

**IN THE MATTER OF )**  
**ARBITRATION )**

**BETWEEN )**

**FRATERNAL ORDER OF POLICE, )  
OLC, INC. )**

AND )

**STATE OF OHIO: DEPARTMENT )  
OF NATURAL RESOURCES/DAS )**

[illegible]

**GRIEVANCE ID: DNR-2016-01600-2**

**Grievant: RYAN GARRISON, ET AL**  
**Wildlife Investigator/ classification review**  
**(22293)**

**BEFORE: ROBERT G. STEIN, NAA  
ARBITRATOR**

**FOR THE UNION:**

**Douglas Behringer  
General Counsel  
FOP, OHIO LABOR COUNCIL, INC.  
222 EAST TOWN STREET  
COLUMBUS, OHIO 43215-4611**

**FOR THE EMPLOYER:** \_\_\_\_\_ **E**

**Eric Eilerman, Management Advocate**  
**OFFICE OF COLLECTIVE BARGAINING**  
**1602 West Broad Street**  
**Columbus, OH 43223**

## INTRODUCTION

This matter came before the arbitrator pursuant to the collective bargaining agreement ("Agreement") (Joint Ex. 1) between The State of Ohio ("Employer" or "ODNR"), specifically including employees and bargaining unit members classified as Wildlife Investigators of the Ohio Department of Natural Resources, and the Fraternal Order of Police, Ohio Labor Council, Inc., Unit 2 ("Union"). That Agreement is effective from July 1, 2012 through June 30, 2015 and includes the conduct which is the subject of the instant grievance (Joint Ex. 1)

Robert G. Stein was mutually selected to impartially arbitrate this matter, grievance DPS-2016-01600-2, as a member of a recognized permanent panel of arbitrators, pursuant to Article 20.06(1) of the Agreement. A hearing was conducted on April 24, 2018 at the Ohio Office of Collective Bargaining, located at 1602 West Broad Street in Columbus, Ohio. The parties mutually agreed to that hearing date and that location, and they were each given a full opportunity to present oral testimony, documentary evidence, and arguments supporting their respective positions. No transcript was recorded of the proceedings, which concluded with the parties' submission of post-hearing briefs on May 11, 2018.

No issues of either procedural or jurisdictional arbitrability have been raised, and the parties have agreed that the matter is properly before the arbitrator for a determination on the merits. The parties stipulated to the following:

*The parties agree that the following point factor assignments for the Wildlife Investigator classification are not in dispute-Worker Characteristics, Supervision Exercised, Policy & Methods, Records & Reports, Safety of Others, Mental Skills and Physical Demands.*

This is a class action grievance and parties have also stipulated to the statement of the issue to be resolved in this matter and to the submission of five (5) joint exhibits.

## **ISSUE**

Did the Employer violate Article 65? If so, what shall the remedy be?

## **RELEVANT CONTRACTUAL PROVISIONS**

ARTICLE 20 Grievance Procedure  
ARTICLE 65.3 Classification Review

## **BACKGROUND**

The issue in the instant matter arises from a dispute between the Union and the Employer regarding the findings of report and recommendation issued regarding a classification review of the position of Wildlife Investigator ("Investigator") conducted by the Department of Administrative Services ("DAS") on March 3, 2016. (Joint Ex. 2) Following DAS recommendation, Ryan Garrison, a nineteen (19) year employee of the ODNR classified as a Wildlife Investigator filed a class action grievance on April 21, 2016 citing violation of Article 65 of the Agreement. DAS, in its recommendation issued on March 3 recommended that the classification of Wildlife Investigator is to remain in pay grade 11, the Grievant and the Union argue that Article 65.03 has been violated and are seeking to have the Investigator position upgraded to a pay grade 12.

Because the instant matter remained unresolved at the Agency Step of the Agreement's grievance procedure, it was advanced to the arbitration level. Thus, the grievance has been submitted to this arbitrator for final and binding resolution.

