

ARBITRATION DECISION NO.:

242

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Transportation
Medina County, Ohio

DATE OF ARBITRATION:

DATE OF DECISION:

March 13, 1990

GRIEVANT:

Mark Mayer

OCB GRIEVANCE NO.:

G-87-0643

ARBITRATOR:

Jonathan Dworkin

FOR THE UNION:

Daniel S. Smith

FOR THE EMPLOYER:

Michael P. Duco
Meril Price

KEY WORDS:

Demotion Into the
Bargaining Unit
Position Control Number
(PCN)

ARTICLES:

Article 17-Promotions and
Transfers
§17.02-Vacancy
§17.04-Bidding
§17.05-Selection

FACTS:

A Maintenance Superintendent 1 employed by the Ohio Department of Transportation received a demotion for disciplinary reasons into the bargaining unit position of Highway Worker 4. His duties changed from those of a supervisor to those of a highway worker and his reporting location was changed from the County Garage to the Burbank Outpost.

Subsequently, he was reinstated to his prior position outside the bargaining unit through a reduction of

the penalty by the State Personnel Board of Review and a vacancy in the Highway Worker 1 classification was posted. When the employee was demoted he retained his position control number, (PCN). When he was reinstated to a management position he received a new PCN and the Highway Worker 1 position was posted with his old PCN.

UNION'S POSITION:

When the Maintenance Superintendent 1 was demoted for four and one half months to the Highway Worker 4 position a vacancy must have first been created. That vacancy must be filled according to the agreement, Article 17, Promotions and Transfers. The fact that the Maintenance Superintendent's PCN did not change is irrelevant. He was moved into a newly created position with new duties thereby violating the agreement. The Ohio Administrative Code section 123:1-47-01A defines position as "a group of job duties intended to be performed by an individual."

A second violation occurred when the employee was reinstated to a non-bargaining unit position and a vacancy was created in the Highway Worker 1 classification. This deprived bargaining unit employees of the opportunity for a promotion. The posting should have been for the Highway Worker 4 position.

EMPLOYER'S POSITION:

No new position was created by the demotion because the former Maintenance Superintendent 1 retained his PCN. This indicates that he had not changed positions and the vacancy did not exist for him to be demoted. As no vacancy existed, Article 17 does not apply. Additionally, the employer retained the right to determine whether a vacancy exists. The employer's right to manage will be impaired if the employer's right to demote non-bargaining unit employees is restricted. Past practice shows that the employer has the right to demote employees into the bargaining unit during realignments and reductions in forces and when supervisors fail their probationary periods. The Ohio Administrative Code section 123:1-23-12 and the Agreement section 17.02 both support this argument. There is no difference between the cited situations and the incident at issue.

ARBITRATOR'S OPINION:

The arbitrator rejected the employer's argument based on employees' PCN numbers. Regardless of the position control number, the employee had changed duties and therefore positions. The Ohio Administrative Code section 123:1-47-10 (A) defines position as a group of duties. The duties, not the PCN, define the position.

The reason that the demoted employee's PCN did not change may have been in response to arbitration of grievance G-87-1239. A contract violation was found by demoting an employee into the bargaining unit and changing his PCN without posting a vacancy. The demoted employee here was placed into a new position regardless of whether the PCN changed or not. For that reason a vacant position must have existed for the demoted employee to enter. It was a bargaining unit position subject to Article 17 post and bid requirements.

The subsequent posting of the Highway Worker 1 position after the reinstatement of the former Maintenance Superintendent 1 is within management's rights. The employer has discretion to fill or leave vacant any position.

AWARD:

Grievance sustained in part. The employee who would have occupied the Highway Worker 4 position will receive the earnings lost as a result of the employer's violation of Article 17 but only for the period that the position was occupied by the demoted employee.

