# ARBITRATION SUMMARY AND AWARD LOG

## OCB AWARD NUMBER: 749

OCB GRIEVANCE NUMBER: 1) 31-12-900503-0031-01-06
2) 15-02-910722-0056-01-09

GRIEVANT NAME: 1) VICK, RONALD
2) MCCLINTON, LIVINGSTON

UNION: OCSEA

DEPARTMENT: 1) ODOT
2) BMV

ARBITRATOR: GRAHAM, HARRY

MANAGEMENT ADVOCATE: 1) TORNES, JOHN
2) FLYNN, ED

2ND CHAIR: WAGNER, TIM

UNION ADVOCATE: 1) LIEBER, STEVE
2) GOHEEN, BRENDA

ARBITRATION DATE: 1) MARCH 18, 1992
2) MARCH 20, 1992

DECISION DATE: APRIL 1, 1992

DECISION: 1) DENIED
2) GRANTED

CONTRACT SECTIONS
AND/OR ISSUES: ARTICLE 17-MINIMUM QUALS: DID MGMT IMPROPERLY DENY PROMOTIONS TO GRIEVANTS?

HOLDING: 1) THE BIDDER MUST MEET THE TESTS OF POSSESSION & PROFICIENCY IN THE MIN. QUALS.. GRIEVANT MEETS MIN. QUALS. BUT, DID NOT MEET THE CONTRACTUAL STANDARD OF "PROFICIENCY" CONTAINED ON THE P.D..
2) AGENCY FAILED TO SHOW THAT JUNIOR APPLICANT WAS DEMONSTRABLY SUPERIOR TO THE SENIOR BIDDER.

COST: $1006.98

#1006.98
($50342/agency)
Min Panels
2 Cases!

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| In the Matter of Arbitration | * | |
| Between | * | Case Number: |
| OCSEA/AFSCME Local 11 | * | 31-12-(5-3-90)-31-01-06 |
| and | * | Before: Harry Graham |
| The State of Ohio, Department of Transportation | * | #749 |

Appearances: For OCSEA/AFSCME Local 11:

Steve Lieber
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For Ohio Department of Transportation:

John Tornes
Ohio Department of Transportation
25 South High St.
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on March 18, 1992 before Harry Graham. At the close of the oral hearing the parties presented closing arguments. The record in this dispute was closed at the conclusion of the oral arguments.

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

> Did the Employer violate the Collective Bargaining Agreement when it failed to promote the Grievant to Auto Mechanic 3? If so, what shall the remedy be?

Background: There is no dispute over the events that prompt

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

> Did the Employer violate the Collective Bargaining Agreement when it failed to promote the Grievant to Auto Mechanic 3? If so, what shall the remedy be?

Background: There is no dispute over the events that prompt

this proceeding. The Grievant, Ronald Vick was initially hired by the State on February 22, 1972. For much of his career with the State he was classified as an Auto Mechanic 2 and employed at various sites in Cuyahoga County.

During the course of Mr. Vick's tenure with the State the Department also had in its employ Andrew Light who was classified as an Auto Mechanic 3. Mr. Light worked at the Burton Yard which is located in Geauga County. During 1989 Mr. Light was on a lengthy Worker's Compensation leave. As his replacement, Mr. Vick assumed Mr. Light's duties. As was Mr. Light, he was classified as an Auto Mechanic 3. That classification was on an interim basis. He served in that classification from June 4, 1989 to September 16, 1989 when he was removed from the classification and assumed his Auto Mechanic 2 position once again. He remained at the Burton Yard. On December 11, 1989 Mr. Light resigned his position as an Auto Mechanic 3 and on January 25, 1990 the Employer posted for the vacant Auto Mechanic 3 position in Burton. The Grievant applied for the vacancy as did three other bidders. One of the bidders, Robert Hallbom, was awarded the position. Mr. Hallbom carries a seniority date of January 19, 1988. He has sixteen years less state service than does the Grievant, Mr. Vick.

In order to protest what he regarded to be a violation of the Collective Bargaining Agreement Mr. Vick filed a

grievance. That grievance was denied at each step of the procedure and the parties agree that it is now properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points out that during the time Mr. Vick served as a Mechanic 3 at Burton the facility was in an unsettled state. Operations were being moved from the existing building to a new building that had been recently constructed on the site. As a result, support services such as proper electrical and air lines had not been made available for mechanics. Consequently, it was not possible for them to perform all aspects of their work as well as is normally the case.

