
 In the Matter of Arbitration Between: *
 *
 State of Connecticut *
 Division of Criminal Justice *
 *
 And *
 *
 Connecticut State Employees Association *
 SEIU, Local 2001, Police Inspectors Council *

*Deborah
 B.B. Ketter*

Grievance: Cold Case Supervisory Inspector

The undersigned, designated in accordance with the Parties' Agreement, conducted a hearing on April 30, 2008 at the Offices of the Employer in Rocky Hill, Connecticut. At that time, full opportunity was provided for examining and cross-examining witnesses and submitting Offers of Proof. Thereafter, the Parties filed Briefs with the undersigned each being received under postmark of September 30, 2008.

APPEARANCES

- For the Connecticut State Employees Association (Union):**
- Robert J. Krzys, Attorney**
- For the Division of Criminal Justice (Employer):**
- Saranne P. Murray, Attorney**

THE ISSUE

The Parties agreed upon the following statement of the Issue:

1. Is the matter arbitrable?
2. If so, did the Division of Criminal Justice violate Article 25, Section 1 of the Collective Bargaining Agreement between the Division and the Union in the selection process for filling the vacancy in the position of Supervisory Inspector in the Cold Case Unit of the Chief State Attorney's Office?

3. If the Division violated Article 25, Section 1 as stated above, what shall be the remedy?

STIPULATIONS

1. All of the applicants for the Cold Case Supervisory Inspector position, with the exception of Dillon, were Inspectors. Dillon was already a Supervisory Inspector.
2. In or about May of 1998*, the Division posted a vacancy in the position of Supervisory Inspector for the Statewide Prosecution unit. Several Inspectors and one Supervisory Inspector (Dillon) applied. Dillon was not selected. Inspector Charles Coffey was promoted to Supervisory Inspector and granted the position. There is no information available concerning the order in which the applicants were interviewed, but all were interviewed on the same day.

*In his testimony, Dillon inadvertently said the date was 1996.

3. In or about April of 2004, the Division posted a vacancy in the position of Supervisory Inspector for the Workers' Compensation Fraud and Abuse Unit. Several Inspectors and one Supervisory Inspector (Dillon) applied. Dillon was interviewed first. Following that interview, Dillon was offered the position and accepted. No further interviews were conducted.

CONTRACT LANGUAGE

Article 9 – Grievance Procedure

Section 1. Definitions.

(a) A grievance is defined as a written complaint involving an alleged violation or application or interpretation of a specific provision of this Agreement....

Article 25 – Transfers for Operational Reasons

Section 1. Permanent Transfer.

At the request of the employee, with the approval of the Chief State's Attorney, transfers may be made to a vacancy in a work unit in the Division of Criminal Justice. The employee shall put such request in writing to his immediate supervisor detailing the unit to which he wishes to be transferred. Said supervisor shall forward the request to the Chief State's Attorney and the State's Attorney for action. If the transfer request is not approved, a written explanation shall be

given to the employee spelling out the reason for the denial. Such denials shall not be subject to review under Article 9....

BACKGROUND

The essential facts in this case are not in dispute. Gregory Dillon is the Grievant who has been employed in the Division of Criminal Justice in the Office of the Chief State's Attorney since 1990. At the time of the arbitration hearing, he held the position of Supervisory Inspector in the Workers' Compensation Fraud Bureau. Dillon began his employment as an Inspector and was promoted to the rank of Supervisory Inspector in 1995. He has been a Supervisory Inspector since then serving in that capacity in several different units.

In the summer of 2007, Dillon applied to be transferred to a Supervisory Inspector Position for the newly created Cold Case Unit. A vacancy existed in the position of Supervisory Inspector for that unit and several inspectors applied for the position, which, for them, would have meant a promotion.

All of the applicants for the Supervisory Inspector position were interviewed on the same day. Inspector Rovella was selected and the other applicants including Dillon were sent a letter advising them of this selection.

The Union filed the instant grievance claiming that the proper procedure for Dillon's response to the transfer request had not been followed. It asserts that the Division treated Dillon's transfer request as an application for a position and wrongfully gave the same consideration as the requests of the inspectors who were seeking a promotion to the position.

The Union asserts that the procedures set forth in the Contract were not followed and that the Division should have first interviewed and taken up Dillon's transfer request and made a decision on that request. According to the Union, the Division could thereafter have

independently considered the applications of the inspectors if it did not grant Dillon's transfer request.

As the stipulations indicate, there was two other occasions where Dillon sought a transfer as a Supervisory Inspector. In response to a posting for a vacancy, Dillon applied for a transfer and several inspectors applied for what would have been for them a promotion. Dillon did not receive his transfer and an inspector was promoted. All of the applicants for the Supervisory position were interviewed on the same day.

In 2004, Dillon applied for a transfer to another Supervisory Inspector position. Several inspectors also applied for the position (a vacancy notice had been posted). Dillon was interviewed first, following which his transfer request was granted. No further interviews were conducted.

POSITIONS OF THE PARTIES - SUMMARIZED

The Division has a twofold arbitrability challenge to the Union's grievance. First, it points out that the clear and unambiguous language of Article 25, Section 1 expressly precludes arbitration over the denial of a transfer request. Article 25, Section 1 grants employees the opportunity to seek permanent transfers but expressly provides that the denial of a transfer request is not subject for review under Article 9, the Arbitration provision.

