

Decision and Award in the matter of Arbitration between:

State of Ohio, Department of Natural Resources

And

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

Grievance #: DNR-2016-01342-2

Grievant: Mr. Stephen Massello

E. William Lewis, Arbitrator

Date of Hearing:	January 10, 2017
Date Decision issued:	February 7, 2017

Representing the Employer:

**Mr. Andrew Shuman
Labor Relations Officer
Department of Natural Resources
2045 Morse Road
Columbus, Ohio 43229**

Representing the Union:

**Mr. Douglas Behringer, Esq.
General Counsel
Fraternal Order of Police, OLC
222 East Town Street
Columbus, Ohio 43215**

By mutual agreement between the parties, the Hearing was convened on January 10, 2017, at 10:00am. The Hearing was held at the Office of Collective Bargaining, 1650 West Broad Street, Columbus, Ohio. All witnesses were sworn.

In attendance for the Employer:

Mr. Andrew Shuman	Advocate, Labor Relations Officer
Mr. Eric Gilerman	OCB, Labor Relations Officer
Mr. Steven R. Bates	HR Administrator/Acting HR Chief (witness)
Ms. Carleen Spradlin	Labor Relations Administrator(witness)

In attendance for the Union:

Mr. Douglas Behringer	Advocate, General Counsel
Mr. Stephen n. Massello	Natural Resource Officer(witness)
Mr. Steve Stover	Unit 2, Representative

The parties were asked to submit exhibits into the Record. The following were submitted as Joint Exhibits:

Joint Exhibit #1	Collective Bargaining Agreement(CBA) July 1, 2012 – June 30, 2015
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Joint Exhibit #1a	Collective Bargaining Agreement, July 1, 2015 June 30, 2018
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Joint Exhibit #2	Grievance Trail
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Joint Exhibit #3	Stipulation of Facts
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Joint Exhibit #4	Issue Statement(Merit)
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The following were submitted as Management Exhibits:

Management Exhibit #1	ODNR-Financial Incentive Test/ Pre-Employment Assessment Form
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Management Exhibit #2	July 9, 2013 to July 15, 2013, e-mails regarding S. Massello returning to bargaining unit criteria.
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The following were submitted as Union Exhibits:

Union Exhibit #1	Certificate of appointment to Watercraft Officer For Steve Massello, and OPOTC certification of Steve Massello
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Union Exhibit #2	Signed demotion consent by Stephen Massello Dated 8/12/14. To Watercraft Officer
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Union Exhibit #3	Watercraft Officer Posting dated 6/05/14.
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Union Exhibit #4	E-mail from ODNR,HR to Steve Massillo identifying his return to bargaining unit as a demotion.
Union Exhibit #5	E-mails dated from July 28, 2014 to August 11, 2014 to Stephen Massello regarding his transfer to Sandusky.
Union Exhibit #6	Physical Fitness Standards Assessment-Stephen Massello, Voluntary Assessment test taken on 7/15/14.
Union Exhibit #7	E-mail to all DNR Commissioned Officers regarding Fitness Testing dates, dated April 4, 2016.
Union Exhibit #8	MINIMUM FITNESS STANDARDS DIRECTIVE, from ODNR Human Resources, dated January 1, 2011.

BACKGROUND:

The State of Ohio, Department of Natural Resources, Division of Watercraft(DNR), hereinafter known as the Employer/State, is responsible for boating safety, education and law enforcement on all waters of the State. The Fraternal Order of Police, Ohio Labor Council, Inc., hereinafter known as the Union/FOP, represents the Watercraft Officers employed by the DNR.

The Grievant, Mr. Stephen Massello, was hired as a Watercraft Officer Cadet on June 5, 2000(Jt.-3). He was promoted to a Watercraft Officer on May 20, 2001. On April 27, 2008, Officer Massello was promoted out of the bargaining unit into supervision. While in supervision he was a Natural Resources Administrator 1, in the Central Office, Columbus(Jt.-3). On June 10, 2014 Mr. Massello applied for a Watercraft Officer position back in the bargaining unit, in Sandusky(Jt.-3). He completed a physical fitness test on July 15, 2014 while in supervision(Jt.-3). He

was returned to the bargaining unit as a Watercraft Officer in Sandusky on September 21, 2014.

Officer Massello took and successfully completed another physical fitness test on June 1, 2015. However, following an e-mail dated April 4, 2016 announcing the next round of fitness testing Officer Massello filed a grievance(Jt.-2). The grievance filed on April 8, 2016, questioned whether Officer Massello would be a mandatory tester or a voluntary tester. He cited Article 31, Section 31.05, Physical Fitness Qualifications as being allegedly violated(Jt.-2). Summarily, Section 31.05 provides the following language regarding fitness testing: "Management will provide voluntary and voluntary compliance of "OPOTC" Basic Training Program Physical Fitness Standards to all employees hired before January 1, 2004. Mandatory testing and mandatory compliance of "OPOTC" Basic Training Program Physical Fitness Standards will be required for all employees hired after January 1, 2004."