When the Grievant held the Mechanic 3 position in the Summer of 1989 it was as an interim employee. In no way did he serve a probationary period. At Article 17, Section 17.02 the Agreement provides that the employee is to serve a probationary period upon promotion. The Grievant was not promoted in the Summer of 1989. He was filling in for the absent Mr. Light. Any attempt to deny Mr. Vick an opportunity to fill the Mechanic 3 vacancy at Burton is improper in the Union's view as the Agreement calls for a probationary period, not service as an interim employee. This is especially the case when the conditions under which Mr. Vick worked at Burton were abnormal.

In this situation the Grievant met the minimum

qualifications for the vacant position. Mr. Vick has received good performance evaluations during the entire course of his employment with the State. On September 1, 1989 Keith Miller and Vincent Armenti recommended that Mr. Vick be removed from the Mechanic 3 position and restored to the Mechanic 2 position he had formerly held. In 1986 Mr. Miller had conducted Mr. Vick's formal performance evaluation. Mr. Vick was highly rated by Mr. Miller. He had commented that Mr. Vick was "an asset to Dist. 12 and to the State." In light of the rating that had been given to Mr. Vick by Mr. Miller, the Union asserts that his recommendation that Mr. Vick not be given the position permanently be discounted.

The Agreement at Article 17 refers to applicants for promotion being required to posses the "minimum qualifications" for the position to which the seek promotion. In this case, Mr. Vick met the minimum qualifications in the Union's view. Examination of the Classification Specification, (Joint Exhibit 3) for the Auto Mechanic 3 vacancy indicates that it requires completion of an associate core program in auto mechanics and 12 months experience in auto repair and maintenance. Obviously Mr. Vick met that qualification. Other minimum qualifications, preceded by the word "or" on the classification specification include 36 months experience in automotive repair and maintenance. No matter what standard Mr. Vick is held to, he more than meets

it. There can be no doubt that by virtue of his experience and satisfactory ratings, Mr. Vick met the minimum qualifications for the position. He cannot be denied it the Union asserts.

Position of the Employer: As does the Union, the State relies upon Article 17 in defense of its action in this situation. Not only must applicants for promotion possess the minimum qualifications for the position upon which they are bidding, they must be "proficient" in them as well. While the Union focuses upon the Classification Specification, the State calls attention to the Position Description. Joint Exhibit 4, the Position Description, provides that the Auto Mechanic 3 will perform duties associated with a "lead mechanic." The person in that classification is to schedule repair assignments. He is to schedule routine maintenance, check parts inventories and order parts. These tasks are in addition to performing work on vehicles themselves. The Auto Mechanic 3 is truly a lead worker in that he carries with him an aspect of supervision. Mr. Vick had filled the Auto Mechanic 3 position on an interim basis during the summer of 1989. Management was dissatisfied with the lead worker aspects of his performance. In the opinion of his supervisors, he was too much of a hands on mechanic and not enough of a supervisor. The Employer grants that Mr. Vick possessed the Minimum Qualifications for the Auto Mechanic 3

vacancy as reflected on the Classification Specification. He lacked the supervisory skills reflected on the position description.

When Mr. Vick served as an interim Auto Mechanic 3 he was supervised by various people. Keith Miller, who had supervised him in prior years and rated him highly, was Mr. Vick's supervisor for a short time at Burton. In his view, Mr. Vick did not carry out the supervisory parts of his job well. Other mechanics reported not being assigned to work. Parts were often not ordered correctly. Mr. Vick did a good job as a mechanic, performing well in the mechanical aspects of his position. He did not do well in the supervisory aspects of the Mechanic 3 job. Consequently, Mr. Miller recommended that he not continue in that position at the end of the Summer of 1989. That view was seconded by Mr. Miller's colleague, Vincent Armenti. As the Maintenance Superintendent in Geauga County he was knowledgeable about Vick's performance. In his view, Mr. Vick needed assistance with the supervisory and parts ordering aspects of the Mechanic 3 position. In fact, assistance was provided. Two clerks were assigned to help with the parts ordering. An Equipment Supervisor, Mark Svoboda, trained Mr. Vick in the specifics of the parts ordering process. Nonetheless, Mr. Vick did not improve his performance in the supervisory aspects of the Auto Mechanic 3 position.

