**OCB AWARD NUMBER: 2195**

|  |  |
| --- | --- |
| **SUBJECT:** | **ARB SUMMARY # 2195** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **DAVID LONG** |
| **OCB GRIEVANCE NUMBER:** | **15-03-20100315-0024-07-15** |
| **DEPARTMENT:** | **Department of Public Safety** |
| **UNION:** | **OSTA** |
| **ARBITRATOR:** | **Sarah Rudolph Cole** |
| **GRIEVANT NAME:** | **Eric Short** |
| **MANAGEMENT ADVOCATE:** | **Lt. Heidi Marshall** |
| **UNION ADVOCATE:** | **Elaine N. Silveria** |
| **ARGUED BY BRIEF:** | **1/23/2013** |
| **DECISION DATE:** | **02/11/2013** |
| **DECISION:** | **Denied** |
| **CONTRACT SECTIONS:** | **Article 4 – Management Rights** |
| **OCB RESEARCH CODES:** | **117.232 – Seniority Lists; 120.01 - Transfer; 119.01 – Promotions-Selection In General** |

**HOLDING: Grievance denied. The Arbitrator held that the Employer did not violate the CBA by choosing to promote Sergeant Molly Clemens rather than transfer Grievant, Sergeant Eric Short into the Administrative Investigation Unit (AIU) position.**

The Grievant was a sergeant with twelve years of experience at different posts as a sergeant. Grievant claimed that the Employer violated the CBA when it chose to post for promotion the newly created AIU rather than post the position as open for a transfer—as the Employer had done in other regions of the newly created AIU. Grievant claimed that he had more seniority than the individual promoted, Sergeant Clemens, and was more qualified for the position. Therefore, the Grievant believes he should have been transferred into the position instead.

The Employer claimed that the issue was untimely and not arbitrable as the grievance was filed 18 days after the Grievant should have known about the promotion posting. The Employer also argued that Article 4 of the CBA gives the Employer management rights to choose whether to fill a position by transfer or promotion—noting a long-standing practice of exercising this right and arbitrators upholding the right. Finally, the Employer argued that it was irrelevant if Grievant may have performed better as the Employer has discretion on how to fill the position.

The Union argued that the Employer should have transferred Grievant into the position because he had an open transfer request and the Employer improperly filled some AIU positions by transfer and others by promotion. While the Union acknowledges that there are existing arbitration opinions interpreting the CBA to allow the Employer to choose whether to transfer or promote, here the circumstances dictate that the decision should be based on seniority alone—noting that the other decisions involved promotions of individuals who had more experience than the grievants, unlike here. The Union also emphasized that arbitration decisions are not binding and the opinions were 15 and 9 years old.

First, the Arbitrator found that the grievance was timely and properly before the Arbitrator. To hold otherwise, would require the Grievant to know that someone else would receive the promotion and would encourage employees to file grievances before adverse decision had been made. The Arbitrator also found that the Employer did not violate the CBA by choosing to fill the AIU position through promotion rather than transfer. Looking at the plain language, the CBA provides, under Article 30, that other options besides transfer are available to the Employer: “*[w]hen* the Employer determines that a vacancy in a non-field position shall be filled by transfer. . . .” As the language anticipates the Employer might fill the position another way and the CBA does not limit the Employer’s rights with respect to promotion, Article 4 controls this situation. This plain language reading is supported by stipulated testimony that the Employer’s practice is to use discretion according to existing needs. As the Employer makes reasonable efforts to rotate positions for promotion or transfer equitably, the Employer’s long-standing and uncontested practice was not arbitrary or capricious.