TEXT OF THE OPINION:**CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD**

In The Matter of Arbitration
Between:

THE STATE OF OHIO
Department of Transportation
Columbus, Ohio

-and-

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION OCSEA/AFSCME, AFL-CIO
Local 11

Grievance No.:
G-98-0643

Decision Issued:
March 13, 1990

APPEARANCES

FOR THE AGENCY

Michael P. Duco, Office of Collective Bargaining
Meril Price, Assistant Advocate
Toia Lee, Agency Personnel Administrator

FOR OCSEA

Daniel S. Smith, General Counsel
Douglas Dutt, Chapter President
Robert Goheen, Staff Representative
Mark Mayer, Grievant

ISSUE:

Article 17: Did demotion of a supervisor into
a newly created Bargaining Unit job violate seniority-bidding rights?

Jonathan Dworkin, Arbitrator
P.O. Box 236
9461 Vermillion Road
Amherst, Ohio 44001

THE ISSUE

The grievance was initiated when a low-level supervisor was demoted into a high-level Bargaining Unit job. The Union contends that the demotion created a "vacancy" which had to be filled by a qualified, senior member of the Unit in accordance with the job bidding language of the management-labor Contract.

The dispute arose in 1987 and is covered primarily by Article 17 of the 1986-1989 Contract. Article 17, which is entitled, "Promotions and Transfers," establishes a formula for declaring, posting, and filling

vacancies. Section 17.02 defines "vacancy" in terms of Management's prerogative to fill or not to fill a position. It states:

"A vacancy is an opening in a permanent full-time or permanent part-time position within a specified bargaining unit covered by this Agreement which the Agency determines to fill."

Once a vacancy (above entry level) is declared, it becomes a promotional opportunity for members of the Bargaining Unit. It must be posted for a specified period of time and is open to bids from all state employees. Article 17, §17.04 and 17.05 deal with the manner in which the successful bidder is to be selected. Section 17.04 requires the Employer first to divide applicants into five groups. The first group, category A, consists of "All employees within the office, 'institution' or county where the vacancy is located, who presently hold a position in the same, similar or related class series." They are to be given first priority for the opening. As stated in Article 17, §17.05, applications from category A shall be reviewed first, and:

The job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee.

The other four groups, which gradually broaden the selection pool to, "All other employees of the Agency" and "All other employees of the State," are prioritized in descending order. The result is that the promotional opportunity created by a vacancy belongs first to senior qualified members of the Bargaining Unit.

The demoted supervisor was not a senior member of the Unit. He was slotted into a job which would have been a desirable promotional opportunity had it been posted as a vacancy. There were eligible individuals in category A who could have filled it. The Employer concedes that a vacancy encompassing the job undoubtedly would have gone to a member of the Bargaining Unit, but it urges that there was no vacancy. In the Agency's view, the position held by the supervisor after the demotion was the same as before; only the functions and pay were changed.

The core issue to be decided is whether or not the supervisor was demoted into a vacancy. The Union regards the answer as obvious. It reasons that the Bargaining Unit position occupied by the supervisor after the demotion did not exist previously. Before he could fill the job, Management had to create an opening for him. That opening, according to the Union, was a vacancy.

The Employer's counter argument is that, both before and after the demotion, the supervisor held only a single position. The demotion did not create a new position vacancy, it simply reduced a position that already existed.

FACTS AND CONTENTIONS

Demotion is and historically has been a disciplinary tool of the Employer. Except when divested through negotiations, the Employer retains the authority to demote under the Ohio Public Employee Collective Bargaining Law. Ohio Revised Code §4117.08 speaks to matters which are included and excluded subjects of bargaining. It states in part:

(C) Unless a public employer agrees otherwise in a collective bargaining agreement, nothing in Chapter 4117. of the Revised Code impairs the right and responsibility of each public employer to:

(5) Suspend, discipline, demote, or discharge for just cause . . .

With respect to members of this Bargaining Unit, the Employer did relinquish its right to demote as a disciplinary measure. In Article 24, §24.02 of the Contract, it agreed that discipline would consist of warnings, reprimands, suspensions and removals. It retained the right, however, with respect to exempt, non-Unit employees such as the supervisor in question.

