

Decision and Award in the matter of Arbitration between:

State of Ohio, Department of Public Safety

And

**The Fraternal Order of Police/Ohio Labor Council, Inc.
Unit 2**

Case # 15-00-20120712-0066-05-02

Grievant: Mr. Steven Laird, Police Officer 2

E. William Lewis, Arbitrator

Hearing date:	December 6, 2012
Date Briefs received:	January 23, 2013
Date decision issued:	February 18, 2013

Representing the Employer:
Mr. Tyrone Reynolds
Labor Relations Officer 3
Ohio Department of Public Safety
1970 West Broad Street
Columbus, Ohio 3223

Representing the Union:
Mr. Paul Cox, Chief Counsel
FOP/OLC, Inc.
222 East Town Street
Columbus, Ohio 3215

By mutual agreement, the Hearing was commenced at 10:00am, on December 6, 2012. The Hearing was held at the Office of Collective Bargaining, Columbus, Ohio.

In attendance for the Union:

Mr. Paul L. Cox	Advocate, Chief Counsel
Mr. Joel Barden	Sr. Staff Rep.(retired)-FOP/OLC-witness
Mr. Richard Cruder	Police Officer 2-witness
Ms. Renee' Engelbach	Paralegal
Ms. Brenda Goheen	Staff Representative,FOP/OLC-wintess
Mr. Steven Laird	Police Officer 2-witness

In attendance for the State:

Mr. Tyrone Reynolds	Advocate, Department of Public Safety(DPS)
Ms. Jessie Keyes	Office of Collective Bargaining-2 nd Chair
Ms. Julianne Lee	Labor Relations Officer-DPS

The parties were asked to submit exhibits into the record. The following were stipulated to by the parties and submitted as Joint Exhibits:

Joint Exhibit #1	AGREEMENT—THE STATE OF OHIO & The Fraternal Order of Police/ Ohio Labor Council 2009-2012
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Joint Exhibit #2	Grievance Report Form-Sтивен Laird
Joint Exhibit #3	P98/96 ACF-PO Seniority List; bid dates using Agency Seniority
Joint Exhibit #4	P98/96 ACF-PO Seniority List, without bid dates using Bargaining Unit Seniority
Joint Exhibit #5	Personnel Action Form-Richard Cruder, continuous Service date of 5/29/2007
Joint Exhibit 6	Personnel Action Form-Sтивен Laird, continuous Service date of 12/13/2004

The following were submitted as Union Exhibits:

Union Exhibit #1	Collective Bargaining Agreement(CBA) 1992-1994
Union Exhibit #2	CBA 1994-1997
Union Exhibit #3	CBA 1997-2000
Union Exhibit #4	CBA 2000-2003
Union Exhibit #5	E-mail response, from Joel Barden to J Ashcraft regarding Seniority definitions.
Union Exhibit #6	E-mail response from J. Barden, regarding a question of a possible MOU on seniority.
Union Exhibit #7	E-mail response regarding Unit 2 Bargaining Unit Seniority.

Union Exhibit #8	E-mail from Joel Barden to Julie Lee, regarding Bargaining Unit Seniority & Agency Seniority.
Union Exhibit #9	E-mail to J. Barden from Samantha Genders' regarding shift bidding seniority.
Union Exhibit #10	E-mail from J. Barden to S. Genders-regarding Bargaining Unit versus Agency Seniority
Union Exhibit #11	Hot Mail- regarding shift bids to R. Cruder from Brenda Goheen-regarding seniority.
Union Exhibit #12	OSHP- Post 98 Seniority Roster—Revised 7/10/11 showing R. Cruder's Bargaining Unit Seniority.

BACKGROUND:

The State of Ohio, Department of Public Safety, Ohio State Highway Patrol, hereinafter, known as the Employer/OSHP, provides law enforcement, investigative, and security services to the citizens of Ohio and employees of the State. The Fraternal Order of Police, Ohio Labor Council, hereinafter, known as the Union/FOP, represents the Police Officers 1 and 2, assigned to the OSHP.