The Step 2 grievance was denied on April 20, 2016, with Management stating that Officer Massello voluntarily agreed to be a mandatory fitness tester as a condition of his transfer to the bargaining unit position in Sandusky. Furthermore, management claimed that the Grievant had knowledge of his testing requirement in 2014 when he negotiated his transfer back to the bargaining unit. Therefore, he violated the time limits to file a grievance in Article 20, Section 20.08(Jt.-2).

The grievance was appealed to Arbitration. At the Arbitration Hearing it was mutually agreed upon between the parties that there were two issues before the arbitrator. The arbitrator would first hear the allegation of the time limits violation, and then the arguments regarding the merits of the case. If the arbitrator sustained managements claim of a time-limits violation, then the grievance would be dismissed. If the grievance were not dismissed, the arbitrator would issue an award on the merits of the case.

RELEVANT CONTRACT LANGUAGE:

ARTICLE 20 – GRIEVANCE PROCEDURE

Section 20.08 Grievance Procedure—Agency Step (First and second paragraph)

An employee having a grievance shall file a grievance in the electronic grievance system within twenty (20) days of the date on which the grievant knew or reasonably should have had knowledge of the event giving rise to the grievance.

Grievances submitted beyond the twenty (20) day time limit will not be honored. The parties shall reference the date the grievance was submitted in the electronic filing system to confirm timeliness.

Section 20.09 #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.

ARTICLE 31 – SELECTIONS, PROMOTIONS AND TRANSFERS

Section 31.01 Vacancies #5

Employees who are in a classification outside of those covered by this Collective Bargaining Agreement and who accept a position in a classification covered by this Collective Bargaining Agreement shall serve an initial probationary period of three hundred sixty-five (365) days. If the employee fails to perform the job requirements of the new position to the Employer's satisfaction, the Employer may remove the employee. The employee shall not challenge such removal.

Section 31.03 Probationary Period—(First paragraph, last sentence)

Employees serving an initial probationary are barred from pursuing any disciplinary action or probationary removal through the grievance procedure or the State Personnel Board of Review nor shall such Board receive such an appeal.

Section 31.05 Physical Fitness Qualifications—

B. Minimum fitness standards shall be in the form of a work rule and the provisions of Article 21 shall be applicable. Management will provide voluntary testing and And voluntary compliance of “OPOTC Basic Training Program Physical Fitness Standards” or other measurable standard to all employees hired before January 1, 2004. Mandatory testing and mandatory compliance of “OPOTC Basic Training Program Physical Fitness Standards” or other measurable standard will be required for all employees hired after January 1, 2004. Departments covered by this Agreement may opt out from the preceding mandatory testing requirement and offer voluntary testing.

ARTICLE 34 – SENIORITY

Section 34.02 Termination of Continuous Service

B. Continuous service for the purpose of calculating classification seniority and bargaining unit seniority shall also terminate when a member is promoted out of the bargaining unit after the effective date of this Agreement and has successfully completed his/her probationary period.

ISSUE #1:

The parties did not formulate this issue on timeliness. Therefore, the arbitrator will formulate the issue as follows:

Did the Grievant violate the time limits as prescribed in Section 20.08, Agency Step?

MANAGEMENT POSITION:

This, per management, is a procedural violation of timeliness on the part of the Grievant. Officer Massello took and passed a “pre-hire” fitness test in 2014. The Grievant, per management, was hired into the bargaining unit on 9/21/2014 from a position outside the bargaining unit. When he entered the bargaining unit, he was told that he would be a mandatory fitness tester.

On June 1, 2015, Officer Massello completed a fitness test considered by management as mandatory. When he took this test he could have filed a grievance. It was not until April 2016 that he filed a grievance.

He sat on his rights, and the Employer is requesting the arbitrator to dismiss the grievance as being untimely.

UNION POSITION:

Article 31.05, Physical Fitness, has two aspects, per the Union. Those are a voluntary tester versus a mandatory tester. Employees hired after 1/1/04 are required to take and pass an annual physical fitness test, as a condition of employment. Employees hired before 1/1/04, are considered voluntary testers. All voluntary testers can take the test and also get compensation if they successfully pass it.

The Grievant was hired in 2000 and promoted to management in 2008. While in

the bargaining unit in 2000 to 2008 he would have been a voluntary tester. Every time he would be required to test while in the bargaining unit it would be an ongoing contract violation. Per the Union, there was no agreement with the FOP for him to be a mandatory tester, which management must have.

