ARBITRATION DECISION NO.:
297

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Bureau of Employment Services

DATE OF ARBITRATION:
June 5, 1990

DATE OF DECISION:
October 15, 1990

GRIEVANT:
Eugene Jablonowski

OCB GRIEVANCE NO.:
G87-1287

ARBITRATOR:
Patricia Thomas Bittel

FOR THE UNION:
Linda Fiely

FOR THE EMPLOYER:
Rachel Livengood, Advocate
Don Wilson, Second Chair

KEY WORDS:
Certified Against Supervisor
Vacancy
Bargaining Unit Integrity

ARTICLES:
Article 17 - Promotions and Transfers
- §17.02-Vacancy
- §17.03-Posting
- §17.04-Bidding
- §17.05-Selection
- §17.07-Transfers
- §17.08-Demotions

Article 25 - Grievance Procedure
- §25.01-Process

Article 43 - Duration
- §43.01-First Agreement

§43.02-Preservation
of Benefits

FACTS:

Ronald Moon, an OBES employee, was promoted from a bargaining unit position in the Cincinnati office to a supervisory position outside the bargaining unit in the Hamilton office. However, the promotion required Moon to pass a civil service exam which he failed to do and consequently he was certified against. Thereafter, management returned Moon to his former bargaining unit position in the Cincinnati office without posting the position.

UNION'S POSITION:

The Union argued that the position filled by Moon constituted a vacancy and should have been posted by Management. Further, the Union argued that there was no statutory requirement for the employer to place Moon in his prior position. The Union argued that the Ohio Revised Code and Ohio Administrative Code do not permit the employer to avoid the obligations of Article 17 when filling a position. Also, the Union argued that the Arbitrator lacked authority to interpret extraneous statutory law to determine the contractual rights of employees. Finally, the Union argued that a side agreement with the Agency precluded movement of employees outside their geographic jurisdiction when an office was closed. Therefore, Moon's relocation was in violation of this agreement.

EMPLOYER'S POSITION:

The Employer argued there was no vacancy within the meaning of the contract because it was forced to place Moon into his relocated position by virtue of a statutory requirement. The Employer argued that it was statutorily required from the language in the Ohio Administrative Code to place employees who have been certified against into their prior positions. The Employer further argued that the adoption of the Union's position could have a negative impact on the State's hiring of exempt personnel and would hamper its ability to attract experienced employees for managerial positions. The Employer contends that since no office was being closed in this case the Office Closing Agreement does not apply. Finally, the Employer contended that the Union's remedy would only be appropriate in a class action grievance.

ARBITRATOR'S OPINION:

The arbitrator states that although the employee may not have a right to the remedy sought, be can and did grieve on behalf of other affected employees. Next, the Arbitrator indicated that the Office Closing Agreement was intended to cover only office closing situations and therefore it had no bearing on this case. The Arbitrator determined the bargaining unit position into which Moon was demoted was a vacancy within the meaning of Article 17. Finally, the Arbitrator concluded the Ohio Administrative Code does not require the Employer to return certified against employees to their previously held bargaining unit positions without regard to applicable provisions of the collective bargaining agreement. Further, the Ohio Revised Code Section 4117.10 gives Article 17 precedence over Ohio Administrative Code Rule 123:1-24-03.

AWARD:

The grievance was granted. The Employer was instructed to remove Moon from his position and allow the most senior employee eligible to bid on the position had it been posted. The selected employee was then to be given pay in accordance with that position, retroactive to the time the position should have been posted.

TEXT OF THE OPINION:

October 15, 1990

In the Matter of Arbitration
between

The Ohio Bureau of Employment Services

and

OCSEA, Local 11, AFSCME, AFL-CIO

Case No.:
G87-1287

APPEARANCES

For the Union:
Linda Fiely, Acting General Counsel
Melissa Koon, Arbitration Clerk
Michael Temple, Staff Representative
Gretchen Genung, Lead Steward
Eugene Jablonowski, Grievant

For the Agency:
Rachel Livengood, Advocate
Don Wilson, Second Chair
Janice Viau, Management
Keith Nichols, Director of Human Resources
R. P. Duco, Assistant Advocate
Robert D. Merkel, Personnel Director

Arbitrator:
Patricia Thomas Bittel

BACKGROUND

This matter was heard on June 5, 1990 in the offices of the Ohio Civil Service Employees Association (OCSEA) before Patricia Thomas Bittel, the permanent umpire mutually selected by the parties in accordance with Article 25, Section 25.04 of the collective bargaining Agreement.

