

OPINION AND AWARD

IN THE MATTER OF ARBITRATION

BETWEEN

THE STATE OF OHIO, DEPARTMENT OF PUBLIC SAFETY,
DIVISION OF THE OHIO STATE HIGHWAY PATROL

AND

THE OHIO STATE TROOPERS ASSOCIATION

Grievance 15-03-20120511-0049-04-01 (Trooper Christopher Ausse)

Date of Hearing: September 24, 2014

Place of Hearing: Columbus, Ohio

Arbitrator: Sherrie Passmore

Date of Award: December 10, 2014

Advocate for the State: Lieutenant Cassandra Brewster

Advocate for OSTA: Elaine N. Silveira, Esq.

INTRODUCTION

This arbitration arises pursuant to the collective bargaining agreement (“Agreement”) between the parties, The State of Ohio, Department of Public Safety, Division of The Ohio State Highway Patrol (“Employer”) and the Ohio State Troopers Association (“Union”). Sherrie Passmore was appointed as the Arbitrator under the authority of the Agreement.

A hearing was held on September 24, 2014. Both Parties were represented by advocates who had a full opportunity to introduce oral testimony and documentary evidence, cross-examine witnesses, and make arguments. Post-hearing briefs were timely filed on or before October 27, 2014.

JOINT STATEMENT OF ISSUE

Did the Employer violate Articles 30 and 23.02 of the collective bargaining agreement, when it did not award the posted K-9 handler position to the Grievant? If so, what shall the remedy be?

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 23 – SPECIALTY POSITIONS

23.2 Dog Handlers

Dog Handler positions shall be posted in accordance with Section 30.01. Selection of the employee to fill the position shall be based upon ability and seniority.

The following criteria will be used to determine the ability of a Trooper to carry out the varied responsibilities associated with being a Drug Dog Handler.

A. Selection Process

1. Experience as a Trooper.
2. Demonstrate ability to apply good judgment, common sense, and the appropriate Highway Patrol policy to a variety of situations. In addition, performance, education, experience, communication skills, deportment, and supervisory opinion supported by fact will be considered.

3. Demonstrate ability, which may include past interest and participation in the Highway Patrol Drug Interdiction Program.
4. Demonstrate an understanding of the laws of arrest and search and seizure.
5. The Trooper must be in and maintain good physical condition.
6. Demonstrate good communication skills and the ability to act as an instructor or presenter before large groups, both public and law enforcement.
7. The Trooper/Dog Handler and his family must be willing to accept the added responsibility of caring for a large canine. Careful consideration will be given to the impact on the family. A committee representative or designee will meet with the persons who reside with the trooper candidate to ensure all are given a realistic preview of the inherent possibilities and potential adjustments associated with the dog handler position.
8. The Trooper/Dog Handler must have the ability and sufficient property to have erected a 4x10x6 kennel with a doghouse and to keep a dog at the residence.
9. Trooper/Dog Handlers selected for the assignment must agree to a minimum three (3) year assignment as a Dog Handler. A contract will be entered into by the parties which imposes a financial penalty for failure to fulfill a three (3) year assignment. The monetary penalty will be pro-rated based upon the cost of training the Trooper/Dog Handler. Extenuating mitigating circumstances will be considered.
10. The Trooper candidate will be asked to complete a questionnaire prior to a scheduled interview with the selection committee. The interview will focus of the following areas.
 - a. Explanation of the assignment
 - b. Laws of arrest and search and seizure.
 - c. A review of the Trooper's qualifications.
 - d. The Trooper's interests, expectations and questions concerning the position.
 - e. The selection committee will consist of the following staff officers:
 - i. Commander, Office of Field Operations, or his/her designee, chairman.
 - ii. Commander, Office of Investigative Services, or his/her designee.
 - iii. District Commander of the candidate, or his/her designee.

ARTICLE 30 - TRANSFERS/PAYMENT FOR MOVING EXPENSES

30.1 Transfers

- A. Employees shall submit transfer requests to the Office of Human Resource Management (HRM) for both Patrol post and specialty positions. Those transfer requests shall be maintained in an active transfer file. When the Employer determines a position shall be filled by transfer, the active transfer file shall be used to fill the position. When the Employer creates a new position, to be filled by transfer, the position will be posted at all Highway Patrol facilities for a period of seven (7) calendar days. All personnel in the affected classification shall have the right to bid on the position. Selection of the person to fill the position shall be based on ability and seniority. In the event of a field opening, i.e., an

opening at one of the fifty-five (55) Patrol posts, seniority shall be the determining factor. If no bid is received and the employer determines the position must be filled, the most junior employee shall be transferred.