In 2014, Officer Massello applied to go back into the bargaining unit, and he went back as a demotion, not as a hire. Therefore, there was no arbitrability violation because he should not have been a mandatory tester in the first place.

DISCUSSION AND OPINION:

Witness testimony is somewhat contradictory regarding the issue of timeliness. Additionally, the evidence does not always substantiate witness testimony. Management's witness testified that Officer Massello was told prior to going back into the bargaining unit position in 2014, that he would be on probation for 365 days and he would be considered as a mandatory tester. Evidence and testimony depicted that prior to returning to the bargaining unit, he took and passed the physical fitness test on July 15, 2014(Jt.-3). Officer Massello also took and passed the fitness test on June 1, 2015(Jt.-3). Management claims that Officer Massello had twenty (20) days to grieve his mandatory fitness test. Therefore, his filing of the grievance on April 8, 2016 was untimely, and violated Section 20.08 of the CBA.

Evidence substantiates that Officer Massello did test on June 1, 2015(ME-1). However, Officer Massello's testimony refutes him being aware that the June 2015 test was mandatory. Officer Massello claims that he did not sign Management Exhibit #1 when he took the test. Management Exhibit #1's form was e-mailed to him for signature and mandatory assessment was not checked, claims the Grievant. Officer Massello signed and returned the form. Therefore, he had no knowledge that it was a mandatory test, per his testimony.

Management claims that Officer Massello did know and/or should have known that he was a mandatory tester in June 2015. Their witness testified that Officer

Massello was told prior to going back to the bargaining unit, that he would be a mandatory tester. Officer Massello denies that he was told prior to returning to the bargaining unit in September 2014, that he would be a mandatory tester. He did testify, that in 2013 when he was still in supervision, he was considering a different bargaining unit position. During those preliminary discussions in 2013, he was told that he would be a mandatory physical fitness tester. Evidence does substantiate that mandatory testing was discussed with Officer Massello regarding the potential 2013 bargaining unit position(ME-2).

Evidence also shows that a notice of Physical Fitness Testing dates was sent to all DNR Commissioned Officers on April 4, 2016(UE-7). Officer Massello filed his grievance on April 8, 2016.

Witness testimony was somewhat contradictory regarding when discussions were held between the parties, in the arbitrator's opinion. Therefore, the testimony coupled with the evidence does not convince the arbitrator that the Grievant should have known that he was a mandatory tester on June 1, 2015. Furthermore, regarding the June 2015 physical fitness test, Officer Massello was still on probation. He came back into the bargaining unit the previous September. Officer Massello was subject to the provisions of Section 31.01,#5, a refusal to test or maybe even to grieve might have jeopardized his job.

When there are ambiguities in the wording of contractual time limits, or uncertainty as to whether time limits have been met, all doubts should be resolved against forfeiture of the right to process the grievance(1).

I do not find in this case, that the Grievant violated the time limits as outlined in Section 20.08, of Article 20.

AWARD:

Management's claim of a time limits violation is dismissed.

The merits of the case will now be addressed.

ISSUE:

The parties jointly stipulated the issue statement to be as follows:

Does the mandatory fitness provision of Article 31.05(B) apply to Watercraft Officer Stephen Massello?

UNION POSITION:

Whether he is a voluntary or mandatory tester is the question. The Grievant was hired before January 1, 2004, therefore he is a voluntary tester. Only the Union can alter the CBA, not an individual, declares the Union Advocate.

Officer Massello was hire prior to 1/1/04, therefore he is a voluntary tester. When he went into management he was promoted. When he came back into the bargaining unit it was as a transfer or a demotion, not as a new hire claims the Union.

In 2013 there were discussions about the Grievant returning to the bargaining unit in a Specialist Position. There were talks with the FOP about the conditions surrounding his return. Those conditions could have potentially included him being a mandatory fitness tester, along with a probationary period. This was not done or agreed to, states the Union.

When Officer Massello did return to the bargaining unit, there were no discussions regarding a fitness testing change to the CBA.

Management and the Grievant have no jurisdiction to change the CBA relative to him going back into the bargaining unit. Officer Massello was a voluntary tester all during his employment, even the time in management. When he did return to the bargaining unit, he came back to the top step of the pay scale. If he was a new hire he would be at step 0.

Were the arbitrator to deny the grievance, it would set a dangerous precedent. The FOP requests the arbitrator to grant the grievance.

MANAGEMENT POSITION:

At issue is whether or not the mandatory fitness requirements of Article 31.05(B) apply to Watercraft Officer Massello. The language states in relevant part, "Management will provide voluntary testing and voluntary compliance of "OPOTC Basic Training Program Physical Fitness Standards" to all employees hired before January 1, 2004. Mandatory testing and mandatory compliance of "OPOTC Basic Training Program Physical Fitness Standards" will be required for all employees hired after January 1, 2004.