On March 30, 1986 employee Ronald Moon was promoted from the bargaining unit position of Employment Service Representative in the Cincinnati office of the Ohio Bureau of Employment Services to the position of Compensation Manager I in the Hamilton office, a supervisory position outside the bargaining unit. His appointment was provisional, and he was required to take a civil service examination for the Compensation Manager I position. Had he passed this examination, he would have left provisional status and gained certification. However, he did not receive the necessary score and was certified against.

Management returned Moon to the position of Employment Service Representative at the Cincinnati office effective March 15, 1987 without posting the position.

On March 17, 1987 another employee in the Cincinnati office filed a grievance alleging Article 17 had been violated and stating as follows:

"On 3/16/87, Ron Moon, Manager of the Hamilton Unemployment Section came into the office at 1916 Central Parkway, in the Employment Service Section and Management told us he would be working as an E.S.R. in our district. Since Mr. Moon is part of management and is not in the collective bargaining unit, it is contended that he may not be put back into the collective bargaining unit and be moved accross [sic] district lines to do so. It is felt by members of the collective bargining [sic] unit in the Cincinnati ES Section, that this was done in direct violation to the union contract and the pertinent articles listed above."

The remedy sought was Moon's return to the District from which he came and complete restitution. The sections of Article 17 specifically alleged to have been violated are reproduced below in pertinent part:

"17.02--Vacancy

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.

17.03--Posting

All vacancies within the bargaining units that the Agency intends to fill shall be posted in a conspicuous manner throughout the region, district or state ....

17.04--Bidding

Employees mail file timely applications for promotions.

Upon receipt of all bids the Agency shall divide them as follows:

A. All employees within the office, 'institution' or county where the vacancy is located, who presently hold the position in the same, similar or related class series ....
B. All employees within the geographic district of the agency ... where the vacancy is located, who presently hold a position in the same, similar or related class series ....
C. All other employees of the agency in the same, similar or related class series.
D. All other employees of the Agency.
E. All other employees of the State.

Section 17.05--Selection

A. The State shall first review the bids of the applicants from within the office, county or 'institution.' * * * 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.
B. If no selection is made in accordance with the above, then the same process shall be followed for those employees identified under 17.04 (B).
C. If no selection is made in accordance with the above, then the agency will first consider those employees filing bids under 17.04 (C) and then 17.04 (D), and then 17.04 (E). Employees bidding under 17.04 (C), (D) or (E) shall have no right to grieve non-selection.

17.07--Transfers

If a vacancy is not filled as a promotion pursuant to 17.04 and 17.05, then submitted bids for a lateral transfer may be considered. A lateral transfer is defined as a movement to a position in the same pay ranges as the posted vacancy. Consideration of lateral transfers shall be pursuant to the criteria set forth above."

ARGUMENTS ADVANCED

By the Union

The Union contends the Agency violated Article 17 when it filled the employment services representative position without posting. The position filled by Moon should have been posted, maintains the Union, as it falls within the contract definition of “vacancy”. It claims the seniority rights of all employees in the Cincinnati office were violated, and in the event of lay-offs those employees would be disadvantaged by having their relative seniority reduced.

The position was actually filled by the Agency, points out the Union, arguing an employee was added to the bargaining unit. It refers to the Schwab stipulated award deeming movement of a project engineer from a supervisory position to a bargaining position was in violation of Article 17. It also refers to the Mayer decision where Arbitrator Dworkin held Article 17 was violated by demotion of a supervisory employee into a bargaining unit position without posting.

