In the Matter of Arbitration Between Fraternal Order of Police - Ohio Labor Council and State of Ohio, Department of Liquor Control	Case No.: 21-04- (12-21-88- 102-05-55 Before: Harry Graham

Appearances: For Fraternal Order of Police-Ohio Labor Council

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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on May 12, 1989 before Harry Graham. At that hearing both parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on June 17, 1989 and the record was closed on that date.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the Ohio Department of Liquor Control violate Article 33.02 of the Agreement when one of the Grievants was not transferred to the position of Liquor Control Investigator 1, Position Control Number 475.0? If so, what shall the remedy be?

Background: The events that give rise to this proceeding are not a matter of controversy. In 1987 and 1988 a number of employees of the Ohio Department of Liquor Control (Paula Waid, Robert Vanderhorst, Sandra Steinhelfer, Tim Snyder and Dwight Johnson) indicated to the Department their desire for a transfer. All requested transfer to the Permits Division of the Department. Their requests were filed pursuant to the terms of Article 33.02 of the Collective Bargaining Agreement which provides that requests for reassignment may be made "each year." In December, 1988 Paula Waid, an Investigator in the Department became aware that a new hire had come to fill a position as an Investigator I in the Permits Division. She regarded that action to be a violation of the Agreement as she and several of her colleagues (see above) had indicated their interest in moving to the Permits Division. A grievance protesting the failure of the Department to place an incumbent employee in the Investigator's position in the Permit Division was promptly filed. It was not resolved in the procedure of the parties and they agree that it is properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points to the Agreement at

Article 33.02 and asserts that the language found there is clear and not susceptible of interpretation. It also insists that the language supports its position in this dispute. The Agreement indicates that when the Department of Liquor Control determines to fill a vacancy in the Divisions, "... employees in like classifications are eligible to indicate their interest for work reassignment. Such expressed interest will be given first consideration by management on the basis of ability and seniority." Excluded from that requirement are the Special Investigations and Internal Affairs divisions of the Department. They do not have any relationship to this dispute.

The Union reads that language to indicate that it applies to this dispute. Subject only to the exclusions for Special Investigations and Internal Affairs, the language applies to all positions in the Department, including those at issue here. Employees who bid on the vacancy had seniority and were qualified. This reduces the question to one of whether or not the rejected applicants met the test of "like classification" set out in the Agreement according to the Union. The applicants were all classified as Investigator II's. The vacancy was for an Investigator I. This does not mean that the Investigator I and Investigator II positions do not meet the test of "like classification" set forth in the Agreement. To the contrary, the Union insists the reverse is

true. Investigator I and Investigator II are "like classifications" within the meaning of the Agreement. The incumbent who held the position retired which led to the vacancy at issue in this proceeding. He was classified as an Investigator II. The Department reclassified the job as Investigator I but did not change the duties. The person performing the tasks today is doing exactly the same job as the person who formerly held it. Merely to change the title from Investigator II to Investigator I does not constitute a change in the classification. Something must be different from the I's to the II's in order for a distinction to be made according to the Union. There is no difference in this case, hence the "like classification" test is met and the Grievance should be granted according to the Union.

This view is bolstered by the history of negotiations. During the negotiations the Union was very concerned about the relationship between Investigator I's and Investigator II's. It was of the view that in fact all Investigator I's and Investigator II's were performing the same duties. As such, they should receive the same pay. The State came to agree with this view in the Union's opinion. This is shown by the fact that the parties agreed that when a newly hired Investigator I completed his or her probationary period he or she was to be automatically reclassified as an Investigator II. In essence, Investigator I became a probationary

position.

The Agreement does not permit the Employer discretion in the manner in which vacancies are filled. It indicates that employees who express an interest in a vacant position "will be given first consideration by management on the basis of ability and seniority." The employer has the ability to select among applicants based upon the criteria specified in the Agreement, ability and seniority, but it must first look to incumbent employees who express an interest in a vacancy before going to the labor market. It failed to do so in this case, resulting in a violation of the Agreement the Union insists. It's view of the contract language is buttressed by the history of negotiations. On April 30, 1986 the parties dealt at length with the question of promotions. In the course of discussions the Chief Negotiator for the State on this issue indicated that it was the intention of the State to "give these people the positions." (Employer Exhibit 4). Given the clear language of the Agreement accompanied by the explicit understandings reached in negotiations the Union insists the grievance be sustained.

As the Union views this dispute there is only one Article of the Agreement that is applicable to it. That is Article 33. At the hearing the State made the argument that Article 31, "Promotions" is the appropriate section of the Agreement that bears upon this dispute. That is not so

according to the Union. It grieved under Article 33. The entire course of discussions between the parties were couched in terms of Article 33. Only belatedly has the State raised any concern with Article 31. That concern is misplaced and should be disregarded by the Arbitrator according to the Union.

The sequence of events that will occur in this situation is relevant to this dispute. The newly hired employee, the Investigator I, will be reclassified to an Investigator II at the end of successful completion of his probationary period. His tasks will not change. The classification of Investigator I is for pay purposes only. Article 31 of the Agreement is concerned with promotions. No promotion occurred in this situation. Article 33 represents the agreement of the parties on Transfer and Reassignment. No transfer occurred in this case. A Reassignment, governed by Article 33, Section 33.02 took place. The language of Section 33.02 mandates that the "first consideration" which is to be given to incumbents actually be provided to them. As is was not the Union insists the Grievance be sustained. It seeks a remedy directing the Department to fill the vacancy in the Permits Division from among the list of Grievants in this dispute based upon "ability and seniority" as provided for in Article 33, Section 33.02.