Evidence and testimony will show that Officer Massello was hired into the bargaining unit on September 21, 2014. Prior to 9/21/04 he was in a position outside the bargaining unit. He was aware as far back as 2013, that if selected for a bargaining unit position, he would be treated as an initial hire, and he would be subject to mandatory testing. With the mandatory testing knowledge, he applied for a bargaining unit position in 2014.

The Employer will show clear contract language that employees who leave the bargaining unit lose their continuous service. They also must serve an initial

probationary probation period upon moving into a bargaining unit position.

It is management's position that Officer Massello applied for, tested for and accepted this position with his eyes wide open. He had full knowledge that he would be required to comply with the annual mandatory fitness requirements.

The Union is attempting to use the grievance procedure to gain for Officer Massello a benefit which they could not negotiate at the time he was hired into his current position, because he was not a bargaining unit member. If the parties had intended that employees returning to the bargaining unit to be exempt from mandatory fitness testing, language would have been added to one of the four (4) negotiations since mandatory testing was first included in 2003. Therefore, per management, the contract must be read to cover only employees with continuous membership in the unit, and not employees who are outside the bargaining unit coming in, regardless of past membership.

For these reasons, the Employer asks the arbitrator to deny this grievance in its entirety.

DISCUSSION AND OPINION:

Management argues that Officer Massello was hired into the bargaining unit on 9/21/14 from a position outside the unit. According to management he was aware that he would be a mandatory physical fitness tester.

The Union argues that individuals cannot change the contract without the Union's consent. If done, it is done through a Memorandum of Understanding between the Employer and Union(MOU). The CBA is clear, per the Union, annual physical fitness testing for employees hired before 1/1/04, will be voluntary. Mandatory physical fitness testing applies to employees hired after 1/1/04. The Grievant was hired on June 5, 2000, claims the FOP.

Stipulated facts, item #1, identifies Stephen Massello as being hired June 5, 2000(Jt.-3). Additionally, Officer Massello was Commissioned on May 9, 2001 as an Ohio Peace Officer(UE-1).

Was Officer Massello rehired back into the bargaining unit on 9/21/14 as argued by management? Officer Massello did re-enter the bargaining on the 9/21/14 date, however, Joint Stipulation #7 shows “hired back” redacted(Jt.-3). Additional evidence identifies Officer Massello being demoted back into the bargaining unit, not hired into the unit(UE-2,4,5). In answer to the arbitrator’s question, both advocates stated that other Grievant’s benefits were not altered, based on ODNR’s claimed Re-hire date. These unaltered benefits would include, for example, pay grade step, vacation eligibility level, and amount of accumulated sick leave.

MINIMUM FITNESS STANDARDS DIRECTIVE, issued on January 1, 2011, by ODNR Human Resources, addresses Mandatory and Voluntary Testing(UE-8).

#2 Mandatory Testing

“Commissioned FOP/OLC and Exempt Officers hired AND/OR commissioned after 1/1/04 are required to comply with the Ohio Peace Officer Training Commission (OPOTC) Basic Training Program Physical Fitness Standards to obtain initial employment with the ODNR. During each Division’s annual testing period, the aforementioned Commissioned Officers are required to comply with the ODNR Physical Fitness Standards found in the ODNR Officer’s Physical Fitness Handbook to retain employment with ODNR.

#3 Voluntary Testing

“For Commissioned FOP/OLC and Exempt Officers hired and/OR commissioned before 1/1/04, physical fitness testing is voluntary. Interested Commissioned Officers shall receive one opportunity during the annual testing to comply with the ODNR Physical Fitness Standards in an attempt to receive the pay supplement.

Voluntary testing shall occur during the scheduled testing hours only and employees shall not incur overtime in the pursuit of passing the physical fitness requirements.”

Thus, even if the “hire date” were altered, Officer Massello was Commissioned before 1/1/04. In the arbitrator’s opinion, his Commission date would classify him as a voluntary fitness tester, per this ODNR Directive.

The evidence in this case is clear and convincing in the arbitrator’s opinion. Although there were discussions regarding the Grievant’s fitness testing status, the evidence does not support an agreed upon change to mandatory testing for Officer Massello. There was no MOU between the parties changing the Grievant to a mandatory tester. For the arbitrator to change the Stipulated hire date of June 5, 2000, to the management modified date would in fact change the CBA language intent to a continuous service provision, not now in the CBA. Therefore, in the arbitrator’s opinion, to deny the grievance would be exceeding his authority and modifying an existing term of this Agreement.

AWARD:

The Grievance is granted, the mandatory fitness provision of Article 31.05(B) does not apply to Watercraft Officer Massello.

This concludes the Arbitration decision.

Respectfully submitted this 7th day of February 2017.

E. William Lewis

Arbitrator

/s/