On or about July 11, 2012, the OSHP posted a seniority list for Posts 98/96, and the Alum Creek Facility. This posting was for shift bidding purposes(JE-4). This list included the Grievant and other Police Officer employee's names. This list (JE-4) included the employees' Bargaining Unit Seniority accompanying their names. The list with bargaining unit seniority was soon removed by the Employer and replaced by another list for shift bidding (JE-3). The replacement list included the same names as the initial list of twenty one Police Officers (PO). However, seven of the listed PO's had different seniority dates accompanying their names. The

seven changed employee seniority dates reflected their seniority date based on their transfer dates into the DPS, Ohio State Highway Patrol Division. Shift bids were required to be made in accordance with the revised seniority dates(JE-3).

A grievance was filed by PO Laird representing all the affected. It claimed that the revised or second seniority list was in error. The second list, which utilized “agency seniority” violated the CBA. Per the grievance, Article 22, Section 22.02 establishes the use of bargaining unit seniority for shift bidding not agency seniority. In addition, Article 34-Seniority, was also violated, since the revised seniority list did not use bargaining unit seniority, as defined in this Article. The grievance requested a new shift bid be posted for pay period 8/26/2012, utilizing bargaining unit seniority.

A Step 2 meeting was held on August 16, 2012, and the Employer’s response was issued on August 28, 2012. The Employer claimed that a clear and unambiguous interpretation of the words in Section 22.02 leads one to conclude that PO shift assignments are determined by the amount of seniority accrued while working at a particular agency, and not total time in the bargaining unit. Therefore, per the OSHP, the Contract was not violated, and the grievance was denied.

Ultimately, the grievance was appealed to Arbitration, Step 3, by the FOP. The parties mutually agreed to hold the Arbitration Hearing on December 6, 2012. At the Hearing both parties stipulated that there were no procedural issues, and that the grievance was properly before the arbitrator.

However, during the Hearing, the Union, by objecting, challenged the Employer’s introduction of witnesses. The Union claimed that the OSHP violated Section 20.08-Arbitration, #7-Discovery. Per the FOP, no OSHP witness’s names were delivered to them five (5) days prior to the Hearing date. The Employer did not challenge the objection, and they agreed that the Employer could address their concerns and arguments in their brief. Thus the objection was sustained by the arbitrator.

ISSUE:

After discussion with the arbitrator regarding the framing of the issue, the parties jointly stipulated the issue to read as follows:

Did the Employer violate the Labor Agreement by having bargaining unit members classified as Police Officers 1 & 2's, bid on shift assignments by using an inappropriate seniority roster? If so, what should the remedy be?

RELEVANT CONTRACT LANGUAGE:**ARTICLE 20 – GRIEVANCE PROCEDURE****20.08 Arbitration****5. Limitations of the Arbitrator**

Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the language of this Agreement.

7. Discovery

Five (5) days prior to the start of an arbitration hearing under this Article, the parties shall deliver the names of all witnesses to each other.

ARTICLE 22 – HOURS OF WORK AND OVERTIME**22.02 Posting of Work Schedules (sentences 9 & 10)**

Within a classification, requests for days off will be determined by classification seniority. Shift assignments will be established by classification seniority within that classification, except that all bargaining unit members classified as Police Officer 1 and 2 shall use bargaining unit seniority within the respective agency.

ARTICLE 34 – SENIORITY

34.01 Definition

For purposes of this Agreement, seniority shall be defined as follows:

- A. Bargaining Unit Seniority: The length of continuous service in a position or succession of positions within Bargaining Unit Two (2), beginning with the last date of hire or transfer into the Bargaining Unit, as defined by seniority credits.
- B. Classification Seniority: The length of continuous service in a single classification, beginning with the last date of hire or transfer into the classification, as defined by seniority credits.
- C. Seniority credit: The total number of pay periods during which an employee holds or has a right to return to a bargaining unit position.

34.04 Seniority Lists

The Employer shall prepare and maintain seniority lists of all employees and shall furnish said lists to the Labor Council. Such lists shall include the name, current classification, Bargaining Unit Seniority, Classification Seniority, last date of hire, and the employee ID number for each bargaining unit employee and location of employees.

34.05 Identical Hire Dates

When two (2) or more employees have the same Bargaining Unit and/or Classification Seniority credits within an agency, seniority shall be determined by last date of hire in a classification covered by this Agreement.