## **SUMMARY OF THE UNION'S POSITION**

The Union contends that Article 65.03 of the Agreement permits the Union to request review of two (2) classifications per year and that by agreement said contract reviews are to be based upon position description questionnaires (PDQ's). These reviews are conducted by DAS. In 2015 one of these reviews dealt with the classification of Wildlife Investigator, classification number 22293. The Union avers the Report and Recommendation (Joint Ex. 2), if done properly, should have resulted in moving the classification to pay range 12. Instead the Report and Review of DAS resulted in having the Investigator classification remain at pay range 11.

The point factor system used by DAS is an evaluation tool and it has been used by DAS since 1999. (Union Ex. 1) Joint Ex. 4 in this matter is what the Union refers to as the "Bible" for Classification review that describes what factors are based upon specific criteria, more specifically duties actual performed. The heart of the dispute lies in a disagreement by the parties regarding the DAS review and recommendation in four specific areas:

**Personal Contacts**  
**Mental Demands**  
**Unavoidable Hazards**  
**Surroundings**

As stipulated above the parties these are the areas in dispute regarding the DAS Report and Recommendation ("DAS RR"). In pertinent part the focus is on degree of difficulty and subsequent point factor assigned in the above listed areas.

The Union conducted its own review of the evidence and testimony as well as its own analysis by FOP, OLCI expert, Brenda Goheen ("Goheen"). She concludes that in the

four areas of dispute DAS under valued the classification in terms of degree of difficulty and assigned point factors in abbreviated form they are as follows:

**Personal Contacts, DAS (degree 4, 8 pts) FOP (degree 5, 14 pts).** The Union argues DAS erred in this point assignment and that a degree of difficulty categorized as Very Difficult warrants a degree 5 and a point factor of 14.

In addition to conducting her own analysis of all the evidence and in particular the PDQ's, the Union asserts that the Employer, despite having acknowledged that personal contacts of Investigators reach a degree of difficulty of very difficult, in terms of undercover surveillance, serving warrants, investigating hunter injuries and deaths, working with confidential informants, dealing with victims, found they are not consistently performed warranting a degree 4. Union witness Goheen, who agrees with the DAS analysis regarding degree, testified that Personal Contacts is an either/or category and should not have been solely based on the term "or". Goheen in her analysis argues that in this area of Personal Contacts, the degree should have been a 5 with a point factor of 14 points.

**Mental Demands, DAS (degree 3, 6 pts) FOP (degree 4, 10 pts)**

Goheen argues that Investigators are exposed to usual pressure when conducting and completing investigations. These are very detailed investigations required a high degree of detail in order to stand up in court. These employees often do not have immediate backup when conducting interviews of witnesses and family members of hunters who have been wounded or died.

The Union points out that the Employer in its opening stated that part of the classification review process is "internal consistency and equity across classifications." The Union argues it is relevant to compare similar classifications. There are approximately 250 police officers at ODNR, composed of Natural Resource Officers and Wildlife Officers. All of these police officers at ODNR scored a degree 4 in mental demands, except for the 22 Wildlife Investigators, which were assigned a degree 3. (Union brief, p. 14)

**Unavoidable Hazards, DAS (degree 2, 2 pts) FOP (degree 3, 4 pts)**

Goheen testified that Investigators are continuously exposed to working conditions where moderate serious injuries are encountered warranting a degree 3 with the assignment of 4 pts.

**Surroundings, DAS (degree 1, 1 pts) FOP (degree 2, 2 pts)**

The Union points out that Investigators work outside and are exposed to unpleasant conditions that the Union describes as extremely disagreeable, to include disease,

biohazards, dead animals, extreme temperatures, etc. Anytime an animal is shot by a hunter, these officers are the primary investigators. These items are all part of their duties as outlined in the PDQ's. The Union rejects the Employer's argument that Wildlife Inspectors are rated lower because they are not exposed to adverse surroundings on a continuous basis arguing that it is a matter of whether or not they have this duty as opposed to whether it is a regular occurrence.

The Union further points out that in the PDQ's for Police Officers at ODNR the same conditions exist and they were assigned a degree 2 in the area of Surroundings. Therefore, there is absolutely no justification to rate Wildlife Investigators at a lower rate.