The supervisor was a Highway Maintenance Superintendent 1 assigned to Medina County, Ohio. His general duties were to travel among work sites, put maintenance crews together, oversee performance, plan

jobs, and communicate instructions. He was a bona fide supervisor with authority to impose discipline. When he failed to discipline a Highway Worker 2 for a motor vehicle accident, he was charged with neglect of duty, suspended ten days, and reduced in position to Highway Worker 4. Thereafter, his functions changed dramatically. Instead of putting crews together, he was placed in crews. His reporting location was changed from the County Garage to the Burbank Outpost. The actual work he performed was practically indistinguishable from the labor of other Highway Workers. He drove a snow plow, repaired guard rails, and filled pot holes. He also performed some quasi supervisory duties which are normally included in the Highway Worker 4 Classification. He served as a group leader and did some on-site direction. He also performed record keeping chores incidental to his new position, recording amounts of material used on each job and keeping track of crew workhours. It is to be noted that these group-leader activities were not unique; they were among the responsibilities of every Highway Worker 4.

The supervisor appealed his discipline to the State Personnel Board of Review and won a reversal. The Board reduced the penalty to a written reprimand and overturned the demotion. The employee had entered the Highway Worker 4 position on December 8, 1986 and was reinstated as Superintendent on April 27, 1987.

The Union contends that the four and one-half months the supervisor was in a Bargaining Unit position violated the seniority rights of the senior Highway Worker 3 who was eligible to bid into the vacancy. In the Union's view, the position was most certainly a vacancy -- it could not have been anything else. This argument is presented most concisely in the Union's opening statement:

"The crux of this case comes down to what is a vacancy. Section 17.02 defines a vacancy as "an opening in a permanent full-time or permanent part-time position within a specified bargaining unit covered by this agreement which the agency determines to fill." There is no dispute between the parties that the Highway Worker 4 position was a permanent full-time position at the time that this grievance was filed. There is no dispute that the position was a bargaining unit position. The sole question in dispute is whether there was an "opening" in the position.

The Union contends, obviously, that there was an opening. No Highway Worker 4 position existed prior to the demotion of the supervisory employee. It was created to make room for this demoted supervisory employee. One extra position was added to the bargaining unit."

The Union buttresses its position by referring to Ohio Civil Service Law -- specifically, Ohio Administrative Code §123:1-47-01(A). The provision defines some of the terms pertinent to this controversy. The word "position," according to Subsection (58), means "the group of job duties intended to be performed by an individual employee as assigned by the appointing authority." A "demotion," according to Subsection (28), is "the act of placing . . . an individual in a position, the classification for which carries a lower salary range than that previously held." Using these definitions, the Union points out that two distinct positions are at issue. Until December 8, 1986, the supervisor held a Superintendent position which existed and was defined by the duties it entailed. When demoted, he received a change in position. His duties as a Highway Worker 4 were entirely different from those he performed as a Superintendent 1. The Union regards the argument that the supervisor continued in a single position, only with different duties, as a deception which finds no support in logic or law. It concludes that the second position had to be created before it could be filled and, once created, it could not be filled by assignment. Since it was a Bargaining Unit position, it had to be filled in compliance with the contractual provisions specifying Bargaining Unit rights and entitlements.

A critical factor in this controversy is the supervisor's Position Control Number (PCN). Every State employee, classified or unclassified, carries a PCN. Even the Governor has one. Each is distinct and is used to define the individual "position" to which it applies. As stated previously, a position is a group of duties, and every position in State employment is designated by a PCN. Ohio Administrative Code §123:1-47-01(A)(60) and (61) provides some insight into what a PCN is and how it is used:

(60) "Position control number" - Means a unique number assigned to each employment position within an agency by the appointing authority used to identify each position.

(61) "Position control number change" - Means the movement of an employee from one specific employment position to another within the same agency. A position control number change may be accompanied by a promotion, demotion, lateral class change, or intra-transfer.