Second, the Division asserts that the Arbitrator lacks jurisdiction over the Union's claim that the Division did not follow the contractually appropriate process for considering Dillon's transfer request. This is because it would require the arbitrator to add to the Contract by relying on an alleged "past practice" which did not carryover to the current Contract.

The Division points out that there is nothing in the Collective Bargaining Agreement requiring the Division to proceed in the manner sought by the Union. That is to have Dillon's

transfer request be considered first before considering and taking action on other applicants. The Agreement explicitly states that the arbitrator is bound by the terms of the Parties' Collective Bargaining Agreement, and he shall have no power to add, to alter or to modify the Agreement.

In addition, the Division states that there is no past practice. The fact that the Division had once processed a transfer request for Dillon in the manner sought in this case, does not bind the Division. According to Rexroth Corp., 101 LA 94, 97 (BNA, 1993), a past practice must be:

- (1) unequivocal;
- (2) clearly enunciated and acted upon; and
- (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties;

In short, the Division states that past practices by definition require both Parties to acquiesce in the practice on a continuous and ongoing basis.

Assuming that a past practice does exist, the Division maintains that it is defeated by the language of the current Collective Bargaining Agreement which contains a zipper clause. The practice relied upon by the Union was a one time thing that took place prior to the current contract coming into existence. The zipper clause defeats the existence of any prior practice which did not continue into the terms of the present Collective Bargaining Agreement.

The Union argues that the instant grievance is arbitrable because it is only challenging the process for considering transfer requests. The actual denial of Dillon's transfer request is not being challenged.

The Union states that Article 25, Section 1 spells out a process to be followed when an employee makes a transfer request. That employee, according to the Union, must be considered and then given a reason for non-selection. A transfer is different than a promotion. The Union's grievance raises the question whether the proper procedure was followed because it contends that

the Division was barred by Contract from merging the consideration of the transfer request with several other applications for promotion. It contends that the Contract provides that supervisors get first crack at supervisory openings.

So, the Union goes on to state that this matter is arbitrable because it cannot be said with positive assurance that any language in the agreement bars this matter from arbitration. Moreover, there is a good faith dispute over whether the matter is arbitrable and such disputes should be resolved in favor of arbitration.

The Union asserts that the Supervisory Inspector (Dillon) was entitled to be independently considered for the vacancy. Both in terms of the expressed language of the Contract and, also, based on past practice of the parties which supports the interpretation of Article 25, Section 1 advanced by the Union.

The language of Article 25 provides for a process for transfers. An employee applies and is then considered and if rejected is given a reason. Here, there is no doubt that there was an opening for a Supervisory Inspector position in the Cold Case Unit. An existing Supervisory Inspector sought a transfer and the language of Article 25, Section 1 entitles him to an independent review. This was not a notice of an opening for which persons could apply for a promotion. Four inspectors were not seeking a transfer but were seeking a new position at a higher level.

The Union maintains that the past practice of the Parties is also supportive of the Union's positions. As the stipulations demonstrate, a prior opening for a Supervisory Inspector in the Workers' Compensation Unit was handled consistent with the Union's argument in this case. The Supervisory Inspector was interviewed, selected and the rest of the interviews were cancelled. Similarly, in an earlier transfer case in May of 1998, Supervisory Inspector Dillon

testified that he applied for a transfer to a Supervisory Inspector position and was told in the course of his 2004 interview by Attorney Paul Murray that the process followed at the time in 1998, was mishandled. The Contract provides that transfers are to be considered before others can apply. Deputy State Attorney Murray, however, testified that he could not recall making such a comment to Dillon at the time of the 2004 interview.

As a remedy, the Union asserts that the Division should be required to reexamine the transfer application of Dillon; independently consider him and reach a judgment. Also, the Union seeks a declaration that its interpretation of Article 25, Section 1 is proper so that this issue is resolved for the future.

OPINION

First, it is obvious that the Union is not challenging the Division's failure to transfer Supervisory Inspector Dillon to the Cold Case Unit. That claim would be not arbitrable by the clearly expressed terms in Article 25, Section 1. It is not necessary, then, to review the Division's thorough analysis of a claim that was not actually before me.

The question still remains as to whether or not there is an arbitrable grievance before me. It is my finding that the Union's claim meets the definition of what constitutes a grievance appearing under Article 9, Section 1 (a). It is not necessary for me to dwell into the merits of the Union's case to determine that their claim is an arbitrable one properly before the arbitrator.

As to the merits, the Union asserts that under Article 25, Section 1, Supervisory Inspectors seeking transfers should get first crack at the position to which they wish to be transferred before any consideration can be given to the applications of Inspectors who would be seeking a promotion to this position or positions. There is no expressed language in Article 25, Section 1 to support the Union's position. If the Parties wanted Supervisory Inspectors seeking

transfers to go to the head of the line and be considered first and apart from vacancy applications of inspectors, they simply could have said so.

The Union is simply reading into Article 25, Section 1 language that does not exist and, frankly, cannot be logically implied. One man's transfer, under this Contract, maybe another man's promotion, and I lack the authority to read into Article 25, Section 1 language that would give to the Union the results it seeks.

AWARD

1. The matter is arbitrable.
2. The Division of Criminal Justice did not violate Article 25, Section 1 of the Collective Bargaining Agreement between the Division and the Union in the selection process for filling the vacancy in the position of Supervisory Inspector in the Cold Case Unit of the Chief State's Attorney Office. Thus, the Grievance is denied.

Dated: October 22, 2008



David R. Bloodsworth