The Union additionally refers to the decision of Arbitrator Bradley in Lear-Sigler, Inc., 52 LA 383 (1969) holding the Arbitrator does not have the right unilaterally to return to the bargaining unit promoted employees laid off from their salaried positions without giving members an opportunity to claim the classifications in accordance with bidding procedure. The Arbitrator reasoned that returning the salaried employee to a bargaining unit position presupposes a vacancy in the work force, and if there is a vacancy in the work force the contract language requires posting.

In the Union's view there is no statutory requirement for the employer to place Moon in his prior position. It maintains the employer has latitude in choosing the appropriate placement for an employee in Moon's situation. It strongly argues the Ohio Revised Code and Ohio Administrative Code do not permit the employer to avoid the obligations of Article 17 when filling a position. “The Code and Administrative Rules cannot operate to release the Employer from the obligations to the bargaining unit which it had agreed to in the collective bargaining agreement,” argues the Union in its brief. It points to Section 43.01 of the Agreement which provides as follows:

“To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.”

It also argues the Arbitrator lacks authority to interpret extraneous statutory law to determine the contractual rights of employees. "The Arbitrator should avoid examining the statutory rights of an exempt employee if it interferes with the contractual rights of the employees." The Union attached several awards at arbitration and a judicial decision regarding the precedence of a collective bargaining agreement over statutory law in the situation of employees who have been certified against.

Ohio Revised Code Section 4117.10 establishes those subjects of bargaining which are prohibited: “The conduct and grading of civil service examinations, the rating of candidates, the establishment of eligible lists from the examinations, and the original appointments from the eligible lists are not appropriate subjects for collective bargaining.”

Since the placement of an employee who has been certified against does not fall into any of these categories, it is an appropriate subject of bargaining in the Union's view. It distinguished an original appointment from a promotion, claiming “original appointments” refer to initial hires into the work force of the employer.

The Union argues a side agreement with the Agency regarding office closings precludes movement of employees outside their geographic jurisdiction and claims Moon's relocation was in violation. This agreement, entitled “Office Closing Agreement", states its purpose is to "address certain OBES staff relocations made necessary by the closing of local offices due to the 1987 budget deficit faced by OBES." It then goes on to preclude movement outside geographic jurisdictions: “Employees in the offices about to be closed will be surveyed with a mutually agreed upon survey form ... to find out what office they would like to

move to within their district. Employees shall not move to an office outside their geographic jurisdiction ….”

The Union argues the appropriate remedy would include Moon's removal from his position and placement of the most senior employee who would have acquired the position through the bidding process into the position with back pay. It further requests a cease and desist order against the employer's placing other non-bargaining unit employees into the unit without posting.

By the Agency

The Agency argues there was no vacancy within the meaning of the contract. The language of Section 17.02 defines vacancy as “an opening in a permanent full-time or permanent part-time position ... which the Agency determines to fill." The Agency had already determined not to add an Employment Services Representative in the Cincinnati office, it insists. It was forced to place Moon into that position by virtue of statutory requirement, argues the Agency, distinguishing a voluntary decision to fill a job from a statutory requirement to do so. In the Agency's analysis, it had not determined to fill the position so it was not a vacancy within the meaning of the Section 17.02.

It refers to the maxim of contractual interpretation that a provision should be construed so as to give effect to all the words used. The Union's position would effectively wipe out of the Agreement the chosen language “which the Agency determines to fill”, contends the Agency.

The Agency argues it is statutorily required to place employees who have been certified against into their prior positions. It cites Ohio Administrative Code Section 123:1-24-03 which states as follows in pertinent part:

"B. No right to return to previous classification as certified, exception. An employee who is in a provisional status due to the operation of this rule and Section 124.311 of the Revised Code and is displaced ... shall not have the right to return to the classification held prior to the classification change except as provided in this rule.
C. Return to previous classification following being certified against by certification eligible list. Whenever an employee is in a provisional status following a classification change from a classification in which he was certified, and is certified against by a certification eligible list, the employee shall be returned to the classification he formerly held subject to the provisions of this rule. * * *
D. Return to a classification with comparable duties and same pay range. If an employee is certified against by a certification eligible list and the former classification to which he has rights to return under paragraph (C) of this rule is not used, or cannot be used by the appointing authority, the director shall designate a classification with comparable duties and the same pay range as that classification formerly held by the employee. * * *

If a similar classification in the same pay range cannot be designated, the employee will be treated as laid off ... and shall be placed on a layoff list in the former classification as a certified employee.”

