BEFORE THE ARBITRATOR

In the Matter of

THE STATE OF OHIO, DEPARTMENT
OF REHABILITATION AND CORRECTION
MARION COUNTY, OHIO

GRIEVANT: JAMES HARRAH

and

No. 27-16-(3/21/91)-592-02-12

THE OHIO HEALTH CARE EMPLOYEES
UNION, DISTRICT 1199, WV/KY/OH.

DECISION AND AWARD

The facts in this dispute are not in controversy. James Harrah is a Correction Specialist in the Department of Rehabilitation and Correction of Marion County (Pay Range 9). In March of 1991 Grievant applied for the position of Parole Officer I, Marion Correctional (Pay Range 8). The job was denied to him because the bid constituted a request for a demotion and was entitled to no priority under 30.02 (A), (B) or (C). Grievant was considered for the job together with other new applicants outside the bargaining unit under 30.02(D). Although he was one of three final applicants receiving the highest scores, he was not awarded the job because another applicant "demonstrated a better knowledge" of probation and parole during his interview.

There is presently a binding arbitration award by Arbitrator Howard D. Silver rendered on May 23, 1990 (Bornstein decision), holding, as was applied here, that the priority provisions of 30.02 are only applicable to "promotions and lateral transfers" and not "demotions."

The union, however, through its president (and negotiator of the 1986 and 1989 agreements), contends that in 1986 the parties contemplated demotions within the purview of Section 28.02 (1986 agreement) and now Section 30.02 of the 1989 agreement. He testified that the purpose, in part, of Section 28.01 was to prevent the State, in the case of a vacancy in a higher pay range, from reducing that pay range for new bidders. Hence the sentence, "After the employees have had the opportunity to bid for lateral transfers or for promotions, the position can be reduced in the classification series." Further, the Union, in support of its position, has presented in evidence a memorandum from Ed Seidler, management negotiator of the 1986 agreement, dated January 7, 1987, some six months after the conclusion of the 1986 negotiations to all Labor Relations Coordinators. That memo reads as follows:

> Subject: 1199 Agreement - Article 28 Vacancies
>
> Date: January 7, 1987
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> For any employees for whom awarding a vacancy will result in a lateral transfer, a promotion or a voluntary demotion, their applications shall be considered per Article 28, Section 28.02 Awarding the Job (Transfers and Promotions).

It is this document which was not presented to Arbitrator Silver in Bornstein, which the Union believes should cause the reversal of Arbitrator Silver's award excluding "Demotions" from the Promotion and Transfer language of Section 30.02 (formerly 28.02).

CONTRACT CLAUSES

Article 7 - Grievance Procedure

§7.07 Arbitration

E. Arbitrator Limitations

1. Only disputes involving the interpretation, application or alleged violation of a provision of this Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

Article 30 - Vacancies

§30.01 Job Vacancies

A vacancy is defined as an opening in a full-time permanent or part-time permanent position in the bargaining unit which the agency has determined is necessary to fill.

When a vacancy is created by an incumbent employee leaving the position, and that incumbent is above the entry level position in the classification series, the job shall be posted at the level in the classification series of the leaving employee, provided the duties and responsibilities remain the same. After the employees have had the opportunity to bid for lateral transfers or for promotions, the position can be reduced in the classification series.

When a vacancy will be created by an incumbent employee leaving a position, the agency may post the vacancy and interview and provisionally select a candidate anytime after receiving notice that the position will be vacated.

A job vacancy shall be posted for a minimum of seven (7) days on designated bulletin boards within the agency at the facility where the vacancy exists. Applicants will be notified within thirty (30) days after the final filing date of the status of their application.

Any employee who desires to be considered for a position(s) in another agency(s) shall submit an Ohio Civil Service Application (ADM-4268) to the appointing authority of the agency or institution where employment is sought. Such application shall specify the desired classification(s) and worksite(s). These applications will be maintained on file for one (1) year from the date of receipt by the appointing authority. If a posted vacancy is not filled

pursuant to steps A and B of this article, any applicant meeting qualifications for this position shall be considered pursuant to step C of this article.

The Employer shall prepare and make available a booklet detailing the classifications available in various agencies, including a listing of the appointing authorities to which applications are to be sent.

Notice of newly-created classifications shall be provided to the Union's central office thirty (30) days prior to initial posting.

§30.02 Awarding the Job (Transfers and Promotions)

Applications will be considered filed timely if they are received or postmarked no later than the closing date listed on the posting. All timely filed applications shall be reviewed considering the following criteria: qualifications, experience, education, and work record, and affirmative action. Among those that are qualified the job shall be awarded to the applicant with the most state seniority unless a junior employee is significantly more qualified based on the listed criteria.

The Employer and the Union agree, through each Agency Professional Committee to review and discuss the agency's approved affirmative action plan annually prior to submission to EEO. Such plans shall include specific hiring goals where necessary.

Job vacancies shall be awarded in the following sequential manner:

A. The job shall first be awarded to a bargaining unit applicant working at the facility where the vacancy exists in accordance with the above criteria.

B. If no selection is made from A above, the job shall be awarded to a bargaining unit applicant working in the agency where the vacancy exists in accordance with the above criteria;

C. If no selection is made from B above, the job shall be awarded to an applicant working in the bargaining unit in accordance with the above criteria;

D. If no selection is made from C above, the job may be awarded by hiring a new employee.

Within non-institutional agencies and within the Adult Parole Authority, step A above shall not apply.

This Agreement supersedes Ohio Civil Service Laws and Rules regarding eligibility lists for promotions.

UNION POSITION

It is the Union's position that the grievance arose under the present agreement (June 12, 1989 to June 11, 1992) and that Article 30 provides for bidding rights for employees seeking openings in lower pay range jobs. It contends that it was never the intention of either party through their respective chief spokesmen, Edward Seidler of OCB and the witness herein, chief spokesman for the Union, to exclude lesser pay range jobs from bidding rights and that the memorandum aforementioned is proof of that intention. It contends that during the 1986-89 contract lower job bids were permitted per the Seidler memo until a new director of OCB came on the scene and changed the State's position shortly before the 1989 negotiations. It contends that because the Bornstein arbitration arose just before the 1989 negotiations and was not decided until after the negotiations, the Union believed there was no need to renegotiate Section 28.02 of the 1986 agreement in 1989 (Section 30.02 now).

The Union argues that based on the Seidler memorandum there is no questions that the parties intended to include demotion within the scope of 30.02 and that because such evidence was not presented in the Bornstein arbitration, it does not mean that it forever cannot assert the right to change the import of that decision.

STATE POSITION

The State argues that it was incumbent upon the Union to seek to change the provisions of the Agreement in 1989 because the Bornstein arbitration had already commenced, that the language of the contract is clear and unmistakable and that since it is silent on demotions, state law is applicable. It contends that state law does not require management to honor requests for demotion, and therefore the contract interpretation of the Bornstein decision must stand.

DISCUSSION

I have reviewed the transcript of the testimony in detail, have examined and reexamined the Seidler memorandum and have read and reread the Silver decision in Bornstein. In addition, I have researched the arbitration decisions and theories concerning interpretation of collective bargaining agreements. I have come to the conclusion that notwithstanding the Seidler memorandum, principles of contract interpretation which the arbitrator must follow dictate that the Bornstein decision must stand.

Generally, an arbitrator gives recognition to the prior decision of other arbitrators regarding the same issue. However, that rule is not etched in stone, and I would feel free to depart from the Bornstein decision if I had a basic disagreement or if the evidence not presented in Bornstein made me conclude that Arbitrator Silver's reasoning was flawed. However, despite the Seidler memo, Silver's reason is still compelling. Arbitrator Silver, after holding that Section 28.01 Job Vacancies refers only

to promotion and lateral transfer and does not anywhere encompass demotions, goes on to hold that Section 28.02 Awarding the Job (Transfers and Promotions) is directly related to Section 28.01 and therefore does not include voluntary demotions. Silver also held that Section 28.02 (30.02) standing alone does not require the State to honor demotion bids for three reasons:

1. Section 28.01 refers to transfers and promotions, the same terminology which is used within and as a part of the title to 28.02. It is reasonable to conclude that the transfers intended by 28.02 are those mentioned in 28.01.

2. Section 28.02 specifically mentions transfers and promotions. Therefore, [redacted]

3. It is not common to include demotions in the bidding process, such bids are a rarity, and there was no evidence that the parties, during the construction of 28.02, intended to include "demotion."

It is as to this third reason that the Union claims that the memorandum of Seidler compels a different result. The arbitrator disagrees. There is still no evidence of discussion at negotiation that demotion was included in the meaning of Section 28.02. Even if there had been such discussion, it is a fundamental rule of contract construction that whatever the final wording of the

contract, that wording represents the agreement and intent of the parties. The word "demotion" was not included in the final language of 30.01 or 30.02. It was not an unfamiliar word to the parties, since it is used elsewhere in the agreement. It must therefore be presumed that the parties, headed by experienced negotiators, were aware of the meaning of the language used, and had they intended to include demotion, they would have said so. The memo by Seidler some six months later does not change what was written six months before. [redacted] Furthermore, it is not altogether clear what Seidler was saying. He directed that promotion, transfers and demotions be handled per 28.02. A part of 28.02 provides that new hires are to be hired subject to qualifications, experience, education, work record and affirmative action. Thus as in this case, the state used the criteria of 28.02 to evaluate the grievant with new hires. Although Grievant did not receive priority in hiring above new hires, he was considered within the parameters of 28.02.

In addition, as Arbitrator Silver observed, job bidding provisions of collective bargaining agreements do not normally apply to bidding downward. Bidding is designed to increase promotion from within based on seniority. Lateral bidding is also

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[redacted] should be noted that this memorandum is not included in the side letters to the Agreement of the parties.

permitted at times. Downward transfers, however, destabilize the work force by permitting employees to jump from one job to another; therefore, bidding downward is the exception, not the rule, in the area of collective bargaining whether it be the private or public sector. Indeed, research of recent cases demonstrates that the only times downward bidding was permitted, contracts specifically allowed downward bidding so that an employee might eventually seek a higher position. See Cloudsley Co., 1985 (Donnelly), 84 LA 1264; Walworth Aloyco Machine Shop, 1981 (Balicer), 76 LA 333.

I believe, as does Arbitrator Silver, that Section 30.01 and Section 30.02 are completely related and integrated. Section 30.01 defines what an applicant can apply for and Section 30.02 defines how that application is treated. Thus the "application" referred to in Section 30.02 deals only with "Transfers and Promotions," not demotions. Where, as here, the wording of 30.01 and 30.02 is clear and unambiguous, the arbitrator must honor that language. Clean Coverall Supply Co., 47 LA 272, 277 (Witney, 1966); General Tel. Co. of Sw, 86 LA 293, 295 (Impavec, 1985). See also Pittsburgh & Midway Coal Mining Co., 87 LA 1107, 1108 (Feldman, 1986); Diamond Crystal Salt Co., 87 LA 427, 434 (Keefe, 1986); Pollock Co., 87 LA 325, 332 (Oberdank, 1986); Kroger Co., 86 LA 357 (Milentz, 1986); Owens-Ill, Inc., 86 LA 354, 357 (Darrow, 1985).

The parties have called to my attention the fact that under Section 7.07(E)(1) of the contract the Arbitrator cannot modify or change the language of the contract. That language is as follows:

> The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

[redacted]'s [redacted] However, as stated before, I believe that if the parties had intended demotion to be a part of transfers and promotions, the contract would say so. The words "promotion," "demotion" and "transfer" flow together normally in labor jargon. The fact that the word "demotion" is not included does not permit me to add it to the definition of "transfer." This is consistent with Arbitrator Silver's opinion that the word "transfer" in Section 30.01 or 30.02 does not encompass the word "demotion" -- *inclusio unius est exclusio alterius*. The inclusion of specific words excludes others not mentioned.

In Michigan Dep't of Social Servs., 82 LA 114, 116 the arbitrator states:

> Not only is it axiomatic that the clear unambiguous language of the agreement must be honored, but here the contract in exact terms forbids the arbitrator from ignoring 'in any way' the specific provisions of the contract nor giving, to either party, rights which were not 'obtained in a negotiating process' . . . Such restriction goes far beyond the simple statement that the arbitrator is bound by the language of the contract.

Equally, if not more, important, under the instant contract, not only do I not have the authority to amend the contract under Section 7.07, I cannot "impose on either party a limitation or obligation not specifically required by the express language of

this agreement." Notwithstanding the Seidler memorandum and the testimony with respect to the reasons for the language of Section 30.01, nothing specifically required by the express language of this agreement can justify my adding "demotion" to the intent of Section 30.02. To do so would clearly violate my obligation under Article 7.07. For these reasons, I must deny the grievance.

AWARD

Grievance denied.

JONAS B. KATZ, ARBITRATOR

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August 6, 1992