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OPINION AND AWARD

IN THE MATTER OF THE ARBITRATION BETWEEN

Ohio Department of Natural Resources
-AND-
OCSEA/AFSCME Local 11

Appearing for DNR
Steven R. Bates, ODNR/OHR HR Administrator
Brian Mitch, ODNR, REALM
Carrie Spradlin, ODNR, Labor Relations Officer 3
Joseph Trejo, Assistant Manager of Labor Relations

Appearing for OCSEA
Treva J. Knasel, ODNR Chief Steward
Sharon V. Ralph, OCSEA, Staff Representative
Patty Rich, OCSEA Witness
Clark Scheerens, Witness, ODNR Retired
Thomas Tomastik, Witness, ODNR 2515 President

CASE-SPECIFIC DATA
Grievance No.
25-11-20060706-0004-01-13

Hearing Held
May 20, 2008

Case Decided
April 12, 2009

Subject
Management Performing Bargaining-unit Work

Award
Grievance Denied

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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I. The Facts

This is a contractual interpretation dispute involving the Ohio Department of Natural Resources (ODNR), Division of Real Estate and Land Management (REALM)–Environmental Services Section (ESS) ("Agency" or "ODNR") and the Ohio Civil Service Employees Association AFSCME Local 11 ("Union").[1]

Among its responsibilities, the Agency must administer a statewide Environmental Review Program, which includes: coordinating environmental projects/programs with external stakeholders on behalf of the Director, conducting research, and establishing the overall ODNR environmental policy.

A. Historical Sketch of Classification Disputes

This is a job classification dispute ("Classification Dispute") in which the Union challenges the Agency's decision to classify a vacant position as Administrative Assistant-2 ("exempt" "AA2" "Managerial") rather than Environmental Specialist 1 ("Nonexempt" "ES1" "Bargaining-unit). In various forms, classification disputes are a perennial sore point between the Parties. Several causal factors help to foment and aggravate classification disputes. For example, there appears to be no list of well-defined exempt and nonexempt duties, nor is it clear that such a list could be developed.[2] Moreover, the utility of such a list, in classification disputes, would be substantially undermined because supervisors and bargaining-unit employees have historically performed nonexempt and exempt duties respectively. Indeed, Article 1.05 of the Parties' Collective-bargaining Agreement specifically permits supervisors to perform nonexempt duties under certain circumstances. Finally, the longevity of classification disputes and the grief they have caused suggest that they are well neigh inevitable. Otherwise, one reasonably assumes that the Parties would have severely reduced, if not eliminated, them. Against this backdrop, the Arbitrator will resolve the instant dispute and humbly propose a screening device that might prove useful in resolving subsequent classification disputes.

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[1] Hereinafter collectively referred to as the ("Parties").

[2] Certainly the arbitral record contains no such list.

B. Genesis of the Instant Dispute

On April 24, 2006 through May 3, 2006, the Agency posted a nonexempt position in the Environmental Services Section ("ESS").[13] On May 30, 2006, the Agency subsequently withdrew the nonexempt position and replaced it with a position that the Agency classified as exempt.[14] In a letter dated May 24, 2006,[15] the Agency notified bargaining-unit applicants that the nonexempt position had been withdrawn. The Agency selected Mr. Brian Mitch (a non-bargaining-unit employee) to fill the contested position, and, on June 25, 2006, he commenced his duties therein.[16]

On July 6, 2006, the Union filed Group Grievance No. 25-11-20060706-0004-01-13, challenging the Agency's decision to substitute the nonexempt position for the contested position. Specifically, the Grievance stated in relevant part: "The Exempt position description was essentially the same as the ES1position that was not filled, and both positions were in the same Division and Section reporting to the same supervisor."[17] According to the Union, the Agency violated Articles 1.05, 17.05, and other relevant provisions of the Collective-bargaining Agreement.[18]

The Parties failed to resolve this dispute and ultimately secured the Undersigned to hear the matter. During the ensuing arbitral hearing, the Parties presented their evidence and arguments before the Undersigned. At the outset of the first hearing day, the Agency raised an issue of procedural arbitrability, claiming that the Grievance was tardily filed. Pursuant to the Parties' request, the Undersigned resolved that procedural issue in a separate opinion, ultimately finding the dispute arbitrable.