The Employer relies strongly on the fact that the supervisor's PCN did not change as a consequence of the demotion. It was 9602.0 when he was a Superintendent 1 and it was 9602.0 when he was a Highway Worker 4. The continuity of his PCN is, in the Employer's judgment, highly significant. For the number to remain the same, two branches of State government had to approve it -- this Agency, the Ohio Department of Transportation, and the overseeing Agency, the Ohio Department of Administrative Services. The movement of the number with the Employee was intentional and reflected the Employer's concept that no new position was created. As the Employer argues "the fact that the position control number did not change indicates that an opening did not exist. That is, the position which [the supervisor] held was reduced and reassigned to a Highway Worker 4."

The State contends that demoting and reassigning employees are aspects of Management Rights which have not been circumscribed by the Contract. Article 17 requires vacancies to be posted but carefully preserves the Employer's authority to determine whether or not vacancies exist. No vacancy was declared in this case, and none existed. In the past, the Union recognized the Agency's right to bump supervisors into the Bargaining Unit during realignments and reductions of forces. More recently, it acknowledged the Employer's authority to demote previously promoted individuals who, during their probationary trial periods, prove inadequate for the requirements of their new jobs. This right is affirmed in both the Ohio Administrative Code and the new Collective Bargaining Agreement (1989-1991). Administrative Code §123:1-23-12 states in part:

"All promotions shall be for a probationary period established in Chapter 123:1-19, and if in accordance with that rule, the promoted employee is found to be unsatisfactory in the advanced position, he shall, upon submission of a report to the Director of Administrative Services showing the reasons why the employee's service was found to be unsatisfactory, be demoted to the position from which he was promoted or to a similar position; upon such demotion, his salary shall be the same that he was receiving prior to promotion, except for changes in pay range that may have occurred or any step increase to which he would have been entitled in the lower classification."

The new Agreement echoes the Code provision. Article 17, §17.02 provides:

"During a promotional probationary period, the Employer maintains the right to place the employee back in the classification that the employee held previous to the promotion if the employee fails to perform the job requirements of the new position to the Employer's satisfaction."

The Agency argues that there is no substantive difference between the kinds of demotions authorized by the Union and what happened in this case. The results are exactly the same. Moreover, an award sustaining the grievance will improperly abridge Management's prerogatives to direct, control, and discipline its exempt employees. A crucial aspect of those prerogatives is and has been the right to impose demotion for disciplinary reasons. If the demotion at issue is held to have violated Bargaining Unit rights, even though no opening was declared and the affected employee's PCN remained unchanged, the Employer will be likely to lose its authority to demote in most exempt classifications. Imposing such limitation, according to the Employer, is not within the Arbitrator's jurisdiction.

In conclusion, the Employer contends that the Union has no real basis for its complaint. No jobs were lost; no one was laid off. In fact, the Bargaining Unit received a significant benefit. When the State Personnel Board of Review restored the supervisor to his former position, the Highway Worker 4 job was vacated but the PCN was moved to an entry-level position. As a result, a new, permanent Highway Worker 1 job was created. The Union collected dues or fair-share fees from both the supervisor's stint as Highway Worker 4 and the creation of the new Highway Worker 1 position.

OPINION

This dispute has nothing whatsoever to do with demotions from probation or bumping rights during layoffs. The only relevant fact placed in arbitration is that a supervisor was moved into the highest, most desirable promotional position that a member of the Highway Worker Classification can attain. By way of demotion, the Agency slotted him into a Bargaining Unit job. When reduced to its essence, the only rationale for the Employer's argument that a vacancy was not filled is that his PCN was not changed. Ironically, his PCN was changed when he returned to the supervisory position. He received a new number and his old one stayed in the Bargaining Unit as a Highway Worker 1 vacancy.

The Arbitrator is hesitant to admit it, but the logic of the State's case escapes him entirely. The Agency candidly admits that: the supervisor's classification changed; his job title changed; his duties changed from those of one classification to those of another; his work description changed. Yet it argues (as it must) that he did not occupy a new position. It seems clear to the Arbitrator that he did occupy a new position. Any other finding would be inconsistent with the definition of the word "position" in the Ohio Administrative Code. How then can the Agency reasonably argue that the demoted employee did not enter a new position? The answer given is that his PCN did not change.