In summary, it should be noted that in general the Union rejected the Employer's rationale for providing a lower rating that was based upon frequency and regularity. The Employer gave the classification of Wildlife Inspector a total score of 82. it would take a total of 91 points to reach a pay grade 12 and the Union argues that the evidence and testimony actually support a total of 95 points for this classification. The Union requests that its grievance be sustained and that the classification of Wildlife Investigator be elevated to pay range 12.

#### **SUMMARY OF THE EMPLOYER'S POSITION**

The Employer contends that the Union has failed to sustain its burden of proving that the former violated the Agreement. In support of this position the Employer made several arguments, underscored on the premise that the position of Wildlife Investigator has not appreciably changed in the last 20 years and in particular since it was last reviewed in 1999.

The Employer states that in the review of the Investigator position that took place in late 2015 to early 2016 there was one change in the class specs for the position and that was the addition of one word, "undercover", or a total of three (3) words. And, that word

was requested to be changed by ODNR to “covert &/or overt”. Referring to prior arbitrial history in this area of classification review, the Employer points out that “it has been well established that DAS should be given deference as to its expertise when conducting point factors and assigning pay ranges to job classifications. And, in order to determine error on the part of the Employer a three (3) part test should apply:

1. Did the Employer conduct the classification review in an arbitrary and capricious manner?
2. Did the Employer fail to consider all of the relevant facts?
3. Did the Employer incorrectly apply its standards?

The Employer avers that the FOP provided virtually no context or analysis as to how or why DAS could have erred in their point factor process. In abbreviated form under the four areas in dispute the Employer makes the following arguments:

**Personal Contacts**, the reason for the score of 4/8 was ultimately related to frequency and regularity of contacts and that the words ultimately added to the specs of over &/or overt verbiage did not connote a new duty, but was simply a better descriptor of the types of investigations performed by Wildlife Inspectors.

**Mental Demands**, the consensus of the Employer was that although there is a need to frequently pay close attention, it did not rise to “continuous.”

**Unavoidable Hazards**, again it deals with frequency of exposure. The Investigators are not out in the field continuously.

**Surroundings**, the consensus of DAS was that while the Investigators were somewhat exposed to disagreeable conditions it was intermittently and not a frequently.

The comparable classification raised by the Union of Natural Resource Officer was properly reviewed and rated asserts the Employer. Moreover, the Employer argues that “the fact that certain factors may have scored higher in a different classification should be given little weight since there is no questions or testimony about how similar and/or different those classifications are to the Wildlife Investigator.

Based on the above assertions, the Employer requests that the Union’s grievance be denied in its entirety.

## **DISCUSSION**

In this arbitral proceeding involving the interpretation and application of the Agreement, as asserted by the parties’ advocates, the arbitrator is a creature of the contract from which he derives his authority, and he must confine his decisions. An arbitrator’s decision must be based on the terms of the contract which the parties themselves have created and adopted to govern their relationship. It is the contract and its precise terms which must be examined to determine the merits of the case. The arbitrator’s sole duty is to find out what was intended by the language actually incorporated into the Agreement.

It is generally recognized that the primary function of an arbitrator in construing a contract is, of course, to find the substantial intent of the parties and to give effect to it. Presumptively, the parties’ intent is expressed by the natural and ordinary meaning of the language employed by them . . . to the end that a fair and reasonable interpretation will result.

*NSS Enters., Inc. and Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., Local 12, 114 LA 1458 (2000).*



It must be recognized that the Union, as the grieving party in this matter, has the burden of proving by a preponderance of the evidence that the Employer has violated the Agreement if it is to prevail.

An established principle in labor relations is that the party alleging a violation of a collective bargaining agreement bears the responsibility of proving by persuasive evidence that there has been a contract violation. There is no rigid formula stating the amount or degree of evidence that is necessary to sufficiently prove a contract violation. An arbitrator should evaluate all of the circumstances surrounding the alleged contract violation and weigh the relative worth and relevance of all the evidence presented in relation to the terms of the collective bargaining agreement.