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[13] Joint Stipulation 1.

[14] Hereinafter referenced as the "Contested Position."

[15] Management Exhibit L, Joint Stipulation no. 2.

[16] Joint Stipulation 4.

[17] Joint Exhibit 2-1.

[18] *Id.*

On May 20, 2008, the Undersigned held a hearing on the merits, during which no further procedural issues were raised. During the arbitral hearing, both Union and Management advocates made opening statements and introduced documentary and testimonial evidence to support their positions in this dispute. All witnesses were duly sworn and subjected to both direct and cross-examination, and all documentary evidence was subject to proper and relevant challenges. At the close of the hearing, the Parties elected to email written closings (Post-hearing Briefs) to the Undersigned on or about June 30, 2008. All closings were timely submitted.

II. The Issue

Did ODNR violate Articles 1.05, 17.03, and/or 17.05 of the Collective-bargaining Agreement? If so, what shall the remedy be?

III. Relevant Contractual and Regulatory Provisions

Article 1.05–Bargaining-Unit Work

Supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

Supervisors shall only perform bargaining unit work to the extent that they have previously performed such work. During the life of this Agreement, the amount of bargaining unit work done by supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

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[S]upervisory employees shall only do bargaining unit work under the following circumstances . . . when the classification specification provides that the supervisor does, *as a part of his/her job*, some of the *same duties as bargaining unit employees*.

* * * *

The Employer will not take action for the purpose of eroding the bargaining units. The Employer recognizes the integrity of the bargaining units and will not take action *for the purpose of* eroding the bargaining units.

Article 17.03–Posting

Posted vacancies shall not be *withdrawn to circumvent* the Agreement.[9]

Article 17.05–Selection

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[9] Although the Grievance mentions Article 17.05, the arbitral record focuses on Articles 1.05 and 17.03. During the arbitral hearing, the Union did not allege the violation of any specific language in Article 17.05.

Generally addresses selection procedures.[10]

Bargaining-Unit Exemptions

Fiduciary Employees–Employee appointed pursuant to 124.11 and has a high degree of trust and confidence necessary for his or her job.[11]

IV. Summaries of the Parties' Arguments

A. Summary of the Union's Arguments

1. The Employer deliberately and blatantly violated the Collective-bargaining Agreement by improperly transferring long-standing, bargaining-unit work to exempt employees and, thus eroding the bargaining unit.
2. The contested position's description was essentially the same as that of the nonexempt position that went unfilled. Yet, both positions were in the same division and section reporting to the same supervisor. Consequently, on June 25, 2006, the Agency eroded the bargaining unit and trammeled bargaining-unit members' promotional rights by assigning the contested position to Mr. Mitch, a non-bargaining-unit employee.[12]
3. Only a few minor duties separated the exempt and nonexempt position descriptions. Therefore, assuming, arguendo, that Mr. Mitch performed exempt duties in his position, they were too few to convert that position from bargaining-unit to exempt.
5. Furthermore, fiduciary duties do not justify classifying the contested position as exempt. Many professional and technical ODNR bargaining-unit employees (specifically Messrs. Scheerens and Tomastik) regularly perform fiduciary duties such as representing the Agency and Director Sean Logan, and acting as liaisons between their respective divisions and various community, public, and trade groups.
6. Mr. Mitch's duties are largely administrative, and he neither supervises anyone nor performs work that is supervisory, confidential, or fiduciary.
7. That bargaining-unit work has never existed in the Division of Environmental Services Section ("EES") REALM does not exonerate the Agency under Article 1.05 in this case.