The Employer insists it had ample opportunity to observe Mr. Vick in action as an Auto Mechanic 3 during the summer of 1989. Mr. Vick did not serve a probationary period as specified by the Agreement. Nonetheless, the Employer was well aware of his strengths and weaknesses for the Auto Mechanic 3 position. As that was the case, it was a waste of time and energy for all concerned to put Mr. Vick into a probationary period when it was obvious to the Employer that he would not successfully complete it. Section 17.05 of the Agreement indicates that the applicant for a promotion must meet the minimum qualifications and be "proficient." The Employer knew Mr. Vick was not proficient. Hence, he was not given an opportunity to fill the vacancy on a probationary basis. As that is the case, to have provided Mr. Vick the probationary period would have been a waste of time and energy for all concerned. In the view of the Employer, the grievance should be denied.

Discussion: The contractual test for eligibility for promotion is set forth in Section 17.05 of the Agreement. It provides that bidders in the various classes, A, B, C, D, E, and F are to be considered from among those "who possess and are proficient in the minimum qualifications contained in the class specification and the position description." The bidder must meet the tests of possession and proficiency in the minimum qualifications.

There is no question that the Grievant meets the minimum qualifications set forth on the classification specification. By virtue of his experience he far exceeds the minimum qualifications on that document. Further, no question was raised at the hearing but that Mr. Vick is an excellent vehicle mechanic. Clearly, he has performed the mechanical tasks associated with the Mechanic 2 position acceptably for many years and also meets the minimum qualifications set forth on the classification specification. He was also the most senior bidder for the vacancy for the Mechanic 3 at Burton Yard. These factors weigh in his favor. Set against them is language in the Agreement which provides that bidders must be "proficient in the minimum qualifications contained (on) ...the position description." That is, the test goes beyond possession of the minimum qualifications on the classification specification. The bidder must also be proficient in the minimum qualifications found on the position description. Based upon the record and testimony at the hearing it is obvious that the State's managerial officials, Messrs. Miller, Armenti and Svoboda, do not believe that he does so. It cannot be plausibly argued that they stacked the deck or set up the Grievant to not receive the Mechanic 3 position as they recommended that he be removed from his interim service in that classification well before the vacancy in question in this proceeding arose. Nor

was there any animosity or hostility shown between any of the management representatives and the Grievant. If anything, the record is to the contrary. Mr. Vick's evaluations are good. This includes those given by Mr. Miller, one of the management witnesses who testified to Mr. Vick's shortcomings as a Mechanic 3.

The Union is correct to point to the unusual set of circumstances surrounding this dispute. Mr. Vick served a three month appointment as an interim Mechanic 3. He did not serve a probationary period in the position. In these circumstances it is unreasonable for the Union to argue that as Mr. Vick's service was as an interim employee, not a probationary employee, that the Agreement has been violated. That argument raises form over substance. It asks the Arbitrator to cast a blind eye on the reality of the fact that Mr. Vick had served three months as a Mechanic 3 and that his performance in the lead worker aspects of the position had been found wanting. Based upon the testimony of the management officials as well as the documentary evidence (eg. Joint Exhibit 16) it must be concluded that the Grievant did not meet the contractual standard of "proficiency" in the minimum qualifications contained on the position description.

In this case there is no evidence of bad faith or improper motive. To the contrary, the evidence indicates that

the Employer made a good faith judgement based upon the evidence available to it. That evidence was both documentary and personal knowledge of relevant supervisors. To hold that the Grievant had a right to a probationary trial period in the face of the evidence that he had not performed satisfactorily in a three month interim appointment shortly prior to the vacancy is a time wasting exercise.

The holding in this case must be viewed as being specific only to the facts before the Arbitrator. Obviously that is the case for each promotion dispute that is contested. That the Employer prevails in this situation should not be viewed as granting license to put employees in interim positions which represent promotions, conclude they are unsatisfactory and then fail to promote them if a vacancy arises. The facts surrounding the vacancy at Burton Yard are unusual. The award in this case must not be interpreted as providing a loophole in the Agreement for the Employer to structure the promotional process so as to prematurely disqualify applicants for promotion.

Award: The grievance is denied.

Signed and dated this 14 day of April, 1992 at South Russell, OH.

