

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 652

OCB GRIEVANCE NUMBER: 21-03-910319-0135-05-02

GRIEVANT NAME: WALTERS, WILLIAM

UNION: FOP UNIT 2

DEPARTMENT: DEPT. OF LIQUOR CONTROL

ARBITRATOR: GRAHAM, HARRY

MANAGEMENT ADVOCATE: KIRSCHNER, PAUL

2ND CHAIR: SAMPSON, RODNEY

UNION ADVOCATE: COX, PAUL

ARBITRATION DATE: JULY 31, 1991

DECISION DATE: AUGUST 15, 1991

DECISION: NOT ARBITRABLE

CONTRACT SECTIONS
AND/OR ISSUES:

IS THE GRIEVANCE PROTESTING REMOVAL OF GRIEVANT
PROPERLY BEFORE THE ARBITRATOR? STATE CONTENTS
IT IS A PROBATIONARY REMOVAL.

HOLDING: "MR. WALTERS CONTINUED TO BE A PROBATIONARY EMPLOYEE
TO THE TIME OF HIS DISCHARGE. AS A PROBATIONARY EMPLOYEE, MR.
WALTERS HAS NO RIGHT TO PROTEST SUCH AN ACTION UNDER THE CLEAR
TERMS OF THE AGREEMENT. THE ACTION OF THE STATE IS NEITHER
GRIEVABLE OR ARBITRABLE."

COST: \$646.37

#652

In the Matter of Arbitration

Between

Fraternal Order of Police-
Ohio Labor Council

and

The State of Ohio, Department
of Liquor Control

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Case Number:

21-03-(91-03-19)-0135-05-02

Before: Harry Graham

Appearances: For Fraternal Order of Police-Ohio Labor Council

Paul Cox
Fraternal Order of Police-Ohio Labor Council
222 East Town St.
Columbus, OH. 43215

For Department of Liquor Control:

Paul Kirschner
Office of Collective Bargaining
65 East State St., 16th Floor
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on July 31, 1991 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this case. They were exchanged on August 9, 1991 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:

Is the grievance of William Walters properly before the Arbitrator?

Background: The facts of this case are not in dispute and may

be simply stated. The Grievant, William Walters, was hired by the State on April 23, 1990 as a Liquor Control Investigator I. On March 17, 1991 he was removed from his position. In order to protest his removal he filed a grievance. The Employer took the position that Mr. Walters had no right to grieve his termination. As that question was not resolved in the meetings between the parties it was advanced to arbitration. This proceeding is solely concerned with the procedural aspects of this dispute. No question of the merits of Mr. Walters discharge is before the Arbitrator.

Position of the Employer: The State insists this grievance is not arbitrable on its merits. As the Employer recounts the history of Mr. Walters employment he was a probationary employee at the time of his discharge. At no time was he ever promoted to a nonprobationary position. The classification specification for his position, a Liquor Control Investigator I calls for a 12 month probationary status. As is seen from the account of the facts above, Mr. Walters was within his initial 12 month period of employment with the State at the time of his discharge. Hence, it must be concluded he was a probationary, not a nonprobationary employee, when he was terminated.

There has occurred negotiation between the Union and the State outside of the framework of regularly occurring collective bargaining. That negotiation has concerned the

appropriate pay to be provided to Liquor Control Investigator I's. The State agreed to advance the Liquor Control Investigator I's a pay grade. That does not constitute a promotion. His classification number was changed to a number denoting a holding classification (30809) from his Liquor Control Investigator I number. No promotion occurred during Mr. Walters tenure with the State.

Never in his employment with the State was Mr. Walters told he had been promoted. No record of any promotion exists. Mr. Walters received an adjustment in his pay as part of negotiations with the Union. He was not promoted and remained a probationary employee at the time of his discharge. Consequently, he has no right to secure review of his discharge on its merits the State insists.

At Article 31, Section 31.03 the Agreement defines a promotion as movement to position in the bargaining unit that pays more. That does not apply in this situation. Mr. Walters received a pay increase during his service with the State. This was due to a revision of the pay system, not any movement to a position that paid more. His position was revised to provide it with a pay increase. The position moved, not Mr. Walters.

Section 20.03 of the Agreement provides that probationary employees will not have access to the disciplinary grievance procedure. Mr. Walters was a

probationary employee. The clear language of the Agreement prohibits him from securing review of his discharge according to the State.