The Agency concludes there is an apparent conflict between the parties' Agreement and the Civil Service Law. It argues the Union is seeking to strip away an important form of protection for exempt State employees who previously worked in the bargaining unit. “The only position which resolves this apparent conflict is a careful reading of Section 17.02 and the recognition that the Agency had not 'determined' to fill the position in question,” argued the Agency in its brief.

It maintains the Mayer case is distinguishable for three reasons: the demotion of the supervisor into the bargaining unit in that case was disciplinary in nature; there was evidence the employer sought to avoid the contract by retaining the supervisor's position control number after the demotion; and there was no statutory obligation to place Mayer into the bargaining unit, making the decision voluntary on the part of management. It notes Moon's position control number changed upon demotion and argues Moon's placement was not discretionary, being required by law.

“The Union's position would never leave the employer with a place to put the employee,” argues the Agency in its brief. It contends the approach taken by the Agency in this case is superior to that advocated

by the Union because it protects employees seeking advancement from risking their jobs when taking a new position and because it prevents promotions which are in effect sham transactions designed to get rid of certified employees not favored by management. The adoption of the Union's position could have a substantial negative impact on the State's hiring of exempt personnel and hamper its ability to attract experienced employees for managerial positions, asserts the Agency.

The Agency contends the Office Closing Agreement does not apply to the case in point because it was concerned only staff relocations necessitated by office closings. Since no office was being closed in this case, the Agreement does not apply, it argues.

The Agency also takes issue with the Union's remedy demand, arguing it would only be appropriate in a class action grievance. The Grievant in this case was an Employment Services Representative at the time of Moon's demotion, it notes, arguing that even if he had received the position, it would have been a lateral transfer. The Agency claims in its brief “The instant grievant, under section 17.08, would have been a lateral transfer who would be without the right to grieve non-selection,” it points out. Granting this grievance would expand the matter to a group grievance which is precluded by Article 25.03, prohibiting the Arbitrator from adding to, subtracting from or modifying contract terms, it argues.

Section 17.08 states "Job movements to a lower pay range are demotions. Employee requested demotions shall only be done with the approval of the Employer."

Since the Agreement is silent on the issue of promotions outside the bargaining unit, Civil Service Law is controlling because the right to reinstatement is a benefit under Section 43.02 of the Contract. This Section reads as follows:

“43.02--Preservation of Benefits

To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to State employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives."

DISCUSSION

A. Is Consideration of This Grievance Barred By the Status of the Signatory Grievant?

The Agency has asserted that because Grievant was already an Employment Services Representative, his remedy would be a lateral transfer, a matter he is precluded from grieving. It has also argued the Union failed to properly present the grievance as a class grievance.

The Section 17.05(C) prohibition against grieving goes to those bidding from outside the geographic district. According to Section 17.07, lateral transfers are to be made pursuant to the same criteria. It follows that only lateral transfers from outside the geographic district are barred from the grievance procedure. As Grievant was in the Cincinnati district, he is not precluded from filing a grievance regarding failure to post an E.S.R. position there.

Article 25, Section 25.01 (B) specifically contemplates the possibility of a class action grievance and of one grievant representing a group. The language of the grievance itself clearly indicates an intent for it to be handled as a group grievance. "It is felt by members of the collective bargaining unit in the Cincinnati ES Section, that this was done in direct violation to the union contract and the pertinent articles listed above.”

While the grievance is signed by one grievant in this case, by its specific terms it is filed on behalf of all members of the collective bargaining unit in the Cincinnati ES Section. On its face, it is clearly brought on behalf of the group and cannot be seen as an individual grievance. Given these facts, it does not need further designation as a class grievance to be understood and handled as one.