When position openings are created as the result of the impending graduation of a cadet class, the Employer shall post an "open bid" period for transfer requests. The Employer shall state the graduation date of the cadet class, and the effective date of position openings as the result of the graduation. The Employer shall then receive and consider all transfer requests of incumbents prior to assigning cadets to positions. Transfer requests may list up to five posts.

There shall be no cadet assigned to a position if a member has properly submitted a transfer request for that position during the posted "open bid" period. The Employer is not otherwise required to honor a member's transfer request during this period.

BACKGROUND

The Grievant, Christopher Ausse, is a Trooper with the Ohio State Highway Patrol. He applied for a District Three Trooper K-9 Handler position posted in February 2012. Grievant was granted an interview but was not selected for the position. He filed a grievance alleging that the Employer violated Articles 30.01 and 23.02 in not selecting him.

POSITIONS OF THE PARTIES

Position of the Union

The Union's position is that Grievant was wrongfully denied the canine handler position because he was the most senior Trooper who applied with the required ability and qualifications.

The Union begins by noting that this case involves a "lateral transfer" and not a "promotion". It further points out all sworn personnel within the bargaining unit, regardless of position or assignment, hold the classification of Trooper. The use of a single classification, reasons the Union, is evidence that all Troopers are qualified for all positions or assignments within the classification. Although some of the

applicants for the canine handler position may have been more qualified than others, the Union argues that all must be considered qualified by virtue of being Troopers.

Because the position at issue involves a lateral transfer and qualifications were not an issue, the Union contends that Article 30.01 required the position to be filled based on seniority and ability. Since the Grievant has eight years more seniority than the successful candidate, the Union suggests that the ultimate issue in this case was whether Grievant had the ability to be a canine handler.

Based on previous arbitration rulings, the Union argues that minimum ability is the test for selection, not comparative ability. In assessing ability for a canine handler positions, the Union notes that Article 23.02 specifies the factors to be considered.

As proof that Trooper Ausse possessed the required minimum ability, the Union points to the Employer's own records of Grievant's training, awards, criminal patrol experience, performance evaluations, and Command Post input. The Union disputes the reasons advanced by the Employer for not selecting Grievant as erroneous and unsupported.

Position of the Employer

The Employer's position is that it did not violate the Agreement when it did not award the posted canine handler position to the Grievant. It contends that Article 30 must be considered in conjunction with Article 23, which deals with specialty positions. The Employer points out that although Article 30.01 provides

that both seniority and ability are to be considered in selecting employees for specialty positions, Article 23.02 lists ten criteria to be considered in determining ability. The Employer acknowledges Grievant was the most senior Trooper to apply for the position, but contends Grievant lacked the ability to be a canine handler. Specifically, the Employer claims Grievant failed to meet the following two criteria for determining ability under Article 23.02:

2. Demonstrate ability to apply good judgment, common sense, and the appropriate Highway Patrol policy to a variety of situations. In addition, performance, education, experience, communication skills, deportment, and supervisory opinion supported by fact will be considered.

4. Demonstrate an understanding of the laws of arrest and search and seizure.

The Employer concluded Grievant did not meet criteria number two because of areas of concern noted on Grievant's most recent evaluation:

Trooper Ausse needs to monitor the amount of sick leave he uses. On occasion he has had a zero sick leave balance. Trooper Ausse is getting a reputation with his coworkers and supervisors as being undependable to work his assigned shift.

Trooper Ausse needs to work on his time management skills. While on post, he needs to be more productive in completing his follow-up and needs to ensure that his time is being utilized efficiently. Trooper Ausse has been told on numerous occasions to complete his monthly follow-up. Twice he has failed to turn in citations to the court prior to the court date. The first time the citation was found in his box and the second time the citation was found on a ledge mixed in with other tickets. When Trooper Ausse is confronted by post supervision about his lack of follow-up, he often tries to rationalize the situation or blame supervisors instead of taking responsibility. (Union Exhibit #8, Page 6 -Back Side).