ARTICLE 35 – REDUCTION IN FORCE

35.02 Guidelines

The Labor Council will be notified in writing of the targeted classifications/positions involved in the layoff. Bargaining unit seniority as defined in Article 34 shall be used to determine the order of layoff, recall and reemployment.

35.06 Closing of Facilities

Employees outside of a district who are on layoff due to a facility closing shall be considered, by bargaining unit seniority, for existing vacancies that the

Employer determines to fill. These employees shall only be considered for vacancies in the same like classification that they held immediately prior to layoff.

UNION POSITION:

Many years ago they used agency seniority in the CBA. It was abolished and removed from the seniority definition section. The intent was clear, claims the Union. There have been no disputes for over ten (10) years regarding this concept. Agency seniority was eliminated, and it has also been management's understanding, through the years.

In the first six months of 2012 there were jobs being abolished in the Police Officer classification, in the Department of Developmental Disabilities. Discussions were conducted between the State and the Union as to how to move and rank PO's 1 and 2, into the Department of Public Safety. Bargaining unit seniority was to be applied and the State agreed, per the Union.

Section 22.02-Posting of Work Schedules, does not modify the definition of seniority. There is no agency seniority. Article 34-Seniority, has the only definition of seniority in the CBA, claims the Union. It defines Bargaining Unit Seniority and Classification Seniority, and credits for accruing such.

The elevation of the term "within the respective agency", by management to a definition of agency seniority, is an outrageous usurpation of the bargaining process. Until 2012, there has never been a management interpretation that Section 22.02 language, meant anything other than posting the employee's bargaining unit seniority for your agency. "Within the respective agency" language did not mean establishing an Agency Seniority list. Management has invented a new concept of agency seniority, that has not existed since the early 1990's, per the Union.

It is frustrating for the FOP and their members, who have had to live with this erroneous process for six months. The arbitrator needs to correct egregious act by management, and grant the grievance.

MAMAGEMENT POSITION:

On May 20, 2012, the grievant, along with several other PO 2's, transferred from the Department of Development Disabilities, Columbus Development Center, to the Department of Public Safety. Their bargaining unit seniority ranged from over eight years to under one year, per the Employer.

In early July, 2012, a shift assignment bid sheet was distributed to PO's assigned to Shipley Building, State Fairgrounds, and to Alum Creek. The initial bid sheet, Joint Exhibit #4, arranged the PO's by total bargaining unit seniority. It should have listed them by their seniority date within the respective agency, per management. A new bid sheet was issued, listing the PO's by their total bargaining unit seniority within the respective agency, not by their total bargaining unit seniority.

The Employer, per the plain language of the Contract, counted only the bargaining unit seniority within the respective agency. To do otherwise, would violate the clear language of the Contract, per the OSHP.

During processing this grievance, and in this proceeding, the Union will use grammatical gymnastics. They will argue that the term "within the respective agency" has no real meaning. They will claim that on at least one occasion, shifts were bid using total bargaining unit seniority, and not seniority within the respective agency. They also will assert that other agencies (DDD) bid shifts using total bargaining unit seniority, claims the Employer.

The CBA intent was to protect officers who had gained tenure at one agency.

This is evidenced by the exception carve-out in Section 22.02, when bidding on shifts, per Management. "Shift assignments will be established by classification seniority within that classification, except that all bargaining unit members classified as Police Officer 1 and 2 shall use bargaining unit seniority within the respective agency." This language was added to the 1994-1997 CBA to protect the seniority of PO's at their respective agency, argues Management(UE-2). Otherwise, the language would have remained the same as in the 1992-1994 CBA(UE-1), according to Management. The 1992-1994 language in Section 22.02, reads as follows: "Shift assignments will be established by seniority within a classification, except that in the Department of Mental Health and Mental Retardation by bargaining unit seniority within the respective facility." This exception was added to the Contract and has remained for eighteen years, which indicates the intent is and was very clear.

The Employer followed the plain language of the Contract when it bid shift assignment for PO's based on their total bargaining unit seniority within their respective agency. Therefore, the State requests that the arbitrator deny the grievance.

DISCUSSION AND OPINION:

The crux of this matter as per the Employer's Brief, has to do with the application of seniority to shift bidding for PO's 1 and 2. Section 22.02-Posting of Work Schedules, as it applies to shift assignments reads as follows: "Shift assignments will be established by classification seniority, within that classification, except that all bargaining unit members classified as Police Officer 1 and 2 shall use bargaining unit seniority within the respective agency." To ignore the phrase "within the respective agency", would, argues the Employer in its Brief, require the arbitrator to read a provision out of the Agreement. Thus, subtracting or amending the Agreement, and overstepping arbitral authority.

However, the parties jointly agreed that the grievance was properly before the arbitrator. Thus in the arbitrator's opinion, he is being asked to interpret the language per Section 22.08, #5., in Section 22.02. In so doing, he is limited to not add to or subtract from the terms of the agreement⁽¹⁾.

In this case, the parties have evidenced through testimony and exhibits a different interpretation of the Contract language as it applies to shift assignments for PO's(JE-2). The Department of Public Safety argues that shift assignments for PO's is based on agency seniority. Thus the grievants' seniority for shift assignment would be the date they transferred from DDD to DPS(JE-3). On the other hand, the FOP argues that the PO's total bargaining unit seniority applies to them for shift preference(JE-4).

Retired Senior Staff Representative Barden testified to the history of the bargaining process as it related to seniority and its application. It was shown, through his testimony and submitted evidence, that the term agency seniority was once defined in the CBA. It was defined in the 1992-1994 Agreement, in Section 34.01, D.(UE-1). Agency Seniority was defined as "the length of continuous service in the employ of the Agency dating back to the last date of hire." It was followed in the 1992-1994 Agreement by the definition of Bargaining Unit Seniority, which read: "The length of continuous service in a position or succession of positions within bargaining unit two (2)"(UE-1). According to Mr. Barden's testimony and submitted evidence, agency seniority has not appeared in any subsequent CBA's for this bargaining unit(UE-1thru4,& JE-1).

Although this is a compound sentence that addresses shift assignments being made by classification seniority, it excepts PO's 1&2 from such application(JE-1). Most classifications, per unrebuted testimony, are unique to an agency.

(1)-Elkouri & Elkouri, 6th Ed. Pg. 446.

However, PO's are employed in multiple agencies, thus per testimony, they were exempted from classification seniority for shift assignments. In so exempting PO's 1 and 2's the language reads that the PO's "**shall use bargaining unit seniority** within the respective agency.

The Union's position is further substantiated by other provisions of the CBA(JE-1). Section 34.04-Seniority Lists reads as follows: "The Employer shall prepare and maintain seniority lists of all employees and shall furnish said lists semi-annually to the Labor Council. Such lists shall include the name, current classification, Bargaining Unit Seniority, Classification Seniority, last date of hire, and the employee ID number for each bargaining unit employee and location of employees." It does not identify Agency Seniority as to be included as one of the inclusions on the lists. Furthermore, Sections 34.05 and 34.06 do not consider Agency Seniority as one of the criteria to be used for determining layoff or for tie breaking decisions(JE-1).

The language is clear in the arbitrator's opinion. Shift assignments for PO's 1 and 2 are to be based on bargaining unit seniority, as defined in Section 34.01 A., in ARTICLE 34- SENIORITY. The term "within the respective agency" is not read out of the CBA by this decision. And it is not in the CBA to protect bargaining unit members already in the agency. In the arbitrator's opinion, it is used within Bargaining Unit 2, to identify where and how to apply Bargaining Unit Seniority. This decision is further substantiated by other provisions of the CBA which do not contain any definition of Agency Seniority, nor is it found within ARTICLE 34 – SENIORITY(2).

AWARD:

Future shift assignments for Police Officer 1 and 2, made through Section 22.02- Posting of Work Schedules, shall use Bargaining Unit Seniority when determining the order of selection.

This concludes the Arbitration decision, issued this 18th day of February 2013.

Respectfully submitted,

A handwritten signature in cursive script, reading "E. William Lewis". The signature is fluid and elegant, with a long, sweeping tail on the final "s".

E. William Lewis
Arbitrator