*Am. Std., Paintsville, Ky. and United Steelworkers of Am., Local 7926, 05-2 Lab. Arb. Awards (CCH.) P 3213 (Allen 2005).* Essentially, the Union must demonstrate that the Employer had a duty or obligation under the Agreement that it failed to meet or carry out in a reasonable manner.

It should be made clear that in the past the arbitrator in this matter has previously stated and still holds the opinion that considerable deference shall be given to DAS in making classification reviews. However, when Employer improperly applies its own findings and standards or acts in an arbitrary fashion in violation of Article 65 of the Agreement an arbitrator is obligated to determine whether the Agreement was violated. After a thorough review of the contractual language, the facts in this case, the evidence submitted, testimony considered, and the arguments presented by the parties, the arbitrator finds that the Union has met its burden in part by providing sufficient evidence that the Employer had erred in applying its own standards and findings and violated Article 65 of the Agreement in two of the disputed areas: Personal Contacts and Mental Demands. However, there is insufficient evidence to support the Employer's contention that the

Union had agreed to the classification review and conclusions by the Employer, with the grievance as being evidence to the contrary.

The Employer's overriding position in this matter in its own words is as follows,"the Union is attempting to secure a pay raise for a job classification despite the fact that very few of the duties have changed over nearly twenty years." (Employer brief, p. 1)

**Personal Contacts:** The evidence demonstrates that the Employer in its reviews and conclusion regarding the classification of Wildlife Investigator stated, *"Very difficult personal relationships associated with undercover criminal investigations, apprehending & dealing with armed violators"* in which the Employer assigned a degree of 4 with 8 pts. (Tab 2) When compared to the review that took place in 1999 the same category of Personal Contacts was described as; *"Very difficult personal relationships, apprehends violators, makes arrests & enforces hunting & fishing regulations, investigates fatalities & hunting accidents; deals with armed violators"* in which the Employer again assigned a degree of 4 with 8 pts. (Mgt. Ex. 1) Why there is a difference in these two descriptions (consensus) in light of the Employer's position that the job of Wildlife Investigator has not changed significantly is not clear. Most importantly however, is the fact that in both 1999 and 2016 the consensus of the DAS was that under Personal Contacts the Employer acknowledges that the classification deals with "Very difficult personal relationships" and that phrase specifically appears under a degree 5 rating, versus the degree 4 assigned by the Employer. (State of Ohio Point Factor Evaluation Manual, Tab 4) Here, the Employer failed to correctly apply its own standard and findings. The Employer argues the 4 rating, with its assignment of 8 points is justified in 2016 as it was in 1999 due to frequency and regularity. How is it possible to predict the frequency and regularity of a Wildlife

Inspector's encounters with very difficult personal relationships in a given period? Doesn't this depend on the volume and nature of the investigations, the amount of work an individual is assigned, the number of those assignments, the number of very difficult persons or encounters that are driven by an unpredictable number of incidents of crime?

The frequency and regularity argument used by the Employer would be based upon firmer footing if one were evaluating a classification where frequency and regularity are more closely controlled variables. For example, if in attempting to evaluate the proper pay range for employees who operate bull dozers, the Employer can control the frequency and regularity of making this assignment, the size and complexity of the dozer, and the difficulty of the assignment given to an employee that would affect the level of necessary skill to operate the dozer. But, the frequency and regularity and the scope of a crime investigation is by definition not predictable or within the control of ODNR management. Under Specifications, Job Duties in Order of Importance and Major Worker Characteristics: The following lines reasonably demonstrate the unpredictable nature of the work as well support for the Employer's acknowledgement of the very difficult personal nature of the Wildlife Inspectors' work. They read:

*"Conducts covert &/or overt criminal investigations...(e.g. hunter incidents, involving personal injury, death &/or property damage, sport &/or commercial fishing operations,... Ability to define problems, collect data, establish facts, and draw valid conclusions; recognize unusual or threatening conditions & take appropriate action; handle sensitive &/or dangerous face-to-face contacts during investigation & enforcement of regulations..."*

By specifically using the term "very difficult" the Employer failed to properly apply its own long standing standard to this review and conclusion. The Union convincingly argues that the Employer erred in applying Article 45, its own rating standard. A Degree of 5 with 14 points should have been awarded here.