Position of the Employer: The State takes the view that

reliance by the Union on Article 33 is misplaced. The language that governs this dispute is found in Article 31, "Promotions." Article 31 indicates that a vacancy in the bargaining unit is "defined as a position above entry level for a full or part-time permanent position in the bargaining unit which the Employer has determined to fill." Article 31 should be read in connection with Article 6, the Management's Rights article. The language in that Article confers wide discretion upon the State with respect to how it desire to "manage the work force." That is what it did in this instance. The Liquor Control Investigator II was classified in the State classification system as Position Control Number (PCN) 475.0. The State determined that PCN 475.0 should be downgraded. It is permitted to do so under the language found in Article 6.

Article 31 applies specifically to this situation. It indicates that a vacancy exists for a position above "entry level" that the "Employer has determined to fill." In this situation the vacancy existed at the entry level, a Liquor Control Investigator I. As there was no Liquor Control Investigator II vacancy in existence the Employer had no obligation to post for a vacant position as none existed.

In fact, all applicants were classified as Liquor Control Investigator II's. In the opinion of the State, they sought a demotion. Hence, the "Transfer and Reassignment"

language of Article 33 is not applicable to this dispute according to the State.

If, in fact, should it be determined that Article 33 does apply to this dispute the State indicates it is permissive, not mandatory, in nature. This view is supported by the history of negotiations leading to the language found in the Agreement. The language that was ultimately adopted indicates that the State is to give "first consideration" to internal applicants. The phrase "first consideration" is permissive in nature and merely commits the State to examine applications s from employees prior to hiring from outside of the bargaining unit. As this is the case, the State urges the Grievance be denied.

Discussion: Article 33, Section 33.02, dealing with "Reassignments" contains a proviso that permits employees of the Department of Liquor Control to submit a request for reassignment to a different division of the Department on a yearly basis. That occurred in this situation. The Agreement continues to specify that "All requests (for reassignment) shall be given first consideration as vacancies occur." That did not occur. There is nothing on the record to indicate that the State gave any of the Grievants the "first consideration" for reassignment to the Investigator I position that is required by the Agreement. On its face, that represents a violation of Article 33, Section 33.02. The

State must "consider" internal applicants before resorting to the labor market. It has retained discretion to select from applicants for reassignment based upon "ability and seniority." It must first examine the qualifications of incumbents who have filed requests for transfer before resorting to the labor market to hire from outside of state service. If that "first consideration" is not made, the language at Article 33, Section 33.02 is reduced to a nullity. The State is not bound to honor a reassignment request if it determines that no applicant is qualified. It is bound to first consider such a request based upon the ability and seniority of those making the request.

The language of Article 31, Promotions, does not bear upon this dispute. This is due to the history of negotiations concerning the relationship between the Investigator I and Investigator II positions. Joint Exhibit 6b indicates that the parties agreed that all non-probationary Liquor Control Investigator I's were to be reclassified as Liquor Control Investigator II's. As noted in the memo sent to William Flaherty, Director of the Department of Liquor Control on December 18, 1987 the effect of the agreement meant that Liquor Control Investigator II's would become Liquor Control Investigators and Liquor Control Investigator I's would more accurately be known as Liquor Control Investigator Trainees. This agreement had the effect of incorporating Liquor Control

Investigator I's and II's into the "like classification series" referenced in Article 33.02. When the opening developed in the Liquor Control Investigator I position which was maintained by the State for pay purposes, the State was obliged to treat it as a "vacancy" under Article 33.02. That at least one applicant (Paula Waid) was willing to take a reduction in her pay in order to secure that position does not render it less of a vacancy. Employees may often be motivated by non-monetary considerations, such as hours of work, location, or type of tasks to be performed. In order to secure a more desirable work environment they may trade off income. That Ms. Waid was willing to do so does not make her request for reassignment or that of any other similarly situated person less valid under the Agreement.

The language relied upon by the State to support its position in this case is at Article 31, "Promotions." In no sense did the opening termed Liquor Control Investigator I by the State involve a promotion. The applicants were all Liquor Control Investigator II's. If one of the applicants had been awarded the vacancy in the Permits Division he or she would have continued to be classified as a Liquor Control Investigator II. The newly hired employee will be classified as a Liquor Control Investigator II upon completion of the probationary period pursuant to the Agreement of the parties. (Joint Exhibit 6b).

The history of events giving rise to this case is clear. The Grievants properly submitted their requests for reassignment under Article 33, Section 33.02. That language mandates that they receive "first consideration" for any vacancies based on ability and seniority. That did not occur in this situation.

Award: The grievance is SUSTAINED. Those members of the Department of Liquor Control who expressed an interest in reassignment to the Permits Division, Paula Waid, Robert Vanderhorst, Sandra Steinhelfer, Tim Snyder and Dwight Johnson, are to be given the first consideration for the vacancy in the Permits Division based upon their ability and seniority as determined by the Employer pursuant to Article 33, Section 33.02 of the Agreement.

Signed and dated this _____ day of July, 1989 at South Russell, OH.

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Harry Graham
Arbitrator