The Employer considers the comments about time management and follow up to be of concern because canine handlers have extensive amounts of detailed documentation that must be kept about call-outs and canine training.

In regard to criteria number four, the Employer argues that Grievant fell short because he only exhibited a basic understanding of search and seizure and misapplied a search warrant exception during his interview, as well as appeared uncomfortable when asked follow up questions about it. The Employer also notes that during his interview Grievant prefaced his answer to a question about search warrant exceptions with "I memorized this last night." The Employer stressed that it is critical for canine handlers to be well versed in search and seizure and are looked to as experts, particularly by Road Troopers.

The Employer also noted that the Selection Committee felt that Grievant overstated his experience with the District Three Criminal Patrol Team.

DISCUSSION

This case involves a transfer into a specialty position, canine handler. Articles 30.01 and 23.02 of the Agreement govern such transfers. The parties agree that those are the relevant provisions of the Agreement.

For specialty positions, Article 30.01 provides that both seniority and ability are to be considered in determining transfers and Article 23.02 identifies the criteria to be used in determining ability to be a canine handler. Grievant was the most senior applicant who interviewed for the position. The applicant selected had nearly eight years less service than Grievant. Therefore, to the extent Grievant had

the ability to be a canine handler within the meaning of Articles 30.01 and 23.02 he should have been selected.

The meaning of “ability” has been the subject of two previous arbitrations between the parties. In both cases, the arbitrators found that the inquiry under Article 30.01 is whether or not an individual has the minimum ability to perform the job, not whether one individual has more ability than another.

In his award in the case of Trooper Larry K. Phillips in 1995, Arbitrator Marvin Feldman concluded as follows:

Does ‘more ability’ count more than ‘minimal’ ability when a choice under a contractual clause, ‘seniority and ability’ is indicated? It is apparent that from the writings of the contract that the parties agreed that seniority and ability are the basis for choice not seniority and most ability...The contract demands that there be a choice based on seniority and ability and not on seniority and most ability.

In a 2002 award involving Trooper Russell Cantrell, Arbitrator Jerry Sellman concurred with Arbitrator Feldman. In applying Article 30.01, he wrote that “...if an individual is deemed to have at least a minimal ability to perform the job, then seniority must be the determining factor.”

Given the above awards and that the relevant language under Article 30.01 has not changed, I find that the appropriate inquiry in this case is whether the Grievant possessed the minimum ability to be a canine handler, not whether he was the applicant with the most ability.

The parties have specified in Article 23.02 the factors the Employer may consider in determining minimum ability. Based on those factors, I find that the Grievant possessed the ability required under Article 23.02 to be a canine handler.

The evidence does not support the reasons cited by the employer for concluding Grievant lacked that ability.

Article 23.02(A) specifies ten criteria to be used to determine the ability of a Trooper to be a canine handler. The Employer only contends that the Grievant fell short on two of the ten considerations, Article 23.02(A)(2) and (4).

Article 23.02(A)(4) permits the Employer to consider whether an applicant demonstrates “an understanding of the laws of arrest and search and seizure.” The record does not support a finding that Grievant did not meet this requirement.

The Employer’s basis for arguing that Grievant did not demonstrate this ability was a response he gave and a comment he made during his interview. The Selection Committee reported that Grievant “appeared” to have misapplied a search exception in giving a personal example of one of his cases and commented that he had memorized a search and seizure exception the night before. The Committee’s report equivocates about whether Grievant misapplied the exception and it is unclear how his comment, which reflects that he prepared for the interview, equates to a lack of ability. More importantly, in spite of the reported comment and response, the Committee found that Grievant had “demonstrated a basic knowledge of search and seizure” and did not conclude in its report that Grievant lacked the requisite ability in this area. Lt. Combs, a member of the Selection Committee and Criminal Patrol Commander testified that he thought Grievant had a “basic understanding of search and seizure”. A basic understanding certainly satisfies the showing required under Article 23.02(A)(4).