B. Summary of Management's Arguments

Article 1.05 Arguments

1. On April 24, 2006, the Agency mistakenly posted an exempt position as a nonexempt position. Upon realizing its error, the Agency withdrew the nonexempt position on May 24, 2006 and replaced it with an exempt position.
2. There has never been a nonexempt position in ESS.
3. The Agency did not "erode" the bargaining unit in violation of Article 1.05, since "erode" means to "wear away gradually."[13] Since there has never been a nonexempt position in ESS, the Agency

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[10] Although the Grievance mentions Article 17.05, nothing in the arbitral record addresses any specific provision of this Article as being in contention in this dispute.

[11] Union Exhibit 1, at 2.

[12] Management Exhibit A, at 1.

[13] Agency's Post-hearing Brief, at 2, citations omitted.

could not have "eroded" the bargaining unit. One cannot erode or "wear away" a nonexistent entity.

4. Article 1.05 also requires intent as evidenced by the phrase, "for the *purpose* of." Nothing in the arbitral record demonstrates that the Agency acted with either the intent or the purpose of eroding the bargaining unit. The nonexempt posting was a mistake. The position that should have been posted was an exempt position. The Agency never intended either to create or to erode a bargaining-unit position; it simply mislabeled the heading of the exempt position.
5. All duties set forth in the exempt job description are themselves exempt. No exempt employees are performing nonexempt duties.
6. An erroneous posting cannot create a nonexempt position.

Article 17.05 Arguments

1. Article 17.05 is inapplicable to the selection of candidates for exempt positions.
2. Because the contested position is exempt, bargaining-unit employees are ineligible to fill it.
3. There has been no erosion of the bargaining unit. Specifically, the number of bargaining-unit employees in the Division of REALM increased from twenty-five to twenty-nine in 2006, clearly demonstrating an increase rather than an erosion of the bargaining unit.
4. Standing alone, the fiduciary component of the contested position justifies classifying it as exempt, even though bargaining-unit employees have frequently performed some duties therein.

V. Analysis and Discussion

A. Evidentiary Preliminaries

Because this is an issues dispute, the Union has the burden of proof or persuasion regarding the allegation that the Agency violated Articles 1.05 and 17.05. To establish those claims, the Union must adduce ***preponderant*** evidence in the arbitral record as a whole, showing *more likely than not* that the Agency violated the Contract as alleged. Doubts regarding the existence of these allegations shall be resolved against the Union. Unless the Union establishes its allegations, it cannot prevail, *irrespective* of the strength or weakness of the Agency's defenses. Similarly, the Agency has the burden of persuasion (preponderant evidence) as to its allegations and affirmative defenses, doubts about which shall be resolved against the Agency.

B. Violation of Article 1.05

The Agency broadly argues that there has been no erosion of the bargaining unit and offers essentially three arguments in support of this position. First, the Agency stresses that between 2005 and 2006 the number of bargaining-unit positions increased, which, in the Agency's view, is wholly inconsistent with erosion, the common definition of which denotes a gradual wearing away. Second, the Agency observes that

before the nonexempt position was posted, there were no bargaining-unit positions in ESS. According to the Agency, bargaining-unit erosion cannot exist absent a bargaining-unit position in the first instance. Third, the Agency maintains that the presence of fiduciary and other managerial duties in the contested position clearly justify its exempt status.

The Union offers no specific response to these arguments. Instead, the Union avers that classifying the contested position exempt constituted per se bargaining-unit erosion and offers two supporting arguments in this respect. First, the Union contends that bargaining-unit employees have historically performed the duties listed in the contested position. Second, the Union argues that the contested position contains only a very small percentage of exempt duties.

C. Assessment of the Parties' Arguments

As discussed below, for two reasons, the Parties' arguments miss the mark in this dispute. First, their arguments do not directly address the fundamental issue herein: Whether the contested position is either exempt or nonexempt.[14] Second, the arguments fail to establish the points they do attempt to make.

