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In the Matter of Arbitration

Between

Fraternal Order of Police-  
Ohio Labor Council

and

Ohio Department of Liquor Control

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Case Number:

21-04-(921014)-0162-05-  
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Before: Harry Graham

Appearances: For Fraternal Order of Police-Ohio Labor Council

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

For Ohio Department of Liquor Control

Sally P. Miller  
Labor Relations Manager  
Ohio Department of Liquor Control  
2323 West Fifth Ave.  
Columbus, OH. 43266-0701

Introduction: Pursuant to the procedures of the parties a hearing was held on August 6, 1993 before Harry Graham. At that hearing the 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 October 16, 1993 and the record in this dispute was closed.

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

Did the Department of Liquor Control violate the collective bargaining agreement when it failed to pay

employees classified as Liquor Control Investigator 1 at pay range 9?

As part of the issue the parties stipulated that:

Both parties recognize that the issue of the pay range assigned to employees classified as Liquor Control Investigator 1's is part of this dispute although compensation issues were resolved by the Factfinder.

Background: The facts prompting this proceeding are not a matter of dispute. During the life of the 1989-1992 Collective Bargaining Agreement between the parties employees classified as Liquor Control Investigator 1's were paid at Pay Range 9 of the Employer's pay classification scheme. During the term of that Agreement there was conducted a study of the pay provided to various jobs in state service. This was known as the Classification Modernization Study. As part of that study many jobs were upgraded in pay. The job of Liquor Control Investigator 1 was reduced in pay. It was downgraded from pay range 9 to pay range 8.

When the parties came to bargain the current Agreement the State placed on the table its final offer. It provided that Liquor Control Investigator 1's would be paid at pay range 9. After the bargain of the parties was rejected by the membership of the Union they proceeded to Factfinding. The position of the State at Factfinding was identical to the recommendations of this neutral in the Factfinding proceeding between OCSEA/AFSCME Local 11 and the State. That is, that there should be no (0.00%) wage increase in the first year of

the Agreement and a five percent (5.0%) wage increase in the second year of the Agreement. When the State submitted its position to the Factfinder, Professor Nels Nelson, it reflected that Liquor Control Investigator 1's be paid at pay range 9. The Factfinder embraced the proposal of the State that there occur no wage increase in 1992 and a five percent wage increase in 1993. The recommendation of the Factfinder was accepted by the parties. When it came time to prepare the text of the Agreement it was recognized by the Office of Collective Bargaining that the State had proposed payment to Liquor Control Investigator 1's at pay range 9. It viewed this to be an oversight and asserted the correct pay range was 8 as had resulted from the Classification Modernization Study. As might be expected, the Union had a different view of these events. It took the position that the proper pay to Liquor Control Investigator 1's should be that associated with pay range 9. The printed Agreement contains an asterisk (\*) next to the position of Liquor Control Investigator 1 reflecting the dispute between the parties.

A grievance protesting the payment of Liquor Control Investigator 1's at pay range 8 was filed. It was processed through the procedure of the parties without resolution and they agree that it is now properly before the Arbitrator for determination on its merits.

Position of the Union: When the parties came to bargain the

present Agreement they kept negotiating minutes. Those minutes for January 28, 1992 indicate that the Union questioned the State concerning its wage proposal. The State told the Union that its proposal reflected its position. That proposal showed that Liquor Control Investigator 1's were to be paid at pay range 9. Payment at that pay range was subsequently presented to the Factfinder. It was voted upon and ratified by the membership. At no time did the State indicate it had made an error in its presentation either at the table or in factfinding. The Union should not be expected to divine any errors in the State's proposal. Both parties exchanged proposals and presumably they reflected their respective positions. The Union believed the State when it proposed paying Liquor Control Investigator 1's at pay range 9. That pay range was accepted by the membership when they ratified the Factfinder's report.

The Union acknowledges that the Factfinder recommended no wage increase for 1992. That recommendation was made more palatable to the Union membership with a "wrinkle" here and there. The payment at pay range 9 for Liquor Control Investigator 1's was precisely such a wrinkle in the Union's view. It was proposed by the State consistently throughout the negotiating process. It was provided to the Factfinder. It was accepted by the membership with the bona fide belief that it represented the position of the State on this

question. The Union should have every expectation that the positions proffered by the State in negotiations represent its positions, not errors that should be caught and corrected by the Union.

