

ARBITRATION DECISION NO.:

147

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Taxation,
State Unit 9

DATE OF ARBITRATION:

May 10, 1988

DATE OF DECISION:

October 4, 1988

GRIEVANT:

Lu Roth

OCB GRIEVANCE NO.:

G-86-0285

ARBITRATOR:

Jonathan Dworkin

FOR THE UNION:

Carol Bowshier

FOR THE EMPLOYER:

Timothy Stauffer

KEY WORDS:

Reciprocity Of Agreement
Promotion

ARTICLES:

Article 17 - Promotions
And Transfers
§17.01-Promotion
§17.05-Selection

FACTS:

This Grievance involved the promotion of a State employee pursuant to Section 17.01 and the reciprocity of the Collective Bargaining Agreement prior to its effective day of July 1, 1986. Grievant works for the Department of Taxation. Grievant submitted a timely bid for an upgraded position which was awarded to another State employee on June 22, 1986. On July 1, 1986, the

State became bound by the Collective Bargaining Agreement and on July 11, 1986, the Director of Administrative Services approved, signed, and finalized the personnel action regarding the promotion. A grievance was submitted to contest the awarded promotion because Grievant had more seniority than the successful applicant. This grievance, however, was submitted to arbitration on the limited issue of whether or not the grievance was substantively arbitrable.

EMPLOYER'S OPINION:

The State argued that the grievance was not arbitrable. The vacancy was filled on June 22, 1986 before the parties were bound by the Collective Bargaining Agreement. Therefore, no contractual foundation for the grievance exists. Grievant had no contractual rights which could have been breached. Promotions are effective "the beginning of the pay period following the receipt of the personnel action by Personnel Services. Thus the promotion was final on June 22, 1986 and the July 11, 1986 signature by DAS was an unnecessary formality. In short, the Employer contended that the Arbitrator had no alternative but to summarily dismiss the grievance for lack of jurisdiction.

UNION'S OPINION:

The Union argued that the issue was wholly arbitrable. Although the promotion selection was made before the Agreement came into being, the Director of Administrative Services did not sign the personnel action until July 11, 1986. By then the contractual relationship had been in place ten days. Since the Director has the power to approve, disapprove, or delay personnel actions, the promotion in issue was not complete until he acted upon it. The Director signed the personnel action on July 11, 1987. Until then, the promotion was pending, not finalized. Therefore, the Collective Bargaining Agreement was in effect when the promotion was finalized and the State was bound by its terms.

ARBITRATOR'S OPINION:

The bulk of evidence favored the Union's position on arbitrability. The fact that DAS approval was necessary to confirm the promotion, plus the fact that the computer entry of the personnel action was termed as "pending" all support a finding that the promotion was accomplished after July 1, 1986. On July 1, 1986, there was no promotion; there was only a pending promotion. The promotion could not be finalized without DAS approval, but once that approval was appended, the employee's upgrade automatically dated back to June 22, 1986. Since the prerequisite of promotion - DAS approval - - occurred during the contractual term, the personnel action was grievable.

AWARD:

The State's motion to dismiss the grievance as non-arbitrable is denied. The parties are directed to proceed forthwith to arbitrate the merits of Grievant's claim.

TEXT OF THE OPINION:

**CONTRACTUAL GRIEVANCE PROCEEDINGS
ARBITRATION OPINION AND AWARD**

In The Matter of Arbitration
Between:

THE STATE OF OHIO

**Department of Taxation
State Unit 9**

-and-

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

Grievance No.:
G86-0285

Decision Issued
October 4, 1988

APPEARANCES

FOR THE STATE

Timothy Stauffer,
Administrative Counsel
Ed Morales,
Labor Relations Specialist
Robert D. Merkel, Supervisor,
Personnel Services
Darla J. Kirkpatrick,
Personnel Officer

FOR THE UNION

Carol Bowshier, Advocate
Ronald Stevenson,
OCSEA Staff Representative
Lu Roth, Grievant
Evelyn Dudley,
Local President

THE ISSUE

The first Collective Bargaining Agreement between the State of Ohio and Local 11 of the Ohio Civil Service Employees Association (OCSEA/AFSCME) took effect on July 1, 1986. It established working conditions for represented employees, and included provisions on seniority. Under the Agreement, seniority became the source of many protections, privileges and rights, one of which was priority for promotional opportunities. Article 17 states in pertinent part:

§17.01 - Promotion

Promotion is the movement of an employee to a posted vacancy in a classification with a higher pay range.

. . .

§17.05 - Selection

A. The Agency shall first review the bids of the applicants from within the office, county or "institution." Interviews may be scheduled at the discretion of the Agency. 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. [Emphasis added.]

The grievance alleges that the State violated Article 17, §17.05 when it filled a vacancy in the Ohio Department of Taxation. Grievant contends that the opening would have been a promotion for her and that she was the senior qualified bidder. But the Employer selected a junior applicant whom it regarded as better qualified.

The controversy was submitted to arbitration, not on its merits, but on the carefully limited issue of whether or not the grievance is substantively arbitrable. The State contends it is not. It argues that the vacancy was filled on June 22, 1986 -- before the parties were bound by the Collective Bargaining Agreement. It concludes, therefore, that no contractual foundation for the grievance exists; Grievant had no contractual rights which could have been breached; there was no mutual Agreement authorizing an arbitrator to insert him/herself into the employment relationship and critically review Management action. In short, the Employer contends that the Arbitrator has no alternative but to summarily dismiss the grievance for lack of jurisdiction.

The Union disagrees. Although the selection was made before the Agreement came into being, the Director of Administrative Services did not sign the personnel action until July 11, 1986. By then the contractual relationship had been in place ten days. Furthermore, the successful applicant did not actually begin training until July 21. The Union maintains that the promotion took place no earlier than July 11, 1986, during the term of the Collective Bargaining Agreement and after grievance rights became vested. It requests a decision affirming arbitrability and requiring the Employer to proceed on the merits of the grievance.

On the surface, the Union's argument is compelling. It is logical to assume that an employee is not promoted until the paper work is finished and the Director of Administrative Services affixes his/her signature. However, the facts of this controversy disclose a striking ambiguity. The wage of the individual selected to fill the vacancy was increased to the rate of his new classification as of June 22, 1986, nine days before commencement of the Agreement. According to the Employer, the promotional process was substantively complete on June 22, and the Director's signature was an unnecessary formality.

The dispute was presented to arbitration on May 10, 1988. At the outset, the Representative of the Employer requested that only the jurisdictional issue be heard. The request was granted (over the Union's objection). Accordingly, the award will be dispositive of the grievance if the State's position on arbitrability prevails. If the threshold issue is decided in favor of the Union, however, the parties will be directed to proceed to arbitration on the substance of Grievant's complaint.

ADDITIONAL FACTS AND ARGUMENTS

The promotional process, both before and during the contractual term, has consisted of several acts, most of which are carried out by computer operators and technicians. The first step (assuming civil service examinations are not required) is to post a vacancy for bids. Once bids are in and interviews have been conducted, the agency makes its selection. It is noteworthy that seniority was a selection factor even before the Agreement became effective and made it a priority. Ohio Revised Code §124.31 sets the following standard:

(A) Vacancies in positions in the classified service shall be filled insofar as practicable by promotions. The director of administrative services shall provide in his rules for keeping a record

of efficiency for each employee in the classified service, and for making promotions in the classified service on the basis of merit, to be ascertained as far as practicable by promotional examinations, by conduct and capacity in office and by seniority in service, and shall provide that vacancies shall be filled by promotion in all cases where, in the judgment of the director, it is for the best interest of the service.

When the agency makes its selection, it enters the proposed personnel action into a computer terminal and forwards supporting documentation to the Department of Administrative Services (DAS). The Department logs the information and sends hard copy to a technician for data processing. The technician searches files to verify that the vacancy exists, the proposed classification is proper, the proposed step and salary are proper, and the candidate is qualified. If everything checks out, the technician certifies (recommends) the promotion and, in accordance with explicit DAS policy, s/he sets the effective date. In this case, the technician established June 22, 1986 as the date for implementing the promotion and placing the employee in his new pay range. But the processing did not end on June 22. As stated, the Director of Administrative Services delayed signing the personnel action until July 11, and the final approval of the promotion by the Personnel Services Branch of DAS did not occur until July 21.

The timing of the promotion at issue was as follows:

April 28, 1986 -- The Department of Taxation posted a Computer Operator-1 vacancy. The deadline for applications was May 5, 1986. Two candidates, both of whom were Data Processors, submitted timely bids.

June 5, 1986 -- Both candidates were interviewed by the Computer Operations Manager.

June 6, 1986 -- The Operations Manager forwarded copies of the bids, interview documentation forms, and questions asked in the interviews to the Personnel Administrator. In a separate memorandum to the Administrator, the Manager recommended selecting one of the candidates because, "[he] seems to be the most qualified of all the applicants interviewed for the position."

June 12, 1986 -- the Tax Commissioner approved and signed the personnel action.

June 16, 1986 -- The proposal was logged in by DAS and hard copy was turned over to a technician in the Personnel Division for processing.

June 17, 1986 -- The technician confirmed the employee's eligibility, and set June 22 as the effective date of the promotion. It is important to observe that selecting the date was not a discretionary task of the technician. In November of the previous year, the Deputy Director of the Division of Personnel circulated a memorandum to "All State and County Human Services Appointing Authorities and Personnel Officers." The memorandum noted that there was a good deal of confusion among administrators as to when promotions took place. To resolve misunderstandings, the Deputy Director set forth the following policy as binding:

Pursuant to section 124.15(e) of the Revised Code, the director [of DAS] has the responsibility to determine the effective date of any new wage or salary to which an employee has been assigned.

The effective date of all promotions . . . is the beginning of the pay period following the receipt of the personnel action by Personnel Services, unless a later date [is] requested by the appointing authority. Therefore, it is incumbent upon all agencies, especially those with decentralized

personnel offices, to submit personnel actions to Personnel Services before any change has occurred. [Emphasis in original text.]

June 22, 1986 was a Sunday. It was the start of the pay period following receipt of the personnel action by Personnel Services.

July 1, 1986 -- The State became bound by the Collective Bargaining Agreement.

July 11, 1986 -- The Director of Administrative Services approved and signed the personnel action.

July 19, 1986 -- The employee received a paycheck which included eighty hours at the Computer Operator-1 rate. The payroll computer printout indicates that wages for the higher classification were retroactive to June 22, 1986. Pay periods for State employees are biweekly, and wages are distributed one pay period behind the date when the compensated services are performed. Thus, the record is consistent with the State's argument that the employee received wages for his promotion as of June 22.

July 21, 1986 -- The successful applicant began training. Additionally, the Computer Operations Manager sent Grievant the following letter:

The interviewing process for the position of Computer Operator I has been completed. In addition to you, we were fortunate to have other applicants with outstanding qualifications, and another applicant has been selected.

We appreciate your interest in a position with our section and wish you success in your future interviews.

The Employer's position rests largely on Ohio Revised Code §124.15(E) which establishes a comprehensive formula for determining wages of new hires and promoted employees. In the State's view, the Code provision "directs the Director of the Department of Administrative Services to determine the effective date of promotions." [Employer's opening statement.] As will be observed in the Opinion portion of this decision, the Arbitrator has difficulty accepting the State's statutory interpretation. Nevertheless, it is apparent that, either by law or by long standing practice, the Director has been placed in the position of setting promotional dates.

Both parties refer to the Director's discretion in support of their positions. The Union contends that, since the Director has power to approve, disapprove, or delay personnel actions, the promotion in issue was not complete until he acted upon it. The Director signed the personnel action on July 11. Therefore, according to the Union, until July 11 the promotion was pending, not finalized.

The State takes a different view of how the Director's authority determined the date of the promotion. Its arguments call particular attention to the memorandum issued by the Division of Personnel in November, 1985. As stated, the purpose of the memorandum was to resolve confusion over operative dates. It explicitly provided that promotions were effective, "the beginning of the pay period following the receipt of the personnel action by Personnel Services." Since the Division is a branch of DAS the memorandum was official policy of the Department and the Director. The policy, in turn, expressed the manner in which the Director chose to exercise his discretion; he meant to make it quasi-automatic. The verification process for approvals and

disapprovals was delegated to technicians. Once the technicians found that predetermined criteria were met, they were authorized to set the effective dates for promotions. It is important to reiterate that setting dates by technicians was not discretionary; it did not invade the Director's province. The act was performed ministerially, in accordance with prescribed DAS policy.

The State vigorously argues that the policy controlled this situation and all similar personnel actions in the past. It maintains that the promotion was substantively executed on June 22, the beginning of the pay period following receipt of the proposal by Personnel Services. That is why the employee started to earn Computer Operator-1 pay on June 22. The Employer does not know why there was a three-week delay between the effective date and the Director's signature -- there might have been any number of technical reasons. However, so long as the policy was followed, according to the State, the actual signing of the personnel action was simply pro forma and only acknowledged what already had been done.

The Union argues that the employee did not move into the job covered by his new pay range until July 21 and, by then, contractual definitions were applicable. Article 17, Section 17.01 of the Agreement gave unmistakable meaning to the word, "promotion." When they adopted the provision, the negotiators bilaterally defined "promotion" as movement into a classification with a higher pay rate. The Union contends that nothing in the Agreement supports the view that the successful applicant became a Computer Operator-1 on the artificial date of his retroactive wage increase. The undisputed fact is that he worked as a Data Processor throughout May, June, and most of July, 1986. In the Union's judgment, it is very significant that the employee did not begin training on his new job until nearly a month after his promotion was approved by the technician. The reason was obvious -- the Director of Administrative Services did not sign the promotion until July 11. The delay between the technician's approval and the employee's movement into the job, it is argued, proves that the signature was much more than an immaterial formality; it was an indispensable requirement. Until the personnel action was signed, the promotion remained an unconfirmed proposal. It was not an accomplished finality.

OPINION

The fact that the successful candidate received the higher wage rate retroactive to June 22 is in marked contradiction to the Union's, reasoning, and a puzzle which the Union does not address directly. It makes no logical sense for an individual to receive wages for a job s/he does not hold. The State seizes upon this anomaly, contending that the only rational conclusion is that the employee's promotion was contemporaneous with his pay raise. The argument allegedly is supported by Ohio Revised Code §124.15(E) which establishes guidelines for placements on the wage continuum. The provision authorizes the Director of Administrative Services to assign employees to steps in classification pay ranges. In the State's view, the following portion indicates a legislative intent that promotions occur when an employee is assigned a higher wage:

In assigning or reassigning any employee to a classification or to a new pay range, other than as a promotion, the director of administrative services shall assign such employee to such appropriate step in the new pay range as the director shall deem equitable. Such new salary or wage shall become effective on such date as the director of administrative services determines. [Emphasis added.]

The Arbitrator finds the Employer's reliance on §124.15 (E) misplaced. The statute does state that the Director shall assign employees to steps in their new pay ranges, but the words "other than as a promotion" must be presumed to mean what they say -- that the code section applies to all

kinds of reassignments except promotions. In the Arbitrator's view, those words make §124.15(E) practicably irrelevant to this controversy.

Characterizing the statute as "irrelevant," and eliminating it from consideration makes this a decidedly confusing case. The Arbitrator took advantage of the authority granted by the parties to perform an independent review of the Ohio Revised Code and the Administrative Code. But the review did little to reduce the ambiguities. There is no definitive legislative statement of when a promotion is effective. It is clear, however, that the Director of Administrative Services has final say on promotions, especially in a case such as this where the action was taken without a promotional examination.^[1] The following provision of the Administrative Code clarifies the point:

123:1-23-02 Promotion without competition

If a vacancy exists . . . but it is found not feasible to conduct an examination, the Director [of Administrative Services] may authorize the appointing authority to nominate an eligible employee for promotion without competition, but in all cases of promotion without competition, the appointing authority shall submit a written statement showing that the duties performed by the person nominated are in actual preparation for the higher position and that such person is entitled to promotion by reason of effective performance, and possesses appropriate qualifications. [Emphasis added.]

Presumably, "nominate" is synonymous with "propose." It is apparent from the fact that the appointing agency must justify its selection to the Director, that the legislative intent was to give DAS the determinant role in promotions under §123:1-23-02.

Did DAS exercise its determinant role, thereby finalizing the promotion, before or after the start of the contractual term? The State reasonably argues that the Department performed its function in accordance with a valid, pre-existing policy which operated automatically. Nothing in the Ohio Revised Code or the Ohio Administrative Code prohibited DAS from formulating such a policy; nor did any of the legislative pronouncements require the Director to sign a personnel action before a promotion could take place. However, the action was controlled by relevant Code definitions. Most notably, Administrative Code §123:1-47-01 defined "promotion" as follows:

(65) "Promotion" - Means the act of placing an employee in a position, the classification for which carries a higher salary range than that previously held.

The Arbitrator finds the language of the foregoing provision plain and apparent. It states that promotion occurs when an employee is placed in a position; "position" being defined in §123:1-47-01(58) as, "the group of job duties intended to be performed by an individual employee as assigned by the appointing authority." As the Union correctly points out, the successful candidate was assigned the duties of a Computer Operator-1 on July 21, not June 22, 1986.

The conclusion logically to be drawn from applying the Administrative Code to the facts is that the promotion occurred after the Agreement became effective. It is arguable, however, that such conclusion derives from an overly strict construction of legislative language and ignores the realities of the past. The State introduced unrefuted testimony that there was nothing unique about the timing of this personnel action. Promotions routinely became effective when wages were increased pursuant to the DAS policy. It was common to postpone actual job accession, and the practice of doing so was not out of line with legislative mandates. The law did not prevent an appointing agency from temporarily retaining a promoted employee in his/her former work functions for a brief period.

The State's contention is reasonable. The Department of Taxation certainly had pre-contract

authority to temporarily assign a Computer Operator to perform lower-rated Data Processor work. Such temporary assignment would not have changed the employee's classification so long as s/he continued to receive Computer Operator pay. Applying this rationale, there is justification for holding that the job at issue was filled by promotion on June 22, when the successful candidate began to receive Computer Operator wages, and the employee's retention in Data Processing for a few weeks was really a temporary assignment. The problem with adopting this conclusion is that it flies in the face of some of the State's own evidence. The Employer's witnesses uniformly testified that the signature of the Director of Administrative Services was not a sine qua non of the promotion, and each expressed their belief that the promotion was in place on June 22, 1986. However, one of the witnesses, a supervisory employee of the Personnel Services Section, made the following concessions:

1. As a matter of policy, a promotion is not deemed to be finally approved until the Director of Administrative Services signs the personnel action;
2. Occasionally (although seldom) DAS has denied promotional proposals or postponed effective dates;
3. The computer log of this promotion did not indicate that the action was final until after the director had signed. Before July 11, the computer identified the action as, "pending."

The computer-log designation of the promotion as "pending" prior to July 11 corresponds with the fact that Grievant did not learn that her job application was turned down until July 21. That was when she received notice from the Department of Taxation. The hearing record does not reveal when the successful candidate was officially informed of his promotion; the probability is that he also received notice on July 21.

A legitimate award in this controversy requires finding an inherently consistent explanation for these seeming inconsistencies. The bulk of the evidence favors the Union's position on arbitrability. The timing of notice, the fact that DAS approval was necessary to confirm the promotion, and the computer entry of the personnel action as "pending" all support a finding that the promotion was accomplished after July 1, 1986. But the fact that the successful applicant was paid Computer Operator wages from June 22, 1986, stands as a signal detraction from that conclusion. The discrepancies dissolve, however, when the pattern is examined as a whole. It is probable that the promotion occurred retroactively after the Director signed the personnel action. The promotion could not have been finalized without DAS approval, but once that approval was appended, the employee's upgrade automatically dated back to June 22. The pivotal inquiry, therefore, is whether or not the retroactive promotion was covered by the Agreement. The answer lies in another question: Was the promotion extant before July 1, 1986 when the Agreement became effective? The Arbitrator finds that it was not. On July 1, there was no promotion; there was only a pending promotion. DAS approval was the source; without it, the position would not have been filled. Since that prerequisite occurred during the contractual term, the personnel action was grievable.

AWARD

The promotion in issue was finalized on July 11, 1986 when it was approved by the Director and Department of Administrative Services. Accordingly, the personnel action was taken during the contractual term even though it was retroactive to a period before the Agreement became effective. Since the promotion was only pending when the Collective Bargaining Agreement started to govern the employer-employee relationship, its final approval constituted a grievable

event.

The State's motion to dismiss the grievance as non-arbitrable is denied. The parties are directed to proceed forthwith to arbitrate the merits of Grievant's claim.

Decision Issued:
October 4, 1988

Jonathan Dworkin, Arbitrator

[1] Ohio Administrative Code §123:1-23-07 states that promotional examinations "shall consist of written tests and ratings for seniority and efficiency". Obviously, the verbal interviews did not conform.