ARBITRATION DECISION NO.:
541

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

EMPLOYER:
Department of Transportation
Wood County Garage

DATE OF ARBITRATION:
January 14, 1994

DATE OF DECISION:
April 26, 1994

GRIEVANT:
Chris Hade

OCB GRIEVANCE NO.:
31-02-(92-10-27)-0022-01-06

ARBITRATOR:
Rhonda Rivera

FOR THE UNION:
John Porter

FOR THE EMPLOYER:
Ted Durkee
Michael Duco

KEY WORDS:
Promotion
Minimum Qualifications
Affirmative Action
Demonstrably Superior
Seniority

ARTICLES:
1992-1994 Contract
Article 2 - Non-Discrimination
    § 2.03 - Affirmative Action
1989-1991 Contract
Article 17 - Promotions and Transfers
    § 17.05 - Applications
    § 17.06 - Selection
1992-1994 Contract
Article 17 - Promotions, Transfers and Relocations
    § 17.05 - Applications

§ 17.06 - Selection

FACTS:

The grievant was a male Bridge Worker 1 competing with a female Highway Maintenance Worker 2 (HMW2) for a position as a Highway Maintenance Worker 3 (HMW3). The grievant had approximately 1 and 1/2 years more seniority than the HMW2, but the HMW3 position was awarded to the female HMW2 based on the employer's determination that she was demonstrably superior. The determination of demonstrably superior was based on Article 17.06, which explicitly states that Affirmative Action can be a valid criterion for determining demonstrably superior. No one disputed that both applicants possessed the minimum qualifications for the HMW3 position and no basis other than affirmative action was alleged by management to support the decision that the less senior employee was demonstrably superior.

UNION'S POSITION:

The union argued that the female HMW2 would not have been demonstrably superior without the use of Affirmative Action. Relying on the principle of seniority as being the most significant factor in promotions, the union asserted that affirmative action could not overrule seniority in and of itself, but needed to accompany additional qualifications to actually satisfy the Employer's burden of proof. Since the employer did not meet the burden by proving that the less senior employee had better qualifications than the more senior employee, the promotion was in violation of the contract.

EMPLOYER'S POSITION:

The state argued that it did not have a burden to prove additional qualifications other than affirmative action in order to prove demonstrably superior, once it had shown that the promoted employee met the minimum qualifications of the position and belonged to a member of a group which affirmative action policies were intended to assist. The state contended that women were under-utilized in HMW3 positions at ODOT, that affirmative action was thus properly applied, and that nothing further needs to be proven.

ARBITRATOR'S OPINION:

Article 17.06 provides that the job at issue will be awarded to the qualified employee with the most state seniority unless the state can show that a junior employee is demonstrably superior to the senior employee. Since it was stipulated that both the grievant and the chosen employee were minimally proficient, the question is whether or not the chosen employee was demonstrably superior.

The language in the contract is clear. The contract specifically provides that "affirmative action shall be a valid criteria for determining demonstrably superior." The burden is on the state to prove demonstrably superior but the burden is on the union to prove that the interpretation of the state violates the contract. Although the term "affirmative action" is not defined within the contract, it has a specific meaning. Here, its meaning has been properly applied to correct past discrimination against women in this particular position and this particular area.

Finally, one factor in and of itself can create a demonstrably superior candidate. Just as an educational degree or particular experiences, by themselves, can make one candidate demonstrably superior to another, so too can affirmative action. Therefore, the grievant's sex makes her demonstrably superior and she should be awarded the position.

AWARD:

The grievance is denied.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

OCSEA, Local 11

AFSCME, AFL-CIO
Union

and

State of Ohio
Ohio Department of Transportation
Employer.

Grievance No.:
31-02-(10-27-92)-0022-01-06
Grievant:
Hade, C.
Hearing Date:
January 14, 1994
Briefs Date:
February 23, 1994
Rebuttal Date:
March 15, 1994
Award Date:
April 26, 1994

Arbitrator:
R. Rivera

For the Union:
John Porter, Esq.

For the Employer:
Ted Durkee, LRO
Michael Duco, Esq.

Present at the Hearing in addition to the Grievant and Advocates were Albert Rakas, OCSEA/Steward, Donald Conley, OCSEA/Field Services Director (witness), Bruce Wynngaard, OCSEA/Director Arbitration (witness), John Tansey, Highway Maintenance Superintendent 2 (ODOT) (witness), Pamela Shanks, Personnel Officer 3 (ODOT) (witness), Scott Stillion, Programmer Analyst 2 (witness), Gene Brundige, Labor Relations Officer 3 (BWC) (witness), Frank Kubovich, Labor Relations Officer 3, and Sil Corbin, EEO Officer Supervisor.

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered. Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Joint Exhibits

1. 1986-1989 Contract

2. 1989-1991 Contract

3. 1992-1994 Contract

4. Management bargaining notes 1986

5. Management proposals for 1986

6. Management bargaining notes 1989

7. Management proposals for 1989

8. Union bargaining notes 1986

9. Union proposals for 1986

10. Union bargaining notes 1989

11. Union proposals for 1989

12. Grievance Trail

13. EHOC files on Grievant and Violet R. Courtney

14. Applicant file for the position of Highway Maintenance Worker 3
15. Performance Evaluations on Grievant and Violet R. Courtney

16. Training records on Grievant and Violet R. Courtney

17. Affirmative Action Plan for the Ohio Department of Transportation

18. Conciliation Agreement and Consent Order between the Ohio Civil Rights Commission and the Ohio Department of Transportation, and ratifying minutes of August 27, 1992

19. Classification Specifications for Highway Maintenance Worker 2 & 3 and Bridge Worker 1

20. Inter-office Communication from Jack R. Marchbanks, Deputy Director, Office of Equal Opportunity, regarding the Recruitment, Retention and Promotion Initiative Implementation Plan

21. Letter from Jack Marchbanks, Deputy Director, Office of Equal Opportunity, to James L. McCarty, District Two Deputy Director, dated September 9, 1992

22. Bridge Worker 1 position descriptions for Grievant and Highway Maintenance Worker 2 position description for Violet R. Courtney

Union Exhibit

0. Opening Statement

Employer Exhibits

0. Opening Statement

1. ODOT DAS-EEO Workforce Composition Report for HMW 3

Stipulated Facts

1. The parties stipulate that the determination of this case rests solely on the issue of demonstrably superior and the minimum qualifications are not at issue.
2. Grievant's appointment date with ODOT is June 1, 1982 as an Equipment Operator 1; he was promoted to a Bridge Worker 1 on March 30, 1986 working in the District 2 Headquarters under the current supervision of Eugene Esterline, Bridge Superintendent.

3. Violet Courtney's appointment date with ODOT is January 17, 1984 as a Clerical Specialist (Time Keeper) in the Wood County Garage. Her work history while in the Wood County Garage includes a promotion on September 1, 1985 to Highway Maintenance Worker 2, a lateral class change to Equipment Operator 1 on May 8, 1988, a change in classification to Highway Maintenance Worker 2 on June 17, 1990 as a result of class modernization and a temporary working level supplement as a Highway Maintenance Worker 3 from August 9, 1992 to October 16, 1992.

4. The Superintendent of the Wood County Garage and a supervisor of Violet Courtney is John Tansey.

5. Grievant's application and Violet R. Courtney's application are both in bid categories 17.05(A)(1) and 17.06(A)(1).

6. The effective date of the promotion to Highway Maintenance Worker 3 was October 18, 1992.

7. Neither Grievant nor Violet R. Courtney have any discipline of record.

8. The Ohio Department of Transportation filed an approved Affirmative Action Plan with the Ohio Civil Rights Commission on July 15, 1992.

9. The Ohio Department of Transportation was under a Conciliation Agreement and Consent Order ratified in the minutes of August 27, 1992 by the Ohio Civil Rights Commission.

10. The classification of Highway Maintenance Worker 3 is in EEO category 8 - Service Maintenance.

11. There are no problems with the procedure in processing the Grievance.

12. The leave balances for the Grievant and Violet R. Courtney as of December 24, 1993 are as follows: A. Grievant - Vacation - 244.9 hrs., Personal - 40 hrs. and Sick - 187.3 hrs. B. Violet R. Courtney - Vacation - 151 hrs., Personal - 9.8 hrs. and Sick - 490.5 hrs.

Issue

Did the Employer violate the Agreement between the parties, specifically Article 17, when it promoted a junior applicant to the position of Highway Maintenance Worker 3, and, if so, to what remedy is the Grievant entitled?

Relevant Contract Provisions

1992-1994 COLLECTIVE BARGAINING AGREEMENT
ARTICLE 2 - NON-DISCRIMINATION

Section 2.03 - Affirmative Action

The Employer and the Union agree to work jointly to implement positive and aggressive affirmative action programs in order to redress the effects of past discrimination, whether intentional or not, to eliminate current discrimination, if any, to prevent further discrimination, and to ensure equal opportunity in the application of this Agreement.

The Agencies covered by this Agreement will provide the Union with copies of their affirmative action plans and programs upon request. Progress toward affirmative action goals shall also be an appropriate subject for Labor-Management Committees.

1989-1991 COLLECTIVE BARGAINING AGREEMENT
ARTICLE 17 - PROMOTIONS AND TRANSFERS

Section 17.05 - Applications

Employees may file timely applications for promotions. Upon receipt of all bids the Agency shall divide them as follows:

A. All employees within the office (or offices if there is more than one office in the county), "institution" or county where the vacancy is located, who presently hold a position in the same, similar or related class series (see Appendix 1), and who possess and are proficient in the minimum qualifications contained in the class specification and the position description.

B. All employees in the office (or offices if there is more than one office in the county), "institution" or county where the vacancy is located, who possess and are proficient in the minimum qualifications contained in the class specification and the position description.

C. All employees within the geographic district of the Agency (see Appendix J) where the vacancy is located, who presently hold a position in the same, similar or related class series (see Appendix I), and who possess and are proficient in the minimum qualifications contained in the class specification and the position description.

D. All other employees within the geographic district of the Agency (see Appendix J) where the vacancy is located, who possess and are proficient in the minimum qualifications contained in the class specification and the position description.

E. All other employees of the Agency.

F. All other employees of the State.

ODOT positions designated as district-wide shall be reviewed pursuant to (C) and (D) above.

Employees serving either in an initial probationary period or promotional probationary period shall not be permitted to bid on job vacancies.

Section 17.06 - Selection

A. The Agency shall first review the bids of the applicants from within the office (or offices if there is more than one office in the county), 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. Affirmative Action shall be a valid criteria for determining demonstrably superior.

Interviews may be scheduled at the discretion of the Agency. Such interviews may cease when an applicant is selected for the position.
B. If no selection is made in accordance with the above, then the same process shall be followed for those employees identified under 17.05(B).

C. If no selection is made in accordance with the above, then the Agency will first consider those employees filing bids under 17.05(C) and 17.05(D). Employees bidding under 17.05(D) shall have grievance rights through Step 4 to grieve non-selection. Employees bidding under 17.05(E) or (F) shall have no grievance rights to grieve non-selection.

1992-1994 COLLECTIVE BARGAINING AGREEMENT
ARTICLE 17 - PROMOTIONS, TRANSFERS AND RELOCATIONS

Section 17.05 - Applications

Employees may file timely applications for permanent transfers, promotions or lateral transfers. Upon receipt of all bids the Agency shall divide them as follows:

1. All employees within the office (or offices if there is more than one office in the county), "institution" or county where the vacancy is located, who presently hold a position in the same similar or related classification series (see Appendix I), and who possess and are proficient in the minimum qualifications contained in the classification specification and the position description.

2. All employees in the office (or offices if there is more than one office in the county), "institution" or county where the vacancy is located, who possess and are proficient in the minimum qualifications contained in the classification specification and the position description.

3. All employees within the geographic district of the Agency (see Appendix J) where the vacancy is located, who presently hold a position in a same, similar or related class series (see Appendix I), and who possess and are proficient in the minimum qualifications contained in the classification specification and position description.

4. All other employees within the geographic district of the Agency (see Appendix J) where the vacancy is located, who possess and are proficient in the minimum qualifications contained in the classification specification and the position description.

5. All other employees of the Agency.

6. All other employees of the State.

ODOT positions designated as district-wide positions shall be reviewed pursuant to (3) and (4) above.

Employees serving either in an initial probationary period or promotional probationary period shall not be permitted to bid on job vacancies.

B. For vacancies that the Employer intends to fill by permanent transfer, the applications shall be listed according to those in the same classification who possess and are proficient in the minimum qualifications of the classification specification and position description of the posted position in descending order of the most senior to the least senior.

Section 17.06 - Selection

A. In cases of promotion:

1. The Agency shall first review the bids of the applications from within the office (or offices if there is more than one office in the county), county or "institution." The job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that the junior employee is demonstrably superior to the senior employee. Affirmative Action shall be a valid criterion for determining demonstrably superior. Interviews may be scheduled at the discretion of the Agency. Such interviews may cease when an applicant is selected for the position.

2. If no selection is made in accordance with the above, then the same process shall be followed for those employees identified under Section 17.05(A)(2).

3. If no selection is made in accordance with the above, then the Agency will consider those employees filing bids under Sections 17. 05 (A)(3) and 17.05(A)(4). Employees bidding under Sections 17.04 (A)(4) shall have grievance rights through Step 4 to grieve non-selection. Employees bidding under Sections 17.05 (A) (5) or (A) (6) shall have no rights to grieve non-selection.

4. If a vacancy is not filled as a promotion pursuant to Sections 17.05 and 17.06, bids for lateral transfer shall be considered. Consideration of lateral transfers shall be pursuant to the criteria set forth herein. The Agency shall consider requests for lateral transfers before considering external applicants. Denial of such lateral transfer request(s) are grievable. The successful applicant shall possess and be proficient in the minimum qualifications of the position description and the classification specification. If there are multiple applicants, the selection will be made from the senior applicant that meets the minimum qualifications as stated above. In places where there are work area agreements no more than 10% of the employees may make lateral transfers either to or from one institution to another in a calendar year. However, in Rehabilitation and Corrections each institution may fill up to 25% of their posted positions under this section through lateral transfers from other institutions in a calendar year.

B. In cases of permanent transfer the applicant who possesses and is proficient in the minimum qualifications of the classification specification and the position description and has the most state seniority shall be selected.

Facts

This Grievance arises in ODOT (Ohio Department of Transportation). On October 29, 1992, the Grievant filed a grievance that alleged that he was improperly denied a position under Contract Sections 17.05 and 17.06. In particular, he claimed that since he was senior to the person selected for the position of Highway Maintenance Worker 3, a female, ("V.C.") that he was entitled to the position over her. At Step 2, the Employer denied that the Contract had been violated and asserted that "V.C." was "demonstrably superior" because the applicants (Grievant and "V.C.") were "similarly situated" and that "V.C." was demonstrably superior because of the use of Affirmative Action. At Step III, the Grievance was again denied on the same grounds. This same result obtained at Step IV, and the Union requested Arbitration. The Arbitration Hearing was held on January 14, 1994.

The venue of this Grievance was Wood County, Ohio. The Employer's first witness was John Tansey, the Wood County Highway Maintenance Superintendent 2. Mr. Tansey testified that "V.C." was the most senior employee of the 23 Highway Maintenance Workers that comprised the 33 bargaining unit employees under his supervision. He said that he had had the opportunity to observe her work since 1990. He described her work as accurate and dependable; moreover, she had a "real knack" with equipment. Mr. Tansey pointed to various projects that she had completed as evidence of the quality of her work. He also cited her safety consciousness for both her fellow employees and for ODOT's customer's, the driving public. When a fellow

worker, Mr. Louis Frees, a Highway Maintenance Worker 3, went on disability leave, Mr. Tansey said he assigned "V.C." as the temporary replacement based on her seniority and her past performance. During that temporary assignment, according to the testimony of Mr. Tansey, "V.C." did a good job in that position. Mr. Tansey also testified very positively about "V.C.'s" assignment as a fill-in for the timekeeper and about her effectiveness in completing the daily reports.

When Mr. Tansey had to fill the HWV3 position permanently, he testified that he considered that general knowledge about the Wood County garage and office, in particular knowledge about the procedures, paper work, and equipment operations, was the most important factor in his decision. He testified that he reviewed the bid sheets of each of the applicants for the position and interviewed both "V.C." and the Grievant. After that paper review and after the interviews, Mr. Tansey said that he also considered the goals of the ODOT Affirmative Action Plan (AAP). He said he had been made aware that women were under-utilized in the HMW 3 positions within ODOT and that no women were in that position in District 2. His information on utilization figures were taken from ODOT's AAP.

Pamela Shanks, District 2 Personnel Officer, stated that affirmative action was an important factor in promotion when applicable. She testified to a variety of meetings and communications that informed her, as Personnel Officer in District 2, of the goals of the ODOT Affirmative Action Plan and, in particular, of the under-utilization of women in the HMW 3 category. In her position, Ms. Shanks reviewed the selection process undertaken by Mr. Tansey. She examined the bid sheets, the interview responses, and the applicant flow data forms used by Mr. Tansey. She said that she did not review the applicants' personnel files because those files were not normally utilized in a promotion process. She then discussed Mr. Tansey's recommendation of "V.C." for the permanent position with Mr. Larry Dargart, District 2 Administrative Assistant. Ms. Shanks testified that she processed "V. C.'s" promotion upon the instructions of Mr. Dargart and they acted upon the recommendation of Mr. Tansey and within the principles of the ODOT AAP.

Mr. Scott Stillion, Programmer Analyst 2, stated that based on his analysis of the Agency payroll records of July 1992 that women were under-utilized in the classification of HMW 3 in District 2.

The Employer offered the testimony of Eugene Brundige who was the chief negotiator for Article 17 in the 1989 negotiations. Mr. Brundige testified that during negotiations, Mr. Murray had specifically asked him about the role of affirmative action as related to promotions and the question of "demonstrably superior." Mr. Brundige pointed to pp. 520-521 of the Employer's bargaining notes from 3/29/89. Mr. Murray asked “17.06 Is seniority taken into consideration?" Mr. Brundige replied: "Yes, it would be a qualification. I believe you still have the seniority language there also but points out that Affirmative Action may be the basis for promotion as well." Mr. Murray asked, "if an employee is qualified and has the seniority and yet a junior employee who is also qualified and has less seniority but with Affirmative Action, the junior would be promoted?" Mr. Brundige answered: "Yes, if they are relatively equal." Mr. Murray: "When wouldn't it over ride?" Mr. Brundige: "When the qualifications were not relatively equal. And it might not anyway. That's a 'may' there and not a 'shall'." Mr. Murray's rebuttal following those statements according to Mr. Brundige, focused not on affirmative action but the Union's continued concern with "job groupings." (Joint Exhibit 6) Mr. Brundige stated that at the end of negotiation, the Union agreed to the affirmative action language in Article 17 in return for other issues yielded on by the Employer.

The Union called Mr. Bruce Wynngaard, current OCSEA Chief of Arbitration, who was assistant to Mr. Russell Murray, the chief negotiator for the Union at the 1989 negotiations. Mr. Wynngaard testified that the Union had achieved major changes in Article 17 in exchange for changes that the State wanted in other areas in the Contract. Wynngaard said that Article 17 was a "priority" for the Union. In 1986, promotions had been limited to "job groupings," and in 1989, the Union sought to expand promotions beyond those job groupings. He indicated that the Union and the Employer were at logger heads over Article 17 until the very end of negotiations. The Employer was pushing the addition of the affirmative action language, and the Union was pushing the "job groupings” issue. Mr. Wynngaard stated that the Union was committed to uphold the principle of "seniority.” Mr. Wynngaard pointed to the discussion between Mr. Paul Breese of the Employer and Mr. Murray on January 17, 1989. (Joint Exhibit 6, p. 65) Mr. Breese read the new affirmative action language of Article 17. Mr. Murray said "This Union does stand for Affirmative Action [but] ... we understand your position and we are opposed to it." On January 31, 1989, Mr. Breese and Mr. Murray

returned to the subject. Breese " ...The State's policy on Affirmative Action is clearly stated in Article 17." Mr. Murray: "Article 17 is not something we are interested in working out as you have proposed it.... We see no need to gut the promotional language...." Murray: "I believe it (the affirmative action language) belongs in Article 2 and not in Article 17."

Mr. Wynngaard stated that he believed that during the March 29, 1989 session, Mr. Murray had clearly rejected the "relative equal" language used by Mr. Brundige. On cross-examination, Mr. Wynngaard indicated that he was not present during the discussions between Mr. Brundige and Mr. Murray on the last day of negotiations; in addition, he agreed that the language with which Mr. Murray had disagreed was to be found in the final Article 17 as approved by the Union leaders and rank and file.

The Union also presented the testimony of the Grievant. The Grievant testified to his education and stated that he was trained as a Diesel Technician at Owens Technical College in Oregon, Ohio. He also reviewed the training he had received from ODOT, both formal and on the job. He testified extensively and in detail as to his job duties and as to the types of equipment with which he was familiar. He indicated that he had a full range of knowledge and experience with, the equipment listed in the class specification and in the position description for a Highway Maintenance Worker 3.

In addition, the Union called Don Conley. Mr. Conley testified that neither the Affirmative Action Plan (AAP) of ODOT nor the Conciliation Agreement with Ohio Civil Rights Commission (OCRC) impose quotas on ODOT but do set goals. Moreover, neither the plan nor the conciliation agreement specify penalties for failing to meet the goals.

Discussion

This case turns on the language of Article 17.05 and 17.06 in the Contract (1992-1994). The language at issue was added in the 1989-1991 Contract. (Joint Exhibit 2) Under these sections, the job at issue will 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 Contract continues and adds that affirmative action shall be a valid criteria for determining "demonstrably superior." In this case, both the Union and the Employer have stipulated that the Grievant and "V.C.", the two final applicants for the job at issue, were both "proficient in the minimum qualification for the position." (Union Brief p. 3) The question is whether "V.C." meets the "demonstrably superior" test.

The State's position is that with regard to their qualifications "V.C." and the Grievant are substantially equal but that since "V.C." is a woman her affirmative action qualification makes her "demonstrably superior" to the Grievant. "V.C." meets the goals of the Affirmative Action Plan of ODOT because women are under-utilized in ODOT in such positions.

The Union's position is that without the factor of affirmative action, "V.C." is not "demonstrably superior" to the Grievant (a position with which the Employer agrees) but that affirmative action is only one of numerous factors that can create a "demonstrably superior" employee and that affirmative action can not "trump" seniority in and of itself. The Union argues, in addition, that by using affirmative action as only one criterion that the State has failed to carry its burden of proof that "V.C." is "demonstrably superior" to the Grievant.

The documents and testimony with regard to the 1989 Contract negotiation indicated that the State's position from the inception of the negotiations was to add affirmative action language to the Contract in Article 17. The Union did not wish the language in that section because the Union believed that such language would dilute seniority rights. The Union's position was that Article 2 should state the joint commitment of the Union and the Employer to the principles of affirmative action but that affirmative action language should not be placed in a section so important to the Union in its fight to retain pure seniority.

The Arbitrator is bound to interpret the language of the Contract. If the language is express, clear, and unambiguous, the Arbitrator is bound to apply those clear words. If the language is unclear or ambiguous either per se or in context, the Arbitrator must use various rules to interpret that language. In labor contracts, if the language is asserted to be unclear, either party can advance a preferred interpretation. To be found to be unclear, the language must be capable of two rational but contrary meanings. Parties can use testimony

from negotiations to meet their burden of proof as to the meaning of the language. Obviously, the "plain meaning" of the words either per se or in context are preferable to post hoc attempts to create self serving interpretations.

On its face, the language appears clear to this Arbitrator. Basic premise: the job SHALL be awarded to the qualified employee with the most state seniority. If presented with two qualified employees, the State is obligated to promote the most senior. However, this obligation is subject to a condition subsequent that can extinguish the obligation. The senior employee shall be promoted UNLESS the Employer can show that the less senior employee (junior) is "demonstrably superior." Then, the Contract specifically adds that "Affirmative Action shall be a valid criteria for determining demonstrably superior." Thus, seniority is trumped by "demonstrably superior," and "demonstrably superior" is expressly defined to include affirmative action as a determinative criteria.

With regard to any individual employee, the Employer has the burden of proving "demonstrably superior." The presumption to be overcome is the seniority of the employee who was not chosen.

However, in this case, another burden of proof issue exists. The Employer has interpreted the Contract to permit a certain result (i.e., the promotion of "V.C."). Under rules on labor contract interpretation, the presumption of the correctness of such interpretation action lies with the Employer. The Union bears the burden of proving that the interpretation of the Employer violates the Contract. So, in this case, while the employer has the burden of showing that "V.C." is "demonstrably superior" and, therefore, trumps the Grievant's seniority, the Union must prove that the Employer's interpretation of the Contract in a manner that makes "V.C." "demonstrably superior" is incorrect.

To determine the meaning of Article 17, at least two terms of art are at issue: The first is "demonstrably superior." To define this term of art, this Arbitrator gratefully relies on the words of Arbitrator Graham in the Castle and Thomas arbitration (OCSEA and OBES). Arbitrator Graham stated that to succeed in promotion the junior employee must bring superior attributes to the position. The Employer must convince a neutral reviewer that the junior bidder is superior, i.e. the junior bidder more nearly fits the requirements of the position ... a "substantial difference" must exist between the senior and junior bidder." Graham stated that if the applicants bring precisely the relevant qualifications to the position, the Employer must show the junior applicant has "a greater potential for success."

However, a second term of art is used in this Article, namely "affirmative action." Affirmative action is not defined within the Contract. However, the term is not a term used exclusively in labor contracts. The term "affirmative action" is a well known term for a remedy for past employment discrimination. Arising from statute as interpreted by case law, the term has a common meaning, but the application and its proper context is a controversial issue of tremendous impact in all current workplaces in the United States. The meaning stated by Mr. Brundige in the negotiation as the Employer's definition is consistent with common legal parlance: If two applicants are equal in their qualifications for a job, then considerations of affirmative action trump. As the Arbitrator reviews the words, Mr. Murray's comments in the negotiations, did not reject this MEANING of the term but rather reflected the Union's position that the Union did not want this standard to be used in Article 17. Moreover, Mr. Murray's response was not directed specifically at affirmative action but at job groupings. The Union apparently, and not unsurprisingly, wanted a pure seniority standard. However, the Union had already agreed to a "demonstrably superior" as a contractually mandated condition subsequent to the seniority mandate. The Union, apparently, did not want another factor to trump seniority. While the Union's position is clear from the negotiation notes of BOTH parties, the Arbitrator finds that the Employer's words and position were incorporated in the final written product; that final written product with the Employer's words incorporated was ratified by the Union membership. With regard to the inclusion of the affirmative action standard in Article 17, the Union lost. Regardless the type of quid pro quo attained, the language is in the Contract. Moreover, Mr. Brundige stated the meaning clearly. The meaning he used is a standard commonly understood meaning. Mr. Murray clearly understood Mr. Brundige's interpretation. He did not like it; he did not want those words in the Contract; he did not want seniority diluted but he provided no other "meaning" for the term affirmative action.

The plain words of the Contract state that affirmative action is "all criteria for designating an employee as "demonstrably superior." The Union argues that affirmative action cannot be "the" sole criteria for

determining "demonstrably superior." No contract language supports this position. The Employer's brief notes that "if the junior employee was already demonstrably superior before the application of the Affirmative Action standard, Affirmative Action would not be needed." (at p. 23) The Union says that the junior employee must already have some characteristics that are pushing him or her into the demonstrably superior category, and then Affirmative Action is just one factor that can push him or her over into the demonstrably superior position." Nothing in the language of the Contract requires this reading. Suppose, two qualified employees exist. The junior employee has a doctorate in statistics; the senior employee does not. Could not that sole criterion (educational level) make the junior employee demonstrably superior without more? The Arbitrator thinks the answer is yes. So, one factor can create a demonstrably superior candidate.

The Union argues that "gender" "race" “ethnicity" are not "qualities" that cause superior qualifications. Generally, the Union's position is correct. However, affirmative action is a method designed to specifically remedy past discrimination based on invidious characteristics. To remedy these situations, these self-same characteristics have been defined to be substantive qualities for the purpose of choosing between two equally qualified candidates. The Contract makes "affirmative action" characteristics meet Graham's definition of "substantial difference." Between two equally proficient candidates, affirmative action makes one candidate "head and shoulders" over the other.

The Union's second argument is that the Employer has failed to meet its burden to show that "V.C." individually is "demonstrably superior" to the Grievant. As interpreted, the Contract only requires that the Employer show that "V.C." is equally capable with the Grievant. Mr. Tansey and Ms. Shanks testified that after an objective review of these qualifications of the two candidates that the Employer determined that the candidates were equally situated in their work abilities. Mr. Tansey indicated that, on balance, "V.C." with her equipment knowledge and experience with the various paperwork within the work setting, was equal in his eyes to the Grievant with his educational experience and equipment knowledge. The Union presented no evidence that the review of the Employer was faulty or violated any procedures. The Employer presented evidence that applications, interviews, and other criteria were compared. The Arbitrator cannot substitute her judgment for the Employer's as between two employees without some proof of bad faith, prejudice, improper or unfair procedure, or clear objective factual error. The Union's evidence on these matters did not materialize.

Award

The Grievance is denied.

RHONDA R. RIVERA, Arbitrator
Date: April 26, 1994