A PCN is nothing more than a number assigned by the Employer. It may designate a position but it does not define one. A position is defined by the functions and duties which comprise it. The Employer's concentration on the argument that the position remained the same because the Agency decided to assign the same PCN is circular and flies in the face of reason. The demotion placed the supervisor factually into a new position no matter what PCN was assigned to him.

Perhaps the most curious aspect of this dispute is the Agency's decision not to change the supervisor's PCN when it demoted him. Ohio Administrative Code 123:1-47-01(A)(61) clearly indicates that a PCN is supposed to change upon "movement of an employee from one specific employment position to another." The provision further states that a PCN change may be accompanied by a demotion. Why then did the supervisor carry his PCN with his demotion?

The Union suggests that the Agency may have been attempting to use the identical PCN as a subterfuge to avoid the impact of a prior grievance settlement. The settlement was endorsed by Arbitrator Rhonda Rivera (Grievance No. G87-1239) in a dispute over the demotion of a Project Engineer 3 to a newly created position of Design Engineer 2. The demotion was accompanied by a PCN change. In her stipulated award, Arbitrator Rivera held that the movement was in violation of Article 17 of the Contract because it disregarded Bargaining Unit promotional rights. She ordered remedies and ended the award stating:

"This stipulated award shall be cited as precedent only in those cases where an employee is demoted from one position control number into a newly created position bearing a different position control number."

By not changing the position control number in this case, according to the Union, the Agency sought to escape the substance and meaning of the Rivera award.

The Union's "explanation" is interesting. But it is speculative and not the proper basis for an award. Actually, it is unnecessary to ascertain the Agency's reason for assigning the same PCN for two positions. Whatever the reason, it is obvious that a new position was created for the supervisor to fill. It was a Bargaining Unit vacancy and, filling it without following the contractual job-bidding regulations violated Article 17. The grievance will be sustained.

REMEDY

The Union requests that the Highway Worker 4 position be reinstated as a vacancy and posted for bid. It asks that the Arbitrator award back pay from December 8, 1986 to the successful applicant. It reasons that, on that date, the Employer exercised its authority to create a vacancy pursuant to Article 17, §17.02 of the Contract. Once the vacancy was created, only a senior, qualified member of the Unit legitimately could have

filled it. In the Union's judgment, the position still existed when the supervisor moved out of it, and the Employer further abused its authority by reducing the job to entry-level. The Union concludes, therefore, that the Arbitrator should correct the double violation by restoring the position.

The Union is entitled to relief. The relief requested, however, is more punitive than remedial and may constitute an unwarranted intrusion on Management's contractually acknowledged rights. The Highway Worker 4 vacancy proved to be a temporary one. The wrong person was placed in it but, once he vacated it, the Agency decided not to fill it. Among the rights of Management set forth in Article 5 of the Contract is the exclusive authority to determine the personnel by which governmental operations are to be conducted. This vested right, together with the authority to declare or not to declare job openings under §17.02, accorded the Agency discretion to vacate the position and not to fill it again.

It is conceivable that the scope of an arbitrator's authority to fashion an award includes the power to invade Management rights and force a remedy of the kind requested by the Union. In the Arbitrator's judgment, however, this case does not call for such decision making. Sufficient relief will be granted if the Agency is required to pay wages for the period that the Highway Worker 4 position was wrongfully occupied.

The Award will require the Employer, in consultation with the Union, to identify the most senior Highway Worker in category A of Article 17, §17.05 who would have been eligible for the promotional opportunity had it been posted and filled in accordance with Article 17. For the period of December 8, 1986 to April 28, 1987, the Employer shall pay that individual the difference between his/her earnings and what s/he would have earned if s/he had been a Highway Worker 4.

AWARD

The grievance is sustained.

The Employer, in consultation with the Union, is directed to identify the most senior Highway Worker in category A of Article 17, §17.05 who would have been eligible for the promotional opportunity had it been posted and filled in accordance with Article 17. For the period of December 8, 1986 to April 28, 1987, the Employer shall pay that individual the difference between his/her earnings and what s/he would have earned if s/he had been a Highway Worker 4.

Decision Issued:
March 13, 1990

Jonathan Dworkin, Arbitrator