Grievant’s evaluation reflects that his supervisor at that time thought he had more than basic knowledge of criminal laws, which would encompass search and

seizure. Under the dimension described as “knows, applies and uses proper traffic, civil, and criminal laws and codes to identify violations and takes appropriate action,” Grievant is rated “exceeds”. His evaluation includes the following comments: “Trooper has a good understanding and working knowledge in enforcing traffic and criminal law violations . . . Other Troopers come to Trooper Ausse for guidance on sections of criminal and traffic law . . .”. This reflects the level of knowledge the Employer contends it was looking for in canine handlers, i.e., a level such that Troopers on road patrol could look to them for guidance.

The Employer makes a point of noting that the Selection Committee thought Grievant overstated his experience but does not indicate why it believes that demonstrated a lack of ability under the Article 23 criteria. Regardless, the record does not support this assertion. In his interview, Grievant stated he had been assigned 6 to 8 times to Criminal Patrol for approximately two-month tours. The Committee concluded this was an overstatement because one of its members, Sgt. Helton, who had been with District Three Criminal Patrol since 1992, only “recalled” one temporary assignment of the Grievant. Sgt. Helton was not called to testify and witnesses who did testify contradicted his recollection. Those witnesses recalled Grievant working multiple temporary assignments on Criminal Patrol at various times and testified that such assignments were months in duration.

The only other Article 23 criteria the Employer relies on for its finding that Grievant did not have the ability to be a canine handler was that of Article 23.02(A)(2):

Demonstrate ability to apply good judgment, common sense, and the appropriate Highway Patrol policy to a variety of situations. In

addition, performance, education, experience, communication skills, deportment, and supervisory opinion supported by fact will be considered.

The Employer's finding that Grievant lacked minimum ability under the above criteria is unreasonable. Its only basis for so finding was Grievant's most recent evaluation. Although some of the comments in his performance evaluation note areas for improvement, Grievant's performance under the dimensions where these comments appear was rated as "meets". The performance evaluation instructions for completion indicate that a rating of "meets" is to be used when the employee meets all performance expectations and indicates an acceptable level of performance. The instruction notes, "A typical officer will have both strong areas of performance as well as areas in need of improvement." Taking into consideration those instructions, comments under a "meets" performance rating alone do not support a finding of a lack of minimum ability.

The evaluation was over eight months old when it was considered. The Post Commander who completed that evaluation, Lt. Haymaker, submitted an input form to the Selection Committee that was positive and supportive of Grievant. The Post Commander either did not view those comments as evidence that Grievant lacked the required ability for the canine handler position or was satisfied the concerns noted had been sufficiently addressed. Grievant testified at hearing that the circumstances which had led to concerns about his dependability based on low sick leave balances were no longer present. He had diminished his sick leave balance during that evaluation period in large part due to an illness of his daughter. Subsequently, his daughter recovered from that illness and his leave bank has greatly improved.

If anything, Grievant's most recent evaluation at the time of his application supports a finding that he had demonstrated the specific ability required under Article 23.02(A)(2), the "ability to apply good judgment, common sense, and the appropriate Highway Patrol policy to a variety of situations." The evaluation states: "Trooper Ausse understands the Division's policy and procedures which allow him to make sound decisions on the road".

Grievant's ability under the other Article 23.02 criteria are not in dispute and the record contains ample evidence that he more than satisfied those criteria. He received ratings of "meets" or "exceeds" in all dimensions of his most recent evaluation. Grievant had over twelve years of experience as a Trooper. He had completed numerous training courses in preparation for the position, had initiated numerous felony cases and investigations in the preceding two years, and had Criminal Patrol experience. Trooper Ausse was in good physical condition and his most recent evaluation rated his communication skills as proficient. He testified that he and his family were willing to accept the added responsibility of caring for a large canine and had the ability and sufficient property to erect an appropriate size kennel to keep the dog at their residence. Trooper Ausse completed the required questionnaire prior to his interview and was willing to make the required three-year commitment.

Because Grievant was the most senior applicant and had the requisite ability to be a canine handler, I find that the Employer violated Articles 3 0 and 23.02 of the Collective Bargaining Agreement when it did not award the posted canine handler position to the Grievant.

AWARD

For the reasons stated above, the grievance is sustained. The Employer is directed to award Grievant the position of canine handler and to pay him the mandatory overtime he would have received had he been properly transferred.



Sherrie J. Passmore
Arbitrator

December 10, 2014