language. Moreover, the Union’s failure to negotiate different language to address what it perceives to be an ongoing issue suggests that it, in general, acquiesces in the practice.

management right to decide whether to fill a position by promotion or transfer is neither a work rule nor a directive. Thus, Article 21, requiring uniform application of work rules, is not applicable here.

The Union's argument that the Employer has acted arbitrarily and capriciously in exercising its discretion regarding promotions or transfers does not satisfy the Union's burden of proof because the Union provides no evidence that the Employer has, in fact, acted in an unreasonable or arbitrary manner. If anything, the evidence the parties submitted suggests the opposite conclusion. The Employer transfers employees into non-field positions well over twice as often as it promotes them into those positions. In the absence of proof that these decisions were unreasonable, this argument, too, must be rejected.

While Sergeant Short appears to be a very well-qualified and experienced sergeant, in light of the plain language of the contract and the parties' past practices, the Employer's decision to fill the Northwest AIU position with Sergeant Molly Clemens was within its discretion under the CBA.

Award

The grievance is denied.

Respectfully submitted to the parties this 11th day of February, 2013.

A handwritten signature in cursive script, appearing to read "SR Cole", is written over a horizontal line.

Sarah Rudolph Cole, Arbitrator