**Mental Demands:** In the 2016 review the Employer gave this category a degree of 3 with a point factor of 6 being assigned. In the description the DAS stated, *“involves frequent exposure to unusual pressure when conducting & completing investigations.”* In 1999 the degree assigned by the Employer was a 4 with a point factor of 10. And in the consensus narrative the Employer stated the following under Mental Demands, *“Combination of B & C, continuous, close attention for accurate results & frequent exposure to unusual pressure.”* Again, what changed? According to the Employer very little regarding this work, yet the degree assignment is lower. This begs the question that if the classification of Wildlife Investigator demands the application of professional investigative methods, which in a legal context unquestionably demands careful attention to detail and precision that by its very nature must stand up to legal scrutiny, why is the area of Mental Demands lower for this classification in 2016 than it was in 1999. Once again this is illustrated in the classification specifications under the category of Major Worker Characteristics, the following lines of which illustrate the need for precision in the work of a Wildlife Inspector:

*“Knowledge of wildlife management (e.g. conservation, ecology); agency policies & procedures related to law enforcement (e.g. investigations, evidence collecting, interviewing) federal & state wildlife laws (e.g. criminal, constitutional, administrative rules, statutes); Ohio Revised Code (i.e. ORC) 1531-1533...”*

The rating Mental Skills, although not in dispute is illustrative of the intellectual demands of the classification of Wildlife Inspector. The Mental Skills assigned degree by the Employer in both 1999 and 2016 remained high as a 5 with a point factor of 16, citing *“Application of professional investigative methods”* in 1999 and in 2016 *“Application of professional-level investigative methods to provide solution of legal problems.”*

Again in viewing Mental Demands of the Wildlife Inspector classification in 1999 DAS found that a combination of (a) Continuous, close attention for accurate results and (b) involves frequent exposure to unusual pressure warranted a degree 4 rating with a point factor of 10. If very few duties have changed in this classification in the last 17 years, and the only difference is descriptive in nature with the addition of three (3) words, “covert &/or overt” it is not reasonable that professional investigative methods that had to meet legal standards to provide solutions to legal problems in 1999 are any less demanding or complex in 2016. And while there is a presumption of accuracy to DAS reviews, if there is an obvious error or misapplication of standards based upon the Employer’s own contradictory findings over time, it needs to be corrected. The Employer erred here and should have reasonably maintained the same degree in 2016 as it found in 1999.

Regarding the other two areas of inquiry, Unavoidable Hazards and Surroundings the Union’s analysis proved to be less persuasive. Unlike the inconsistencies applied to the two categories in 1999 and 2016 addressed above, those seem to be two areas that have not changed appreciably and I find there is insufficient evidence to successfully challenge the DAS review and findings that were demonstrated to be consistent in both reviews when considering the information provided by the PDQ's.

Both these point factor adjustments are not a result of the Arbitrator substituting his judgment for the Employer, but are due to the Employer’s error in applying degrees and attending point factors contrary to its own review and findings in violation of Article 65. Given the vast operation of DAS it is understandable how such errors may occur. All other degree assignments and assignment of points were assigned in accordance with Article 65 and shall remain as indicated in the 2016 review.

## **AWARD**

The Union's grievance is granted in part and denied in part. The degree and points assigned in Personal Contacts should be adjusted to a degree 5 with a point factor assignment of 14 pts. In the category of Mental Demands the degree should be adjusted to a degree 4 with a point factor assignment of 10 points.

The current employees in the classification of Wildlife Inspector shall be placed at pay range 12, and made whole effective with the pay period that includes, April 21, 2016. The Grievants in this matter shall be made whole in line with this ruling.

Pursuant to Article 29.09(3) (a), the arbitrator's fees and expenses shall be equally divided between the parties.

Respectfully submitted to the parties this \_\_\_\_\_ day of June 2018,

---

**Robert G. Stein, Arbitrator**