B. Did the Office Closing Agreement Preclude Moving Grievant from Hamilton to Cincinnati?

The parties' Office Closing Agreement specifically stated its purpose was to address staff relocations caused by office closings. There was no office closing involved in the relocation of Grievant in this case.

The critical provision refers to employees in the offices about to be closed, then states “employees shall

not move to an office outside their geographic jurisdiction …." Logically, the term "employees" as used in this sentence was intended by the parties to be consistent with "employees in the offices about to be closed" as used in the preceding sentence.

There is no indication from the Agreement itself or from the context in which it was written that the parties intended to extend the meaning of their Agreement beyond the office closing situation. Their Agreement, therefore, has bearing on the grievance in this case.

C. Was the Bargaining Unit Position Into Which Moon Was Demoted a "Vacancy" Within the Meaning of Article 17?

Section 17.03 requires all vacancies "that the Agency intends to fill" to be posted. Vacancy is defined as an opening "which the Agency determines to fill".

It was the Agency's determination to use the Employment Services Representative position in Cincinnati for Moon's placement. It was their prerogative to determine otherwise and they chose not to do so.

The State argues the Union's position would make the term "opening" synonymous with "opening which the Agency determines to fill" thereby writing language completely out of the Contract. An opening, however, may be deemed to exist in the context of an Agency decision not to fill it. Management has the right to operate understaffed and to leave jobs unfilled for budgetary or other reasons. When Moon moved from the bargaining unit into the Hamilton supervisory position, the Agency determined not to fill his position. For a number of months it remained unfilled, falling outside the definition of "vacancy" because the Agency had no intention of filling it. This changed, however, when the Agency decided to place an employee into that position. At that point, the position became a "vacancy."

The rationale that the Agency made no "determination" because it was following legal requirements is faulty for several reasons. The Agency actually made several determinations in this case. It decided there was a conflict between the collective bargaining Agreement and statutory law. It then decided to give its interpretation of statutory law precedence over the collective bargaining Agreement. These decisions resulted in a determination to place Moon in his previously held position. The placement was not court ordered or mandated by any other legal authority. It was voluntarily done by the Agency for reasons it deemed sufficient. To hold the Agency did not "determine" to fill the position would begrudge the parties the plain meaning of their chosen language.

The Schwab stipulated award is not on point in making this analysis. It states it can 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." The facts in this case do not support a finding that Moon was moved into a newly created position; rather, his prior position was reopened for his placement. The Schwab award is, by its terms, not intended to be used under different facts and must therefore be discounted.

The Mayer decision, however, is not so distinguishable as the Agency has argued. The fact that grievant's demotion in that case resulted from disciple as opposed to certification against has no bearing on whether placement of a non-bargaining unit employee into the bargaining unit must comply with Article 17. The reason for the demotion does not help answer the question of whether a "vacancy" existed.

The Agency next distinguished Mayer on the grounds that the Agency in that case attempted to avoid the contract by retaining the supervisor's position control number after the demotion. By contrast, Moon received a changed number after his demotion, it asserts. The retention of the same position control number was unsuccessful in defending against the existence of a "vacancy" in Mayer. The distinction is therefore inconsequential.

The Agency's final point of distinction with Mayer was that the employer voluntarily created an entirely new position to accommodate the demoted employee. However, the Agency had determined not to fill the Employment Services Representative position left by Moon. This makes the situation at the time of demotion quite analogous to the one in Mayer.

In both cases, a job in the bargaining unit was opened to accommodate a demoted non-bargaining unit employee without compliance with Article 17. The fact that one position had previously existed and the other

had not is inconsequential in view of the Agency's insistence that it had no intention of reopening the E.S.R. position. The Employment Services Representative position given to Moon was a vacancy within the meaning of Article 17.

The employer's arguments about the negative impact of this result are well taken. Indeed the employee who does promote out of the bargaining unit into a provisional appointment is at risk. However, this was bargained for by the par-ties in drafting Article 17.