1. Assessment of the Agency's Arguments

a. Direct/Indirect Erosion of Bargaining Unit

Contrary to the Agency's position, an increase in bargaining-unit positions over time does not necessarily establish a lack of bargaining-unit erosion. This myopic argument focuses only on *direct* erosion and ignores *indirect/constructive* erosion. Constructive erosion occurs where a new position is erroneously labeled exempt when it should have been labeled nonexempt. In other words, constructive erosion restricts the *future* size of a bargaining unit by impeding its natural growth or accretion; direct erosion reduces the *present* size of a bargaining unit.

Furthermore, there is evidence that Article 1.05 contemplates constructive erosion of bargaining units. First, because Article 1.05 broadly prohibits bargaining-unit erosion, one can reasonably interpret that

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[14] The Arbitrator will address this pivotal issue after addressing the Parties' arguments.

prohibition to include both direct and constructive erosion. This is especially true, since both types of erosion are equally detrimental to a bargaining unit. Both the spirit and letter of Article 1.05 seek to prevent erosion of the bargaining unit. Second, as a practical matter, why would one flatly prohibit direct erosion and yet wholly tolerate indirect erosion? It flies in the face of reason. Focusing on direct erosion at the expense of indirect erosion leaves a gaping, malignant loophole in Article 1.05 that the drafter hardly could have intended. Such a loophole portends the evisceration of both the letter and intent of Article 1.05. Finally, the foregoing reasoning applies with equal force to the Agency's argument that there can be no bargaining-unit erosion where a bargaining unit never existed in the first instance.

b. Fiduciary Duties In Contested Position

Despite the Agency's contention, the arbitral record does not establish that the contested position involves *fiduciary* duties, at least not as that term is defined in Bargaining Unit Exemptions, which defines "Fiduciary Employee" as one "appointed pursuant to 124.11 and has a high degree of trust and confidence necessary for his or her job."[15] The record is barren regarding the elements of trust and confidence as well as the 124.11 appointment.

D. Assessment of the Union's Arguments

Contrary to the Union's position, exempt duties do not become nonexempt merely because bargaining-unit employees actually performed (or had the ability to perform) them; and the same is true where supervisors perform nonexempt duties. A contrary approach will likely smudge, if not erase, meaningful demarcations between exempt and nonexempt duties and the corresponding positions, especially where, as here, positions often involve both nonexempt and exempt duties.

Equally unavailing is the contention that the position in this case is nonexempt because it contains too few exempt duties. In any given position, the ratio of exempt to nonexempt duties is one relevant factor in classifying the position. Standing alone, however, that ratio is hardly dispositive of whether a position

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[15] Union Exhibit 1, at 2.

is either exempt or nonexempt.[16]

E. Violation of Article 1.05

1. Intent/Purpose

To establish a violation of Articles 1.05, the Union must show that the Agency acted with the "purpose" (intent) of eroding the bargaining unit. Actors are generally deemed to have intended the consequences of their conduct only if those consequences were *reasonably foreseeable* either to the *actor* or to a *reasonable person* under the same or similar circumstances as the actor *when* the conduct occurred. Preponderant evidence in the arbitral record does not demonstrate that the Agency possessed that state of mind when classified the contested position as exempt. Instead, the arbitral record merely establishes that the Agency re-posted and reclassified that position.

Of course this conclusion does not address the *impact* of the Agency's vacancy-filling decisions. Clearly, the unintentional impact of such decisions would likely be no less erosive than an intentional impact upon the bargaining unit. Nevertheless, Articles 1.05 does not explicitly contemplate unintentional impacts upon the bargaining unit. Nor does the Arbitrator have the authority to extend the scope of Article 1.05 to include unintentional impacts.[17] In the instant case, the drafter presumably considered and rejected the option of extending Article 1.05 to include untended impacts of vacancy-filling decisions. Consequently, the Arbitrator lacks authority to include unintentional acts within that Article's sweep. The Arbitrator, therefore, holds that evidence in the arbitral record does not establish a violation of Article 1.05.

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[16] *See* the criteria set forth in the essence test below.

[17] Circumstances here differ markedly from those that prompted the earlier holding in this opinion that prohibition of direct erosion implied an intent also to prohibit constructive erosion. In that instance ,the Agency interpreted "eroding" under Article 1.05, which did not explicitly limit "eroding." A contractual provision whose terms lack explicit limits is commonly interpreted more broadly to fully effectuate the Parties' intent under that provision. Other matters equal, explicit limits on terms in a contractual provision betray an intent to so restrict its applicability.

2. Agency's Duty to Make Reasonable Effort

In addition to prohibiting purposeful erosion of the bargaining unit, Article 1.05 generally obliges the Agency to guard against bargaining-unit erosion. In this respect, Article 1.05 states in relevant part: "Supervisors shall not *increase*, and the Employer shall make *every reasonable effort* to *decrease* the amount of bargaining unit work done by supervisors. Supervisors shall only perform bargaining unit work to the extent that they have *previously performed such work.*"[18]

These passages reflect an intent to limit the number of nonexempt duties performed by supervisors and, over time, to decrease the number of supervisors performing nonexempt duties. The Agency must exert a reasonable effort in both areas. More importantly, the foregoing limits on supervisory performance of bargaining-unit duties reflect the Union's profound and vital interest in preserving bargaining-unit work for bargaining-unit employees. In this case, however, the Arbitrator is not persuaded that the Agency violated any of the foregoing strictures under Article 1.05. For example, short of assigning the contested position to a bargaining-unit employee, which is not justified in this dispute.[19] Nothing in the arbitral record suggests that the Agency exerted less than a reasonable effort to preserve the bargaining unit.

F. Violation of Article 17.05

The facts in this case do not establish a violation of Article 17.05, which prohibits the Agency from withdrawing a vacancy "to circumvent the Agreement." Although Article 17.05 does not explicitly require "intent," that state of mind is reasonably imputed. The phrase "to circumvent" is reasonably interpreted to mean *in order to* circumvent or for the *purpose or intent* of circumventing the Agreement.

Again, the arbitral record lacks proof of intent under Article 17.05 for the same reason the Undersigned held that element to be absent under Article 1.05. Furthermore, the Agency's claim of mistakenly posting the nonexempt position and later correcting that mistake by posting the contested position

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[18] *Id.* (Emphasis added).

[19] As discussed below, such an assignment is unwarranted, in this case, because the contested position is properly classified as exempt.

is as less credible as the Union's claim of intent under Article 17.05.[20] More important, nothing in the arbitral record either seriously challenges or arguably rebuts the Agency's asserted reason. Finally, the Union has the burden of persuasion on this issue, doubts about which are resolved against the Union.[21]

G. Reasonable Classification of the Contested Position[22]

1. The Circumstantial Backdrop

The gremlin in this dispute is the" hybrid" nature of the contested position, a point about which a prefacatory comment is indicated. "Hybrid," in this context, reflects the presence of exempt and nonexempt duties in one position. Hybrid positions have long been a bane to the Parties and will undoubtedly persist given the inevitability of overlaps between exempt and nonexempt duties.[23] The natural tension of this duality of duties is aggravated because their juxtaposition within a hybrid position threatens central interests of both Parties. The Union often views assignments of hybrid positions as a clear and present danger to bargaining-unit integrity and stability–the institutional, economic, and political, heart of unionism. From the Agency's perspective, inappropriate assignments of hybrid positions undermines the core of the managerial imperative that only exempt employees conduct, oversee, and preserve central functions of the Agency. The perceived magnitude of this threat together with the centrality of the competing interests cause the Parties to view assignments of hybrid positions as zero-sum games, a perspective that effectively suffocates objectivity and compromise.

2. The Parties' Arguments

Having addressed the Parties' other major arguments and evidence in this dispute, the Arbitrator turns now to their arguments that directly address the outcome-determinative issue: Whether the contested position

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[20] This point is equally applicable to the analysis of Article 1.05.

[21] This is equally applicable to Article 1.05.

[22] Where hybrid disputes are concerned, a "reasonable" classification is about all one can seek.

[23] One cannot reasonably expect perfect demarcations between the duties in exempt and nonexempt positions.

is either exempt or nonexempt.[24] The Union alleges that the contested position is really nonexempt and that the Agency eroded the bargaining unit by posting that position as exempt. Furthermore, the Union contends that awarding the contested position to Mr. Mitch, a non-bargaining-unit employee, constituted "non-selection of a bargaining-unit position." In the Union's view, the Agency's attempt to recast the contested position as exempt based on fiduciary duties therein is unpersuasive for essentially two reasons. First, the Union argues that no duties in the contested position qualify as fiduciary under the "Bargaining Unit Exemptions."[25] Alternatively, the Union contends that any fiduciary duties in the contested position are so minuscule as to be irrelevant in classifying that position. In contrast, the Agency insists that it inadvertently posted the contested position as nonexempt, caught its mistake, re-posted the position as exempt, notified bargaining-unit applicants of that modification, and ultimately hired Mr. Mitch to fill the contested position.

A functional (albeit imperfect) referential *screen or test* can prove useful in resolving disputes about hybrid positions. One can use such a screen to *assist* in classifying hybrid positions as either exempt or nonexempt and, hence, reduce the confusion, discord, disputes, and grievances associated with filling hybrid positions. Accordingly, resolution of this dispute involves the application of a *screen* that hopefully sheds light on and dissipates heat in classification disputes. It is to that task that the Arbitrator now sets his hand.

3. A Tool for Screening Hybrid Positions

The most functional method of screening hybrid positions is to focus primarily on the *essential duties* therein ("Essence Test") and secondarily on other factors. The basic inquiry under the Essence Test is whether either exempt or nonexempt duties are *required* in (*essential* to) daily job performance in a given hybrid position. Other matters equal, a hybrid position is exempt if daily job performance entails exempt

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[24] Nevertheless, the Parties offered several arguments regarding other aspects of this dispute that are subsumed in a determination of whether the position at issue is either exempt or nonexempt. Consequently, the resolution of that issue in this section effectively addresses those arguments.

[25] Union Exhibit 1.

duties. Conversely, a hybrid position is nonexempt if daily job performance necessitates nonexempt duties.[26]

Further inquiry is indicated, however, if daily performance requires either equal or equivalent application of exempt and nonexempt duties. If, for example, bargaining-unit employees have performed exempt duties in a position on another occasion, then one may reasonably classify that *position* as nonexempt without fear of eroding exempt *positions*, even though the *duties* therein remain exempt for purposes of classifying other positions in the future.[27]

Finally, irrespective of the foregoing circumstances, a position is exempt if daily job performance involves exempt duties that: (1) lie at the heart of (central to) managerial decision-making authority, or (2) are fiduciary in nature as that term is defined in "Bargaining-unit Exemptions."[28] Similarly, a position is nonexempt if the daily job performance entails duties that the Parties have explicitly classified as nonexempt.

H. Classification of the Contested Position

Application of the Essence Test indicates that the contested position is exempt. First, the position clearly encompasses a number of exempt duties such as representing administrators and directors in meetings and conferences and assuming responsibility and authority of absent administrators.[29] Because many of the italicized duties lie at the heart of managerial decision-making authority, the contested position is reasonably classified as exempt under the foregoing screening device. Absent clear proof otherwise, one strains to argue that these are duties that nonexempt employees either can or should perform. Reason suggests that exempt employees are better situated and arguably entitled to represent the Agency's interests by standing in for directors and administrators (and performing other central, italicized duties in Appendix A), just as Union

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[26] This approach guards against *undue* erosion of both the bargaining unit and exempt positions.

[27] Observe, however, that the Parties' explicit (as distinguished from implicit) agreement, exempt duties do not lose that status because bargaining-unit employees perform them, and the same can be said for nonexempt duties performed by supervisors. Otherwise, both duties will eventually lose their functional identities and aggravate the confusion surrounding hybrid positions.

[28] Union Exhibit 1. Numbers (1) and (2) guard against erosion of exempt positions.

[29] *See*, e.g., Italicized passages in Appendix A below.

officers are better situated to represent the Union's organizational or institutional interests. The emphasis here is not on the ability to perform (or having performed) an exempt duty. The emphasis is on *interests*, which constitute one of the major distinctions between exempt and nonexempt duties and, ultimately, positions.

Second, the Arbitrator finds unpersuasive the Union's contention that the contested position is nonexempt essentially because Messrs Scheerens and Tomastik have performed some exempt duties therein. Exempt duties do not somehow become nonexempt merely because bargaining-unit employee have performed them.[30] Nor do nonexempt employees otherwise become *entitled* to perform exempt duties (or to hold positions involving those duties) simply by performing the duties.[31] Absent unambiguous mutual agreements between the Parties and in the interest of labor/management peace, exempt and nonexempt duties retain their respective statuses. The Union's approach in this instance virtually assures smudging (if not erasing) demarcations between exempt and nonexempt duties, virtually ensuring the proliferation of ever knottier classification disputes.

Finally, one notes that the Parties explicitly allow supervisors to perform nonexempt duties under certain circumstances. Specifically, Article 1.05 permits a supervisor to perform "some of the *same duties as bargaining-unit employees*" (nonexempt duties) pursuant to the "classification specification" of the provision in question.[32] Observe, however, that Article 1.05 is not a license for exempt employees to erode the bargaining unit by performing nonexempt duties. Those duties remain nonexempt. These considerations persuade the Arbitrator that the contested position in this dispute is exempt.

VI. The Award

For all the foregoing reasons, the Grievance is hereby **DENIED**.

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[30] And despite the strictures of Article 1.05, this truism is equally applicable to situations where exempt employees perform nonexempt duties.

[31] This principle is equally applicable to exempt employees performing nonexempt duties. Observe, also, that application of the doctrine of past practice to classify exempt and nonexempt duties is a recipe for confusion, discord, and grievances.

[32] Joint Exhibit 1, at 2.

Appendix A

Nonexempt Position	Contested Position
Prepares and reviews data & maintains records or reports related to assigned projects (e.g., update Microsoft Access database of projects circulated for review); consults and coordinates with staff of other divisions, state and federal agencies; provides technical assistance and consultation to government officials and private firms or individuals regarding environmental laws, policies and programs & environmental issues. Attends training sessions & seminars; assists in conducting special studies or programs/projects, attends conferences and meetings (e.g. project site reviews, interagency meetings).\1	Serves as *liaison* with public officials, private agencies & general public (e.g., explains policies & programs; responds to telephone & written inquiries & complaints); *represents administrator and Director* in meetings & conferences & *assumes responsibility & authority in administrators absence* (e.g., attends meetings, prepares documents & correspondence regarding program & responds to inquiries from public & ODNR); *relieves supervisor of non-routine administrative duties* (e.g., directors letters regarding the department's environmental policies/programs. *Researches & analyzes programs, procedures & policies related to environmental review . . . . Develops proposals & provides reports* on project status and provides technical advice to administrators; *maintains files* for active, inactive and closed projects and work requests.\2

\1. Management Exhibit C, at 1
\2. Management Exhibit E, at 1.

Respectfully,

Robert Brookins

Robert Brookins, Professor of Law, Labor Arbitrator, J.D., Ph.D.