Harry Graham
Arbitrator

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| In the Matter of Arbitration | * | |
| Between | * | Case Number |
| OCSEA/AFSCME Local 11 | * | 15-02-(91-07-22)-0056-01-09 |
| and | * | Before: Harry Graham |
| The State of Ohio, Bureau of Motor Vehicles | * | #749 |

Appearances: For OCSEA/AFSCME Local 11:

Brenda Goheen
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For Bureau of Motor Vehicles:

Edward A. Flynn
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Columbus, OH. 43266-0020

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on March 20, 1992 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument.

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

> Did the Grievant meet the minimum qualifications for promotion to Reproduction Equipment Operator? If so, was the Grievant improperly denied the promotion to

Reproduction Equipment Operator? If so, what shall the remedy be?

Background: The facts that prompt this proceeding are not in dispute. On May 28, 1991 the Bureau of Motor Vehicles posted to fill a vacant position. That position was as a Reproduction Equipment Operator I. The Grievant filed a timely bid for the position. Bids were received from several other people as well. Among those who bid in addition to the Grievant was Tina Sturtz. Ms. Sturtz has a seniority date of May 22, 1989. The Grievant, Livingston McClinton, has a seniority date of June 23, 1986. At the time of his bid Mr. McClinton was classified as a Data Entry Operator I. Mr. McClinton's bid was rejected and the position awarded to Ms. Sturtz. In order to protest what he regarded as a violation of the Agreement Mr. McClinton filed a grievance. It was denied at each step of the Grievance procedure and the parties agree that it is now properly before the Arbitrator for determination on its merits.

Position of the Union: Section 17.05 of the Agreement is applicable to the dispute. It provides that bidders are to be divided into certain classes for purposes of the selection process. Bidders are to be possess and be proficient in the minimum qualifications contained in the classification specification and the position description. If that is the case the senior qualified bidder is to receive the position unless the State can show that a junior bidder was

"demonstrably superior" to the more senior applicant. In this situation, the Union insists that the Grievant met the minimum qualification standard. As that is the case, it urges he be awarded the position with retroactive pay.

In support of its view that the Grievant met the minimum qualifications for the vacant position the Union points to the position he held at the time of the bid and which he holds to this day. Mr. McClinton is a Data Entry Operator. As such, he utilizes a machine manufactured by Bell and Howell known as a Classic 5600. The Classic 5600 is what is known as a reader/printer. It scans microfilm and when the appropriate document is found, makes a print on plain paper. In essence, it performs a copying function. The copies are made from microfilm to paper. In the daily tasks performed by the Grievant copies of traffic citations and drivers license applications are routinely made. As a regular part of his duties Mr. McClinton also operates a camera known as the VT 220. That is a 16mm camera. The Bell and Howell Classic 5600 also uses 16mm film. The VT 220 reproduces an image from paper on to film. The Classic 5600 does the reverse. Both are microfilm equipment. The Classic 5600 is a photocopier, albeit one that differs from the traditional Xerox equipment. Where Xerox and similar machines copy from paper to paper, the Bell and Howell copies from film to paper. The Grievant was well qualified to perform the tasks associated with the

position of Reproduction Equipment Operator by virtue of his experience. The qualifications set forth on the posting are formal education in arithmetic and the ability to read and write. The Grievant has 2.5 years of college education. He obviously meets those requirements. The posting also requires three months training or experience in operation of reproduction equipment. The posting furnishes examples of reproduction equipment as "photocopiers, microfilm equipment." The Grievant meets that requirement as well. No reason exists to believe that Mr. McClinton did not meet, and in fact exceed, the minimum qualifications for the vacant position. As that is the case, the Union insists that he be awarded the job of Reproduction Equipment Operator.

Position of the Employer: The Employer differs with the Union over the characterization of the Classic 5600. In its opinion, the 5600 is not reproduction equipment. More accurately, it is to be described as retrieval equipment. The Classic 5600 retrieves images from film and prints them on paper. That operation is conceptually different from that performed by reproduction equipment in the opinion of the Employer.

The State also points to the Position Bid Sheets submitted by Mr. McClinton and Ms. Sturtz and asserts that Mr. McClinton gave the Employer no grounds to select him. Ms. Sturtz indicates on her bid that she films driver

applications on a Bell and Howell SRM micro-imagery camera. She also uses other cameras in the Department in her position as a Clerk I. Mr. McClinton cites his experience working with the Bell and Howell Classic 5600 which he terms a "reader printer." Experience with a reader printer does not serve to qualify a person for the Reproduction Equipment Operator vacancy in the State's view. The State asserts further that it is up to the bidder to indicate fully the education and experience that qualifies him or her for the position bid upon. Ms. Sturtz did that. Mr. McClinton did not. Consequently, the State acted properly in this situation it asserts.