C. Should the Arbitrator Examine the Agency's Statutory Obligations?

Arbitrators differ as to their role in assuring an interpretation is consistent with external law. The spectrum ranges from those who believe the arbitrator should respect the agreement and ignore the law to those who believe all contracts are subject to statutory and common law and each contract incorporates applicable law.

At a meeting of the National Academy of Arbitrators, Arbitrator Bernard D. Meltzer suggested three points in analyzing such a situation: (1) where the provision being interpreted or applied has been loosely contrived, the arbitrator may consider all relevant factors, including relevant law; (2) where a provision suggests two interpretations, one compatible with applicable law and the other not, the statute is a relevant factor and the construction compatible with the law should be favored; and (3) where it is clear the parties anticipate the arbitrator will render an advisory opinion as to the law, such opinion is within the arbitrator's role.[1]

The parties have each argued about the compatibility of Article 17 with the Administrative Code and briefed the issue. Neither has posed any objection to consideration of Ohio Administrative Code (OAC) Rule 123:1-24-03. This indicates a mutual desire of the parties that the Arbitrator address the Agency's expressed dilemma in complying with the Administrative Code. The Arbitrator's opinion in this regard is advisory in nature.

In my view, OAC 123:1-24-03 does not require the Agency to return employees who have been certified against to their previously held bargaining unit positions without regard to applicable provisions of the collective bargaining Agreement. The statute clearly contemplates the situation where the former classification is “not used” or “cannot be used” by the appointing authority. It specifically provides for alternatives in this event. Indeed, such is the case here; the appointing authority cannot use an unposted position for placement of a non-bargaining unit employee who has been certified against because this would breach its collective bargaining Agreement. The statute's indicated alternatives therefore come to play.

Even if OAC Rule 123:1-24-03 required Moon to be placed into his previously held position, such a requirement would not be enforceable over Article 17. ORC 4117.10 specifically provides that ORC 4117 takes precedence over conflicting laws.

ORC 4117.10 states the public employer and its employees are subject to applicable employment laws “where no agreement exists or where an agreement makes no specification about a matter." As already pointed out, the parties' Agreement does make a specification about the obligations of the Agency in filling bargaining unit jobs; it is not silent. ORC 4117.10 therefore gives Article 17 precedence over OAC Rule 123:1-24-03.

Similar to ORC 4117.10, Section 43.02 of the Agreement provides for preservation of statutory benefits “in areas where this Agreement is silent". Section 43.01 specifically gives the Agreement precedence over conflicting laws. Hence, the language of the Administrative Code, ORC 4117.10 and Article 43 synchronously recognize the preeminence of Article 17 over any rights to demotion into the bargaining unit designated in the Administrative Code. There is no basis for concluding that the Agency's hands were tied in applying Article 17.

AWARD

The grievance is granted. The parties shall meet and negotiate regarding the appropriate remedy in this case. If they are unable to reach agreement the within 60 calendar days of receipt of this award, the following award shall be implemented at the end of said 60 day period:

1. Mr. Moon shall be removed from his position as Employment Services Representative.
2. In compliance with Article 17, the Agency shall identify the most senior employee eligible to bid on the Employment Services Representative position had it been posted.
3. The Agency will place the identified individual into the Employment Services Representative position vacated by Moon.
4. The Agency will compensate the identified individual for the difference between his/her pay since 3/15/87 and what his/her pay would have been as an Employment Services Representative.
5. In the event the employee was not actively employed during a portion of that period (e.g. leave of absence, termination, retirement), backpay shall accrue only for the time of active employment. Absenteeism shall not be counted as a cessation of active employment.
6. Any promotion of the identified employee to a position of equal or higher pay will cut off back pay liability.

Respectfully Submitted,

Patricia Thomas Bittel
Dated: October 15, 1990

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[1] Meltzer, “Ruminations About Ideology, Law, and Labor Arbitration," Proceedings of the 20th Annual Meeting of NAA, 1, 15, 31 (BNA Books, 1967).