The Ohio Revised Code is incorporated into the Agreement by reference. It provides that the probationary period is to be not less than 60 days nor more than one year. It continues to provide that probationary employees whose service is deemed to be unsatisfactory may be removed after completion of 60 days of service or one-half of the probationary period, whichever is greater. The Grievant was within his probationary period when he was removed. He has no right to a hearing on the merits of the State's action the Employer insists. There was no intention of the parties to provide probationary employees with access to the grievance procedure in instances when they were removed from State service. As that is the case, the State insists this grievance must be denied.

Position of the Union: The Union asserts that the language of the Agreement is plain. At Article 31 it provides that a promotion is movement of an employee to a position that pays more. That undoubtedly occurred in this situation. No dispute exists over the fact that the Grievant received a pay increase during his term of employment with the State. Consequently, he was promoted. As he received a promotion, he was no longer a probationary employee. Hence, he is entitled

to the full panoply of rights made available to members of the bargaining unit.

Included among those rights are those under Article 19 of the Agreement. That Article is concerned with the disciplinary procedure to be followed by the Employer. It provides that there are to be certain steps in the discipline procedure and that discipline may be protested in the grievance and arbitration procedure. Section 20.03 provides that initial probationary employees will not have access to the disciplinary grievance procedure. As Mr. Walters was no longer a probationary employee by virtue of his promotion, he must have access to the grievance procedure to protest his discharge according to the Union.

Probationary employees are provided many rights under the Agreement. No reason exists to believe that the right to protest a discharge is denied to the Grievant, even if it is accepted that he is a probationary employee. Mr. Walters has rights under Article 19, Disciplinary Procedure. The Union points out that it is not making a claim that if Mr. Walters is found to be a probationary employee that he has rights under Article 20, the grievance procedure. Rather, the Union is arguing in this situation that as a member of the bargaining unit, Mr. Walters has rights under Article 19, the Disciplinary Procedure. As those rights were allegedly not afforded to him when he was discharged, the Union asserts

that this dispute should be heard on its merits.

Discussion: The Grievant in this situation, William Walters, was a probationary employee at the time of his discharge. He was not promoted from his entry level position as Liquor Control Investigator I. Joint Exhibit 7, a Memo of Understanding reached by the State and the Union, indicates that certain Liquor Control Investigator I's including the Grievant were to be upgraded in pay from a pay range 8 to a pay range 9. There is absolutely no evidence in that Exhibit to indicate that the movement from pay range 8 to pay range 9 constituted a promotion in any way. To the contrary, the Memo indicates its purpose was to resolve issues relating to the Classification Modernization project of the parties. In good faith the State reached the agreement with the Union reflected on Joint Exhibit 7 to correct an error. Newly hired employees had been told they would be in pay range 9. When they were placed in pay range 8, the State agreed to correct its mistake. Its good faith agreement cannot now be held against it in another context. Mr. Walters was not promoted. He remained a Liquor Control Investigator I to the time of his discharge. Unlike the situation contemplated in Section 31.03 of the Agreement, he did not move to a position which paid more. The position was upgraded to pay more for Mr. Walters and the other people itemized in Joint Exhibit 7. This is different than movement to a higher paying position.

Nor is there any other evidence whatsoever to indicate that Mr. Walters was promoted during his tenure with the State. Nothing to that effect is in his personnel file. His position control number as a Liquor Control Investigator I remained constant. The conclusion is inescapable that Mr. Walters continued to be a probationary employee to the time of his discharge.

As a probationary employee his status under the Agreement with respect to his appeal rights is clear. He "shall not have access to the disciplinary grievance procedure." (Emphasis added). If a discharge is considered to be a form of discipline as is normal in the employment relationship, Mr. Walters has no rights to protest it as he was a probationary employee at the time of his termination.

At Section 20.02 the Agreement sets forth definitions pertaining to the Grievance Procedure. A "disciplinary grievance" is a grievance pertaining to a "removal" among other things. As a probationary employee, Mr. Walters has no right to protest such an action under the clear terms of the Agreement.

As a probationary employee the Grievant has no rights to contest his termination in the disciplinary grievance procedure of the parties. As no grievance may be properly filed contesting the termination of a probationary employee, it must be concluded that the action of the State in this

case is neither grievable nor arbitrable.

Award: The termination of William Walters may not be considered to be properly before the Arbitrator. No hearing on the merits of William Walters termination may be heard by the Arbitrator.

Signed and dated this 15th day August, 1991 at South Russell, OH.



Harry Graham
Arbitrator