The State points out that Mr. McClinton did not complete the selection process. He was not interviewed. If the Grievant and Union prevail in this proceeding the State urges that Mr. McClinton not be awarded the vacant position. There is in Section 17.06 of the Agreement the possibility for the State to promote a junior employee over a more senior colleague. This may be done when the junior employee is "demonstrably superior" to the senior bidder. It may be that Ms. Sturtz is demonstrably superior to Mr. McClinton. As that is the case, the State asserts that an award of the disputed position to Mr. McClinton is premature should he prevail in this proceeding. In that event the State should be directed to reopen the selection process and evaluate Mr. McClinton

against other bidders it claims.

Discussion: The position of the State in this dispute hinges on semantics. It urges the Arbitrator make a distinction between "retrieval" and "reproduction." In the opinion of the State, the differences between those two processes are so vast as to disqualify the Grievant from promotional consideration. In this instance, the State doth protest too much. In support of its claim that there exists a fundamental conceptual difference between retrieval and reproduction the State introduced material from the manufacturer of the Classic 5600 and the SRM Microimagery System, Bell and Howell. Employer Exhibit 4 is a letter from Ronald D. Flowers, Bell and Howell Senior Account Manager to Kevin Gay of the Bureau of Motor Vehicles. It was introduced to support the position of the State that Mr. McClinton was experienced in retrieval, rather than reproduction. It does not do so. Mr. Flowers defines a microfilm reader/printer as "a retrieval device used to view and or make paper copies of microfilmed images on paper." (Emphasis supplied) If making paper copies of microfilmed images on paper is not reproduction, what is it? Mr. McClinton testified that when he made copies of microfilm documents on paper the process was similar to the normal copying process such as might occur when using a Xerox or other office copier. This view was seconded by Mr. Gay, Supervisor of the Motor Vehicles film

room.

The position of the Employer that Mr. McClinton's bid sheet was unresponsive to the posting is belied by the plain wording of the posting and his bid. Joint Exhibit 4 is the posting. It refers to the functions of the Reproduction Equipment Operator as one who "searches files to retrieve original applications." If the Employer insists as it does in this case that the Grievant's skills were in retrieval rather than reproduction his application clearly, unambiguously and without doubt reflects his knowledge of the retrieval function.

Whether or not the vacancy required skills in retrieval or reproduction is truly a distinction without a difference in this situation. Examination of the operating manuals of the Classic 5600 and the SRM Microimagery System does not indicate that the SRM Microimagery System to be more difficult to operate than the Classic 5600. Mr. McClinton testified he thought he could learn the tasks associated with the vacant position in three days. Mr. Gay, the supervisor, estimated five days were required to learn the job duties. Whatever the correct number, the parties agree that Mr. McClinton could learn the work of the Reproduction Equipment Operator quickly. At the hearing it was undisputed that Mr. McClinton works with microfilm equipment in his current position. While the Employer took pains to emphasize the

distinction between reproduction and retrieval equipment in this dispute, it failed to point to the plain words of the posting that refer to experience in the operation of "microfilm" equipment. Mr. McClinton possesses such experience and is senior to the person who was awarded the position.

In its presentation of its case to the Arbitrator the State urged that if it was found that Mr. McClinton were to prevail in this situation, as is obviously the case from the text above, that he not be awarded the position. In the opinion of the State as he did not complete the selection process it would be premature to direct that he fill the vacancy. In this view, the State is correct. Reference is had to Section 17.06 of the Agreement. Language found at that Section provides that "The job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee." The burden is on the State to show that a junior applicant, Ms. Sturtz in this case, is demonstrably superior to the senior bidder, Mr. McClinton. Should the State believe it can carry its burden it may continue to deny the promotion at issue to Mr. McClinton. The Union may then protest in the fashion provided by the Agreement.

Award: The grievance is sustained. The State is directed to

reopen the selection process for the Reproduction Equipment Operator vacancy at issue in this proceeding. The bid of Livingston McClinton is to be reconsidered.

Signed and dated this 14 day of April, 1992 at South Russell, OH.

Harry Graham
Arbitrator