

ARBITRATION DECISION NO.:

170

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Employment Services

DATE OF ARBITRATION:

October 25, 1988 and
November 30, 1988

DATE OF DECISION:

February 9, 1989

GRIEVANT:

Karen Castle
Linda Thomas

OCB GRIEVANCE NO.:

G-86-0411

ARBITRATOR:

Rhonda R. Rivera

FOR THE UNION:

Daniel S. Smith, Esq.

FOR THE EMPLOYER:

Tim Wagner

KEY WORDS:

Job Posting
Applicant Selection
Seniority vs. Demonstratively
Superior

ARTICLES:

Article 17 - Promotions
and Transfers

§17.01-Promotion

§17.02-Vacancy

§17.03-Posting

§17.04-Bidding

§17.05-Selection

FACTS:

On August 29, 1986, Director Nichols by IOC directed that position No. 9601.0 be posted: Classification: 66913 Statistician 3, Location: Labor Market Information. Under "Qualifications" the notice listed: "Desired Qualifications: 3 courses in management and supervisor (or 3 months experience) 6 courses in statistical analysis (or 6 months experience). Attached to the IOC was the position description for 66913.

On September 4, 1986, Grievant Castle applied for the position. At the time of her application, she had 18 years seniority with the State. In addition to the application made by Grievant Castle, the state received an application from Grievant Thomas. Grievant Thomas had been employed by the State for 12 years and nine months at the time of her application. In addition to the two applications received from these Grievants the State also received 5 other applications. On October 14, 1986, the Grievants were notified that they did not receive the position and that it was given to L.M. on November 17, the two Grievants filed their grievances alleging a violation of Section 17.05(A) and all other related articles.

On December 3, 1986, Director Summers denied the grievance by IOC. The decision stated that, "The selection was based on consideration of each applicant's education, experience, and job performance. Mrs. M. was judged to be the superior applicant because of her excellent educational background and experience in the area of statistical analysis."

On January 13, 1987, the grievance came up for a step 3 hearing. On February 11, 1987, the designee of the appointing authority rendered her decision and denied the grievance.

In that decision, the qualifications of the Grievants were described as follows: (in part)

GRIEVANT CASTLE:

The mathematical computations she performed in her position are averaging and percent changes. She has no training or experience in sampling theory, though she stated at the hearing that she believed she would be able to learn on the job.

GRIEVANT THOMAS:

The mathematics used in the position [Stat II] are limited to averaging, percents and percent changes. The Grievant has no knowledge of sampling theory. She has a high school diploma.

The Step Three Designee found that, "The position of Statistician 3 in the OES section, however, has particular requirements for understanding sophisticated statistical methodology which these Grievants do not meet and cannot be trained to meet in a reasonable period of time; further, the type of training which would be required is not available internally." In addition, the Step Three Designee found that, "In this case, it is clear that the person selected for the promotion was "demonstrably superior" to the Grievants as that term is used in Article 17.05(A) of the Contract."

At the arbitration hearing held October 25, 1988, the following additional facts were addressed. First, Mr. Eugene Brundige, Deputy Director of OCB, testified as to the interpretation of Article 17 of the Contract. Mr. Brundige described the promotion process as follows: First a job is posted, bids are received, these bids are divided into stacks pursuant to section 17.04 A-E. Then the groups are "received in seniority order, those which appear to be qualified, if not...they are not interviewed, if qualified the most senior is selected unless a junior is "demonstrably superior."

Second, Dixie Sommers, Director of the Labor Management Information Division, described the Occupational Info System (OIS) and described the qualifications needed for a Statistician 3 in that Section. A Statistician 3 in OIS needed, "basic sampling theory, probability theory, and advanced statistical methods." Ms. Sommers indicated that one could not learn "the theory" required on the job, but that if one knows the theory, one could learn the "applications" on the job.

She further indicated that an employee could not be trained in theory on the job. Ms. Sommers also pointed out that the desired qualification placed on the position included the necessity of having 6 courses in introduction to statistics, probability, sampling theory, sampling error, and research design and that neither Grievant had these courses, and the person selected did.

Third, testimony was offered by Mr. Greene of OBES. Mr. Greene testified that to do the job at issue one needed a knowledge of sampling theory, and sampling theory could only be learned in appropriate college courses and could not be learned on the job. Mr. Greene testified that he had interviewed the two Grievants as well as the person selected. His opinion was that neither Grievant was qualified because they had not had sampling theory in college courses.

Fourth, both Grievants testified that when they read the qualifications they believed they were qualified. Ms. Thomas testified that when Mr. Greene described the job and showed her the position description, she thought she could do the job and learn what was necessary during the probationary period. Both Grievants indicated that Mr. Greene never mentioned sampling theory in the interview. Ms. Thomas further testified that since the job was regulated by the BLS manual, she could follow the manual to learn. Both Grievants indicated that they were currently doing what was called "statistical analysis;" both agreed they had never learned sampling theory.

Fifth, Ray Findley, a Statistical Supervisor 1 and a former Statistician 3, offered testimony. He stated that the Operations Section does not do true sampling theory. However, he stated that in his opinion sampling theory could be learned on the job.

EMPLOYER'S POSITION:

The promotion process was properly followed in accordance with Section 17. The job was posted, the bids were received and received in order of seniority and those qualified were interviewed. The employer pointed out that the position of Statistician 3 in the OES section has particular requirements for understanding sophisticated statistical methodology which the Grievants did not have and could not be trained to meet in a reasonable period of time; furthermore, the type of training which would be received is not available internally. The person who was given the job had a complete understanding of complex sampling theory which was acquired through a college education. As a result the employer felt that the applicant which was hired was "demonstrably superior" to the Grievants.

UNION'S POSITION:

The Union's position is that both of the Grievants meet the qualifications listed in the job posting. Employees who meet these qualifications should be able to rely on the posting when applying for a job. Criteria outside the job posting and position description should not be used by the employer in making their decision. The Grievants both testified that neither of them had a knowledge of sampling theory, but that they both would be able to learn the work on the job. Furthermore, the Union argued that since the job was regulated by the BLS manual, the Grievants could follow the manual to learn to do the work on the job. In addition, the Union argued that both Grievants were currently doing what was called "statistical analysis." Moreover, the Union reiterated the testimony of Ray Findley and argued that the position does not require true sampling theory and that the work which needs to be done could be learned on the job. Finally, the Union argued that under Section 17.05 that this position should have been awarded to the Grievant who had the most state seniority because the Grievants were both qualified and that the person who was given the job was not demonstrably superior to either one of the Grievants.

ARBITRATOR'S OPINION:

The Employer violated Section 17.03 of the Contract. Section 17.03 requires that vacancies

be posted conspicuously and list the knowledge, abilities, skills, and duties as specified by the position description. The posting notice refers to the position description, and thus the employees should be able to read the position description and rely on it when applying for the position.

The Employer maintained in the hearing that the Grievants were unqualified because they did not have college study in "sampling theory." This rigid interpretation of the job criteria is not supported by the position description. If the applicant needs to be trained in sampling theory in college, this should be listed in the Position Description. Furthermore, if the Grievants weren't qualified for the job, the Employer should not have misled them into believing they had a chance at the job by interviewing them.

The arbitrator did not believe that the position of Statistician 3 absolutely requires a college study of "sampling theory" and had some fairly strong doubts that an experienced Statistician 2 could not learn the function in six months with adequate supervision and use of the BLS manuals.

For the above stated response, the grievances were sustained. Grievants were awarded monetary awards, and the agency was ordered to conduct a Job Audit of the Statistician 3 position. The job description should then be made to conform to the findings of that audit.

AWARD:

The grievances were sustained.

NOTE:

In a situation involving promotions, a great deal of information needs to be compiled before a decision can be made. Copies of the position description and the class specification is essential. The knowledge, skills, abilities, work history, performance evaluations and other factors that relate to the ability of the Grievant and the person appointed the job in question must be obtained in order to evaluate whether a promotion grievance has merit.

The Union has been advised by the State that it will go to court in order to have this award overturned. Until this matter is resolved the arbitrator's award will not be implemented. Stewards will be advised of the outcome when the litigation ends.

TEXT OF THE OPINION:

In the Matter of the
Arbitration Between

**OCSEA, Local 11,
AFSCME, AFL-CIO**
Union

and

**Ohio Bureau of Employment
Services**
Employer.

Grievance No.:
G-86-0411

Grievants:

(Castle & Thomas)

Hearing Dates:

October 25, 1988
November 30, 1988

Brief Date:

January 6, 1989

Award Date:

February 9, 1989

For the Union:

Daniel S. Smith, Esq.,
General Counsel, OCSEA

For the Employer:

Tim Wagner, Chief,
Arbitration Services, OCB

Present at hearing on October 25, 1988 in addition to the advocates and the Grievants were Meril Price, OCB, Dixie Sommers (OBES) witness, R. Green (OBES) witness, Sharon Downs (OBES) witness, Allyne Beach OCSEA, Eugene Brundige (OCB) witness. A second hearing was held on November 30, 1988 to take the testimony of Donald Wasserman, OCSEA.

Preliminary Matters

The Arbitrator asked permission to tape the proceedings for the sole purpose of refreshing her memory and on the condition that the tapes be destroyed on the day the award is rendered. Both parties agreed.

The Arbitrator asked permission to submit her decision for publication. Both parties agreed.

Both parties stipulated that the Grievance was properly before the Arbitrator.

All witnesses were sworn.

Issue(s)

The Union stated the issue as follows:

Did management violate Article 17.05 of the contract where it awarded the position of Statistician 3 to a junior employee?

The Employer stated the issue as follows:

Did management violate article 17.05 of the contract when it did not award the position of Statistician 3 to the most senior applicant?

Joint Exhibits

- No. 1 Grievance
- No. 2 Step 3
- * No. 3 Step 3 with Union and Grievant's Responses attached.
- No. 4 Letter stating Grievance is to go to Arbitration
- * No. 5 Vacancy Posting 66913
- No. 6 Classification Specification (Stat II)
- No. 7 Classification Specification (Stat III)
- * No. 8 Position Description 66912 (Stat II) (Operations Report Section)
- No. 9 IOC: Wilkinson to Grievants
- * No. 10 Response to Grievance 12-3-86
- * No. 11 IOC: Sommers to Nichols 10-14-86
- No. 12 Application and Response to Interview Questions (Position Occupant)
- * No. 13 Application and Response to Interview Questions (Grievant Thomas)
- * No. 14 Application and Response to Interview Questions (Grievant Castle)
- No. 15 Evaluations (Position occupant)
- No. 16 Evaluations (Grievant Castle)
- No. 17 Evaluations (Grievant Thomas)
- * No. 18 Proposed Classification Specification Stat II
- * No. 19 Proposed Classification Specification Stat III

*Indicates that the Exhibit will be referred to or quoted from in the Facts or in the Discussion.

Relevant Contract Sections

§17.01 - Promotion

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

§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 (Emphasis added)

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 as defined in Appendix J. Vacancy notices will list the deadline for application, pay range, class title and shift where applicable, the knowledge, abilities, skills, and duties as specified by the position description. Vacancy notices shall be posted for at least ten (10) days.

The Employer will cooperate with the Union to make job vacancies known beyond the required areas of posting.

§17.04(A) - Bidding

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, "institution" or county where the vacancy is located, who

presently hold a position in the same, similar or related class series (see Appendix I).

§17.05(A) - Selection (Emphasis added)

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.

Facts

On August 29, 1986, Director Nichols by IOC directed that positions No. 9601.0 be posted: Classification: 66913 Statistician 3, Location: Labor Market Information. Under "Qualification" the notice listed: "Desired qualifications: 3 courses in management and supervisor (or 3 mos. exp.) 6 courses in statistical analysis (or 6 mos. exp.) or equivalent. (Emphasis added)

Attached to the IOC was the position description for 66913. The major portion reproduced below. (Joint Exhibit No. 5) (Emphasis added)

JOB DESCRIPTION AND WORKER CHARACTERISTICS

Percent

Job Duties in Order of Importance

Minimum Acceptable Characteristics

Percent: 55

Job Duties: Coordinates Occupational Employment Statistics survey, involving annual solicitation and processing of occupational data from a sample of about 20,000 employers.

Minimum Acceptable Characteristics: Knowledge of (1) office practices and procedures; ability to (2) cooperate with co-workers, (3) apply principles to solve practical problems, &(4) write reports

Percent: 10

Job Duties: Trains staff in program and procedures. Assists in developing new procedures relating to data collection, editing, and publication.

Minimum Acceptable Characteristics: Ability to (5) interpret technical manuals.

Percent: 20

Job Duties: Initiates contract with sample reporters with difficult reporting problems, and with delinquents judged important to reliability of overall sample.

Minimum Acceptable Characteristics: Ability to (6) write technical correspondence.

Percent: 5

Job Duties: Reviews reported sample adequacy by industry/area to locate sample panel delinquents requiring intensive follow-up.

Minimum Acceptable Characteristics: Ability to (5), (7) use statistical analysis, & (8) understand formulas & equations.

Percent: 10

Job Duties: Performs related duties as required.

Minimum Acceptable Characteristics: Ability to (3), (4) and (7).

On September 4, 1986, Grievant Castle applied for the position. On the face of her application, she listed the following Course Work: General math 1 year, Business math 1 year, Algebra I 1 year. At the time of her application, she had 18 years seniority with the State. She was interviewed by Mr. