

1047A

IN THE MATTER OF ARBITRATION

BETWEEN

**STATE OF OHIO – OHIO DEPARTMENT OF TRANSPORTATION
CENTRAL OFFICE**

AND

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11
AFSCME. AFL-CIO**

Arbitration Date: October 29, 2009

Grievant Lucille Micatrotto: #31-13(7-28-2008)-0022-01-09
and #31-13 (03-31-09)-0006-01-09

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Colleen Ryan
Ohio Department of Transportation
Central Office
1980 W. Broad Street
Columbus, Ohio 43223

Advocate for the Union:

Lynn Kemp
OCSEA, AFSCME Local 11
390 Worthington Rd., Suite A
Westerville, OH 43082

I. HEARING

The hearing was held October 29, 2009 at the Ohio Department of Transportation's Central Office in Columbus, Ohio. The hearing commenced at 9:05 A.M.

The joint issue before the Arbitrator is "Are the grievances of Lucille Micatrotto , numbered 31-13 (07-28-08)-0022-01-09 and 31-13-(03-31-09)-0006-01-09 arbitrable under the 2006 - 2009 Collective Bargaining Agreement?"

Testifying for the Ohio Department of Transportation ("The Employer") were Latisha Hazell, Senior Human Capital Management Analyst; Edward A. Flynn, ODOT Assistant Administrator for Labor Relations; and Joe Trejo, Office of Collective Bargaining Manager of Labor Relations and Dispute Resolution.

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME ("The Union") were Nadine Kempton, Systems Programmer 3; and Lynn Kenp, Union Staff Representative.

II. STATEMENT OF THE CASE

The Grievant, Lucille Micatrotto, was laid off from her position as Training Officer in the Employer's District 12 on March 16, 2008. As a result of an agreement pursuant to Section 18.14 of the Contract, Grievant was placed in the position of Account Clerk 1. Grievant was then placed on a Recall list for re-employment to Cuyahoga, Lake and Geauga Counties.

The Employer posted a vacancy for Training Officer, position number 20064640 on July 3, 2008. The job duties on the posting included "driving equipment operation training, proficiently operates basic, standard and complex equipment for demonstration." This equipment includes: dump trucks, loaders, dozers, graders, and backhoes. The closing date for the posting was 5:00 P.M. on July 13.

Pursuant to Article 18.12 of the Contract, Grievant submitted an application for this position. The application was sent by Grievant on July 8th to Latisha Hazell by E-Mail. Ms. Hazell notified the Grievant she had received the application.

On July 10th Grievant questioned Ms. Hazell as to her start date. Grievant interpreted Contract Article 18.12 as granting her the position. Grievant stated in her E-Mail "the laid-off employee shall be considered before any other applications and upon meeting minimum qualifications, the laid-off employee shall be awarded the vacancy."

On July 14, Mike Bussa, Administrator for the Employer's Human Resources Division notified Grievant that she would be considered and would be expected to "demonstrate proficiency in the operation of "certain types of equipment and serve a trial period as Training Officer.

The Grievant responded that she would like to be considered for the position and Ms. Hazell scheduled her for an assessment on August 8th. On August 4th Grievant notified Ms. Hazell that the Contract language in Section 18.12 was clear and she would not attend any assessments or interviews. Ms. Hazell notified Grievant that if she failed to take the assessment she would not be considered.

The Grievant filed her grievance 31-13-(07-28-08)-0022-01-09 hereinafter referred to as (22) directly at Step 3 of the grievance procedure and failed to appear for the assessment. This grievance was filed July 31, 2008.

The Step 3 hearing was conducted on August 21, 2008 by Mr. Edward Flynn. In Mr. Flynn's Step 3 response of September 16, 2008 he found no contractual violation but ordered the job to be reposted because he thought Grievant was ill advised not to appear for the assessment. In the Step 3 response there were no Employer procedural objections and none noted in the response.

On September 30, 2008 Ms. Hazell posted the same Training Officer vacancy, adding that an assessment will be administered to applicants and they will be required to show how they demonstrate proficiency in the operation of basic, standard and complex equipment.

The Grievant applied for the position again. The Grievant did not appear for the assessments claiming she was entitled to the position under Contract Article 18.12.

The Employer filled the vacancy on January 4, 2009. On March 31, 2009 Grievant filed her second grievance 31-13-(03-31-09)-0006-01-09, hereinafter known as (6) directly at Step 3. The Employer denied this grievance on the basis it was untimely, Grievant had withdrawn from the process, and on the merits of the Contractual language.

III. THE EMPLOYER'S CASE

The Employer's first witness was Latisha Hazell. Ms. Hazell is a Senior Human Capital Management Analyst. Ms. Hazell has a Masters' Degree in Business Administration and a

Bachelors' Degree in Human Resource Management. Ms. Hazell currently has the Training Division. She screens applicants for positions. Ms. Hazell was referred to Joint Exhibit 3 and said this is the Training Officer Posting 20064640 Position and that the position is in Ashland County. The position is a Central Office position in Pay Range 31. The position was posted from July 3 - July 13, 2008.

Ms. Hazell reviewed Joint Exhibit 1 and said it was an E-Mail and an application from the Grievant. She said this was received on July 8th and there were phone calls and E-Mails after that. Ms. Hazell said Joint Exhibit J was an E-Mail from the Grievant asking for a start date. She then read Joint Exhibit K which is an E-Mail response to Grievant from Mike Bussa, Human Resources Administrator. Mr. Bussa tells Grievant she has to show proficiency in running equipment. She then read Joint Exhibit L which is an E-Mail from Grievant asking to be considered for the position sent July 14, 2008. Mr. Bussa replied the same day and told Grievant she would be contacted once an interview schedule has been determined.

Ms. Hazell then read Joint Exhibit M. This is Grievant's E-Mail to her saying she has contacted the Union Leadership and that the Contract language in Section 18.12 is clear. She should be awarded the position and will not attend any interviews or assessments. Ms. Hazell replied in an E-Mail in Joint Exhibit M that if Grievant failed to take the assessment she would not be considered for the position.

Ms. Hazell said the Training Officer position was not filled but was re-posted. She said the other applicants were sent letters that the position had not been filled. She also said the reporting of the position clarified that applicants had to show proficiency in the operation of equipment and

had to be assessed.

Ms. Hazell was then referred to Joint Exhibit O. This is the reposting of the job. She testified that other people who had applied were asked if they were still interested and the Grievant was advised of the reposting. She said the 2nd posting time closed and assessments were started. She contacted the Grievant and received more E-Mails.

Ms. Hazell was referred to Joint Exhibit Q. This is her E-Mail to Grievant giving Grievant information on an assessment and asking for confirmation of Grievants attendance on November 12, 2008. She read Joint Exhibit R which is an E-Mail from Grievant on October 31, 2008 saying Grievant sees no need for an assessment.

Ms. Hazell was then referred to Joint Exhibit S which is an E-Mail from Lynn Kemp November 3, 2008. Ms. Kemp says that Section 18.12 of the Contract rules and Grievant will not be at the assessment. Ms. Hazell then read Joint Exhibit U which says the Training Office position was filled January 4, 2009. She also testified that non-selection letters were sent but only to those who had an assessment. She said the Grievant was not notified as she considered her "withdrawn". She was asked if all the applicants were bargaining unit members. She said "Yes"

On Cross-Examination Ms. Hazell was asked if she had taken Labor Relations Courses. She replied that she had classes in college. Ms. Hazell was asked "What do you believe contract interpretation means?" Her answer was "The ability to read and interpret the Contract."

Ms. Hazell was then referred to Joint Exhibit J. She said Grievant only asked about a start date. She was then asked "Did the E-Mail also tell you about 18.12 issues?" She answered "We did have an 18.12 discussion." Ms. Hazell was then asked "Did you seek clarification from

Central Office on 18.12.” She said “Yes”. The response from Mr. Bussa was after he talked with Labor Relations. She was then referred to Joint Exhibit Q which is an E-Mail to Grievant. She was asked “Did you consider assessment a Position Specific Minimum Qualification.” She said, “ A CDL is a PSMQ.” Ms. Hazell was then referred to Joint Exhibit R. This is an E-Mail from Grievant to her. The E-Mail says there is no need for assessment and that 18.12 gives her the position without assessment. Ms. Hazell was then asked “Did the applicant bid as a promotion?” She said “Yes”.

Ms. Hazell was then referred to Joint Exhibit N. She said this is a list of people who took the assessment the first time. Ms. Hazell was asked “Were any of those listed laid off as Training Officers?” She said “Just Grievant”.

Ms. Hazell was then referred to Joint Exhibit T. This Exhibit is the sign-in sheet for the assessment November 12, 2008. She was asked “if any of the people listed were laid off as Training Officers.” She said “Not to my knowledge.” She then testified that Joint Exhibits Q,R & S were E-Mails concerning this position.

Ms Hazell was then referred to Joint Exhibit Q and said this was an E-Mail to Grievant but doesn't mention 18.12. She then read Joint Exhibit R. This is an E-Mail where Grievant says she and the Union believe she should have the job because of Article 18.12.

Ms. Hazell then read Joint Exhibit S and was asked “Does the E-Mail say that if Grievant failed to show for the assessment, that she would be no longer considered?” Her answer was “No”.

The next witness was Edward A. Flynn. He is the Employer's Assistant Administrator for Labor Relations. Mr. Flynn says he is responsible for all grievances from Step 3 through Arbitration. He is also the Drug Testing Officer. He goes to all 88 counties for Step 3 hearings and presents or goes to all Arbitrations.

Mr. Flynn was referred to Joint Exhibit B. He said this is the first grievance (22) and his Step 3 response. This Exhibit also contains the second grievance and his Step 3 response. It also contains appeal preparation sheets and the Union's request for Arbitration on both grievances. Mr. Flynn said both grievances were filed directly at Step 3.

Mr. Flynn was then referred to Joint Exhibit A, the Collective Bargaining Agreement. He reviewed Article 25.02 and gave his opinion as to what Step a grievance under Article 18 should be filed under. He said Article 25.02 covers Non-Selection. Mr. Flynn said the time lines start when the Grievant becomes aware of an Action. He said Article 25.01 CDS defines days. Step 1 has a 10 day time line (working days) not to exceed 30 days.

Mr. Flynn said the first grievance (22) was filed on July 28. The second grievance (6) was dated March 30 It was also postmarked March 30 so this is the filing date. He said the first assessment date was August 8th and the grievance was filed before the selection was completed. Mr. Flynn said Grievant withdrew from consideration so there was no 18.12 issue prior to getting a grievance.

Mr. Flynn said after he received the first grievance (22) he had many talks with Ms. Hazell and Mr. Bussa. He then discussed his Step 3 response and said he did a lengthy discussion of 18.12. Mr. Flynn said he took a lot of time on his Step 3 response.

Mr. Flynn said you have to tie Minimum Qualifications into Job duties. The Trainers have to be proficient in equipment operation as this is a Safety issue. He said Grievant had a different type of job when she was a Training Officer. This job requires ability to operate heavy equipment. Mr. Flynn said he wanted to give the Grievant the benefit of possible miscommunication and so he rebid the job to give her another shot. He said in his Step 3 response he tried to explain to Grievant. He said the Grievant's application did not say she had any experience on heavy equipment. Mr. Flynn said if there is more than one applicant under 18.12 have to bid. There still has to be an assessment. He said the Grievant withdrew from the process.

Mr. Flynn said you have to read Contract Article 17.06. He said you have to meet Minimum Qualifications with job duties. He said he gave Grievant another shot but she withdrew, so he went ahead. Mr. Flynn said he only notified people who completed the selection process.

Mr. Flynn said the Employer received grievances from others. He looked at Exhibit Management 1 and said this is another grievance but it was withdrawn after the job was re-posted. He said after the second posting the job was filled. The second assessment was November 12 and the grievance (6) was filed March 30.

Mr. Flynn was asked "Did you see Ms. Kemp?" He said "Yes, several times." He was shown Exhibit Management 2 which are entries from his calender. The calender shows November 12 he was at District 12 in Step 3s. November 20 he had mediation at Districts 3 and 12. On January 13 he was at District 3, January 16 he was at District 12, January 29 he was at

District 3 and February 10 he was at District 3.

- 8 -

Mr. Flynn said Butch Wylie is the OCSEA Staff Rep for District 3. He said he had no inquiry about job being filled until he received the grievance. He also said P A Notices are given electronically. Mr. Flynn said the second grievance (6) refers to Article 17.03 of the Contract. This Article says there are 14 calender days to file a grievance. The job was filled January 4th. Fourteen days from the time of notification of the action would mean the time expired on February 4. Mr. Flynn said the Union had notice under Article 3.08.

Mr. Flynn said the first grievance was filed right after the assessment date. He said if you go by this the second grievance should have been filed in October.

Mr. Flynn looked at Section 3.08 of the Contract. He said the letter of agreement with the Union is that electronic transmission satisfies Article 3.08 of the Contract. He said he responds to non-selection grievances all the time.

Mr. Flynn testified that if a job is filled and the probation period runs, the person in the job feels an ownership interest. These matters have to be resolved quickly and that is why the contract has a short time frame. The maximum is thirty days. Mr. Flynn said the time to file the grievance was after the initial selection was made. He said the time line for the second grievance (6) started running January 4. He said if you use the Grievant's argument, should have filed then.

Mr. Flynn looked at the calender and said the last day would have been the 18th of January but that was a Sunday. The 19th was a holiday so January 20th was the last day. If the

grievance was filed at Step 1 January 16th was the last day. Step 1 has a possible 30 days so the last day was February the 3rd. Mr. Flynn said grievances are usually filed after the process is completed and she didn't complete it.

- 9 -

On Cross-Examination, Mr. Flynn said Management 2 is his calender. He said he saw Ms. Kemp and she didn't say anything. Mr. Flynn said he would not have seen Ms. Kemp at any District 3 meetings. He also said Ms. Kemp did not call about the position being filled.

Mr. Flynn looked at Article 25.02 of the Contract. He said Article 18 is the lay-off Article and the Union would pursue it. He was asked "You say the Grievant withdrew by not taking the assessment?" He replied, "Article 18.12 says you consider laid off employees. Article 18.12 says you have to meet the job duties. The Grievant withdrew from consideration."

Mr. Flynn was referred to Joint Exhibit 3 and referred to the last page of his Step 3 response. He said the selected applicant had not actually taken the job. He also said the PSMQ has to be tied to the job duties. You have to show proficiency.

On Re-Direct Mr. Flynn was referred to Management 2. He said District 3 is in Ashland County. The Grievant is in District 12. Mr. Flynn said he was also in District 12 and no one said anything to him in either District.

Mr. Flynn said the Ohio Administrative Code clearly says there can be proficiency exams. Common sense says you have to know how to run equipment. He was referred to Article 17.06 and said assessments are required.

The Employer's next witness was Joe Trejo. Mr. Trejo is the Manager of Labor Relations and Dispute Resolution at the Office of Collective Bargaining. He has been at the Office of

Collective Bargaining for six years. Mr. Trejo manages all Labor Relations Specialists and is involved in all Contract Negotiations. He takes calls when the Labor Relations Officers are out.

- 10 -

Mr. Trejo was referred to Article 3.08 of the Contract. He said the State is the Employer through the Department of Administrative Services. He said the Union is notified of all personnel actions. The information is transmitted by an electronic system called Tumbleweed. This was agreed to by the Union in 2007. Mr. Trejo was shown Management 3 and said it was the Letter of Agreement with the Union. This was intended to Clarify Article 3.08, and this is indicated in paragraph 4.

Mr. Trejo said prior to 2007 there was a barrage of paper sent to the Union. Now it is all on the server. He said information on the position being filled was sent to the Union.

Mr. Trejo was shown Exhibit Management 4 and said this shows the Training Officer position was filled on January 4, 2009. He said the Department of Administrative Services sent this information to the Union on January 28, 2009. He looked at the calendar on the back page of the Contract and said Article 3.08 requires bi-weekly reports.

On Cross-Examination Mr. Trejo said there was no separate E-Mail to the Union. It was all on the bi-weekly electronic transmission sent January 28, 2009.

IV. THE UNION'S CASE

The Union's first witness was Nadine Kempton. Ms. Kempton has worked for the Union for twelve years and is now a Systems Programmer 3. She said the Union went electronic in 1997

and that she gets the transmissions. Her job is Data Base Administrator. She gets all the reports including the State's file.

- 11 -

Ms. Kempton said she has been involved with the Ohio Administrative Knowledge System (OAKS). She said she gets the State's files on a bi-weekly basis. The tapes have information of Bargaining Unit Members. This includes job information, dues, and benefits. She said there are close to 676 fields on the file per employee.

Ms. Kempton said there is information concerning about 52,000 employees on the tapes and about 32,000 of these are Union members. She said the Union uses the tapes to check on the Bargaining Unit. When information changes the Union System is updated. All of this is done electronically.

Ms. Kempton said the tapes show personnel action but this information is rarely requested. She said she would have to have the name to find the information. She said there are lots of issues with (OAKS). For example, employees whose names begin with M were not paid. Ms. Kempton said the timeliness and reliability of the Human Resources person impacts on the information. She said there may be several hundred personnel actions in a pay period. She also said she would have to write a program to extract this type of information.

Ms. Kempton looked at Exhibit Management 3 and said this Letter of Agreement came about to stop the transmission of Social Security numbers to the Union. The Union had received electronic information before this. She said this Agreement was in response to a student losing

State Tapes.

On Cross-Examination Ms. Kempton looked at Exhibit Management 3. She was asked if the Letter of Agreement complied with Article 3.08 of the Contract. She said "Yes". She was then referred to Exhibit Management 4 and said this was the same format she would use.

- 12 -

Ms. Kempton said the information on the job was on her transmission.

The last witness for the Union was Lynn Kemp. Ms. Kemp is a Staff Representative for the Union and does Contract Administration. She is assigned certain areas for grievances. Ms. Kemp also attends Labor-Management meetings and Health and Safety Meetings. Ms. Kemp is assigned to District 12. She filed grievance (6) in 2009.

Ms. Kemp was referred to Joint Exhibit B. She was asked "Why did you file on this date?" She answered "I became aware of the job being filled. I filed March 30, 2009.

Ms. Kemp was shown Exhibit Union 1 and said she E-Mailed Ed Flynn on December 15, 2008 and asked about the status of filling the position. She also looked at Exhibit Union 2, page 2 and said Mr. Flynn's reply said letters are going out to those who completed the selection process.

Ms. Kemp said the Union Staff Representative in District 3 would not ask about a grievance in another District. She said she filed the grievance at Step 3. She had 14 days to file. Ms. Kemp says Article 25.03 of the Contract says initiate at Step 3.

Ms. Kemp said she was the District 12 Staff Representative and advised Grievant of her Rights under Article 18.12 of the Contract. She said she called Bruce Winegard. Mr. Winegard is

the Operations Manager and negotiated Contract Article 18.12. Mr. Winegard agreed that the Grievant had a CDL, met Minimum Qualifications and PSMQ. Mr. Winegard said the Grievant did not need to go to assessment. Ms. Kemp told the Grievant she didn't have to go.

There was no Cross-Examination of Ms. Kemp. The hearing concluded at 1:50 P.M.

- 13 -

V. OPINION OF THE ARBITRATOR

This case has been very well presented by the parties. They have been very aggressive in their presentation and have made their respective positions very clear.

The Employer argues that the applicable Contract Article is Section 25 which requires this type of grievance to be filed at Step 3 within 14 days. The Employer argues that the first grievance (22) was not ripe and the Grievant had no standing. The Employer also argues that the issue was moot as the job was reposted.

The Employer also asserts that the grievance was not ripe as it was speculative under Article 18.12. The Employer said it did consider the Grievant and therefore there was no violation.

As to the second grievance (6) the Employer argues that the grievance should have been filed at the time of the assessment but in fact was filed after the selection was made.

The Employer also contends that Grievant had no standing as the Grievant did not appear for the assessment and did not complete the process. The Employer says the Grievant should have gone for the assessment and then grieved.

The Employer says Ms. Hazell told Grievant in July that if she did not go for the

assessment she would not be considered. The Employer also says Grievant was told in July, August, and September if she failed to go to the assessment she would not be considered. The job was filled January 4, 2009 and the Grievance was untimely filed.

The Employer cites Exhibit Union 1 which is Ms. Kemp's inquiry as to the status of the position and Mr. Flynn's reply that letters were going out soon. The Employer says the

- 14 -

information was provided to the Union by January 28th and the time to file the Grievance ran out February 11.

In reference to Ms. Kemp's testimony concerning the letters; the Union and the State have agreed as to how information is to be provided. The Union has to handle the information. The Employer said it doesn't notify Staff Representatives or those who did not complete the process. The Union knew in December the job would be filled soon.

The Employer submitted a number of Arbitration decisions and Court Cases. The Employer emphasizes Arbitrator Robert Stern's decision stating "the reason for time lines are to act as a Statute of Limitations and there is no flexibility." The cases review standards for filing grievances and whether a grievance is ripe.

The Union contends that the issue is arbitrable. The Grievant lost her Training Officer job in 2008 and went back to Account Clerk. On July 18, 2008 this Training Officer Job was posted. The Grievant filed her application pursuant to Contract Article 18.12. The Union contends the Grievant met the Minimum Qualifications and the Position Specific Minimum Qualifications. The Union therefore filed a grievance (22) and there was no procedural objection from the Employer. The Union asserts that this is arbitrable under Article 18.12 and that since Grievant

was not awarded the job immediately the grievance was filed. The Union also argues that re-posting the job is irrelevant and doesn't change the Contract. The Union also argues that adding an assessment to a Position Specific Minimum Qualification doesn't change anything.

The Union also provided many Arbitration decisions. The Union stresses a decision by Arbitrator Mollie H. Bowers. Ms. Bowers, in interpreting Article 35 said "a Contract applies

- 15 -

unless there are express provisions to the contrary." The Union points out there are no restrictions on the arbitrability of Article 18.12. The Union also has Arbitration Decisions saying rights are presumed to be enforceable unless the Contract expressly precludes it. The Union contends this contract does not forbid the enforce ability of Article 18.12.

As to the second grievance (6) the Union says it is a Step 3 grievance and is to be filed within 14 days of Notice of the Event. The Union argues that it was not aware that the position was filled. The Union says it filed the Grievance (6) within 14 days after it learned the job was filled. The Union also says it was wrong not to notify the Grievant.

The Union also argues that it cannot get this information from electronic transmission as shown by testimony. The Union therefore contends it was unreasonable to assume that the Union knew that the position had been filled and the Employer should have notified the Grievant and the Union. The Union also says Ms. Hazell did not tell the Grievant she would be out of consideration.

The Union says the most senior employee, if qualified, should be awarded the position and the case should be arbitrated on the merits.

The Union cites a decision by Arbitrator Rhonda Rivera. Ms. Rivera, in deciding a case concerning reinstatement after a disability dealt with a timeliness issue. Ms. Rivera found, "that because the Employer did not communicate a final and clear statement to the Grievant of the denial of reinstatement, and because the Union had no formal notice of these events, the evidence leads to an assumption that the Union acted promptly in filing a grievance, when it had reason to know of a probable contract violation."

- 16 -

The Union asserts that it had no Formal Notice of the event and acted promptly when it became aware.

As to the first grievance filed in this case (22) the Employer argues it is premature or not ripe and also moot because the job was reposted. The Union argues Article 18.12 gives the Grievant the job and therefore the Grievance is neither premature or moot.

The Contract Article 18.12 provides in pertinent part as follows: "Notwithstanding the provisions of Article 17 and the other provisions of this Article a laid-off employee may submit an application for any posted vacancy outside of his/her geographic area or for any posted vacancy in the same office, institution or county from which the employee was bumped, in the same, similar or related classification series from which he/she was laid off or displaced. However, this opportunity is limited to lateral transfer and demotion". It further says: "applications from such laid off employees shall be sorted and considered before any other applications pursuant to the provisions of Article 17. Among such employees submitting applications who meet the minimum qualifications as stated in the Position Description and Classification Specification the most senior applicant shall be awarded the vacancy".

There is no dispute in this case that the Grievant was covered under Article 18.12. This Article commences with the words "Notwithstanding the provisions of Article 17." This means that before Article 17 becomes applicable certain events have to occur. The Grievant having applied for the job the first thing that needs to be determined is whether or not the Grievant is the most senior applicant meeting "minimum qualifications as Stated in the Position Description and Classification Specification". The only evidence as to seniority is the Grievant's statement that the

- 17 -

only other Training Officer laid off had less seniority than she did. As this is not an Arbitration on the merits there may or may not be other evidence on this issue.

The other issue concerns the minimum qualifications. The Union contends the Grievant meets these. The Employer attempts to fall back on Article 17. Contract Article 18.12 expressly precludes the use of Article 17. It specifically says applicants under Article 18.12 must be "Sorted and considered" before other Article 17 applications. There is testimony that Mr. Bruce Winegard of the Union was involved in these negotiations and 18.12 means what it says.

The Arbitrator finds that the grievance was timely filed on grievance (22). The Union had a right to "short circuit" any further job proceedings based on the evidence at hand and have an Arbitration on the merits.

The Employer's argument that there is no injury because the job was re-bid is not well taken. The Employer insists that Article 18.12 must be read in conjunction with Article 17 but that is not the case. Whether the Union's case is as iron clad as it asserts remains to be seen in an arbitration on the merits. The issue on seniority may or may not arise as well as evidence on the

minimum qualifications. Both of these are factors under Article 18.12. Clearly however, the Grievant's Article 18.12 rights are strong enough at this stage that she could suffer economic injury from a delay in granting her the position so the issue is not moot.

The Employer having decided to repost the job the case continued. The Grievant was contacted by E-Mail and again expressed an interest. Ms. Hazell E-Mailed Grievant and told her she would have to be assessed. Both Grievant and the Union replied that she was entitled to the job under Contract Article 18.12 and she would not appear for the assessment. Ms. Hazell did

- 18 -

inform the Grievant that if she failed to appear for the assessment she would not be considered.

The Grievant failed to appear and the Employer proceeded with assessments and awarded the Training Officer Job to another, filling the position on January 4, 2009.

In the mean time Ms. Kemp sent an E-Mail to Mr. Flynn on December 15, 2008 asking if the position had been filled. Mr. Flynn replied the same day but did not give a direct answer, saying instead, "letters are going out shortly to those who completed the selection process".

The Employer's evidence showed Mr. Flynn travels extensively and said he had seen Ms. Kemp several times but she made no inquiry then as to this situation.

Ms. Kemp ultimately inquired of Staff Representative Butch Wylie as to whether or not the position had been filled. She says she became aware that the position had been filled on March 16 and filed the grievance (6) on March 30 and it is therefore timely.

The Employer argues that Article 3.08 of the Contract covers how notice to the Union is to be sent and the parties have agreed on this procedure. The Employer's evidence of Notice is the Exhibit Management 4 which is an extract from the Tumbleweed Report showing a Training

Officer position is filled and giving the position number. The Employer also relies on Exhibit Management 3 which is the Letter of Agreement between the Employer and the Union in August 2007 and says it is dispositive.

The issue here pursuant to Contract in Article 3.08 says in pertinent part that “The Employer will provide to the Union monthly a listing of all approved personnel actions involving bargaining Unit employees. The Employer will provide the Union with a list of employees who have paid Union dues and fair share fees.”

- 19 -

The Letter of Agreement between the Union and Employer modifies Article 3.08. This Agreement has several provisions concerning the elimination of the use of employees Social Security Numbers and steps to be taken if there are information breaches. It also refers to personnel action. The Agreement recites that “Whereas, Article 3.08 of the Collective Bargaining Agreement between the State and OCSEA requires the Employer to periodically provide employee information and an account of all personnel actions involving bargaining unit employees to OCSEA.”

The Letter of Agreement further indicates the parties are making an agreement. This Agreement says on Page 2 under the State’s duties item 3 “Continue to provide position information for all state employees not included in OCSEA represented bargaining units.” (Emphasis added)

This Contract was entered into March 1, 2006. The Letter of Agreement was entered into August 20, 2007. The Letter of Agreement therefore modified Article 3.08 in relation to position descriptions so as to only cover non-bargaining unit employees. As this position is a bargaining

unit position the Tumbleweed transmission was not Notice to the Union.

The Employer also contents that by refusing to go to the assessment the Grievant had withdrawn from the process and therefore there was no reason to notify Grievant or the Union of the filling of the Training Officer position. The Arbitrator finds the Grievant was notified that failure to go to the assessment would cause the Employer not to consider her.

The problem for the Employer is that in December Ms. Kemp E-Mailed Mr. Flynn with a direct question but did not receive a direct answer. The record resounds with the aggressive

- 20 -

stance of the Union on this issue. The Union had already grieved it once. Even though the Employer regarded the 1ST grievance as not ripe and premature, the Union continued its position when the Employer proceeded. Based on the facts of this case the Employer should have notified the Union and the Grievant that the position was filled. Barring that Ms. Kemp should have gotten a direct answer to her question. The Arbitrator finds that Notice to the Union was not until March 16, 2009 and the second grievance (6) was timely filed.

Grievances 31-13-(07-28-08)-0022-01-09 and 31-13-(03-31-09)-0006-01-09 are arbitrable under the 2006-2009 Collective Bargaining Agreement.

Entered at Ironton, Ohio this _____ day of November, 2009.

Craig A. Allen