In this situation the language consistently relied upon by the Union is clear. As that is the case bargaining history should not play a role in the decisionmaking process. Though the outcome of this dispute may not reflect what the State had in mind during the negotiating process the record reflects that the Union at all times had in its possession proposals from the State reflecting payment to Liquor Control Investigator 1's at pay range 9. That proposal was given by the State to the Factfinder. The Factfinder issued his recommendations based upon the proposals and supporting evidence presented to him. He embraced the position of the State with respect to wages. His recommendation was accepted by the Union membership. To their knowledge they were voting on recommendations that included payment to Liquor Control Investigator 1's at pay range 9. The report of the Factfinder, the negotiating records and the Agreement are clear. They cannot be ignored. The proposal to pay Investigator 1's was made by the Employer. If it was erroneous that is too bad. The Union acted in good faith based upon the material given to it by the State. Now the State cannot say it erred and expect employees to take the

consequences. As that is the case the Union urges the Grievance be sustained and Liquor Control Investigators paid at pay range 9.

Position of the Employer: When the parties came to exchange proposals concerning the 1992-1993 Agreement those made by the State contained occasional errors. In the course of negotiations those errors were rectified. On January 28, 1992 the State's Chief Negotiator, Gary Johnson, told his opposite number that "If something happened in class mod, it stays that way." This provided unequivocal notice to the Union that pay at pay range 8 for Liquor Control Investigator 1's was contemplated by the State. When the State made its final pay proposal on April 22, 1992 all pay ranges and titles were correct with the exception of Liquor Control Investigator 1. The State asserts that the Union should have been aware of its oversight. When the State included in its proposal that Liquor Control Investigator 1's be paid at pay range 9 it was not a wiggle. It was not to slip some money into the Agreement to make it palatable to the Union. It was an error. That it was not a wiggle is shown by the fact that it covers nine probationary employees. If the State wanted to give something to the Union in order to facilitate reaching agreement it would not have undertaken to reward nine newly hired employees. To believe otherwise is nonsensical in its view.

At no time did the parties discuss increasing the pay for Liquor Control Investigator 1's. At all times the Union understood the State proposed no wage increase occur in 1992. This was recommended by the Factfinder and accepted by the Union. In a dispute similar to this involving the Departments of Mental Health and Mental Retardation I ruled that no wage increase was intended for certain employees in those departments, notwithstanding language to the contrary in the Agreement. The decision in that case relied upon the recommendation of the Factfinder. Professor Nelson recommended no wage increase be made to "selected members of this unit." (Nelson report, p. 5). Nothing has changed but the players in the State's opinion. Consequently, the result reached in the prior dispute should be reached in this dispute as well according to the State.

Discussion: It is improbable that the State deliberately proposed to pay Liquor Control Investigator 1's at pay range 9 in order to sweeten an unpalatable situation. Were there to be offered some sort of surreptitious sweetener or wiggle it is unlikely that it would be offered to newcomers. Why the State would desire to provide a wage increase to newly hired employees while their more senior bretheren saw their compensation remain unchanged is unfathomable. It is believed that the documents exchanged across the table and provided to the Factfinder represent error, not a deliberate attempt to

move Liquor Control Investigator 1's from pay range 8 to pay range 9. Ordinarily an error, standing alone would serve to bind the party that committed it. In this situation, the error does not stand alone.

When the parties came to bargain the Union was not laboring under any misapprehension concerning the position of the State. In the negotiating session of January 28, 1992 the Union was told by Jon Weiser, a negotiator for the State, that "We didn't include what was in class mod." Then Gary Johnson, the State's chief spokesman, said "If something happened throughout class mod, it stays that way." If jobs had been upgraded through the classification modernization study the State did not propose to alter that development. Similarly, if positions had experienced a down grade no change was contemplated by the State. The Union cannot claim to have been oblivious to that fact.

When Factfinder Nelson came to consider the wage issue before him no doubt exists concerning the contents of his report. He noted in his report that the State proposed a "wage freeze" in the first year of the Agreement. He continued to "recommend the state's proposal. He (the Factfinder) recognizes that a first year wage freeze is not an attractive proposition...." Then he continued to note that "unfortunately, equity would not allow this unit, or selected members of this unit, to enjoy wage increases while other

state employees get no wage raises or, even worse, face the prospect of being laid off."

It goes without saying that a party in negotiations is entitled to rely upon the representations of its opposite number. In this situation it is disingenuous of the Union to assert it was unaware of the State's position. From the onset of negotiations it was told of the wage freeze proposed for 1992 in the most straightforward and clearcut terms. Only wishful thinking could prompt a belief that the State was proposing a wage increase of one pay grade for newly hired employees. The proposal of the State was never concealed from the Union. Nor did it contain any sweeteners or wiggles for selected groups of employees. The Factfinder embraced the proposal of the State. No wage increase, no matter how artfully concealed, was to be made. That recommendation was adopted by the parties. It must be upheld.

Award: The grievance is denied.

Signed and dated this 6<sup>th</sup> day of November, 1993 at South Russell, OH.

  
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Harry Graham  
Arbitrator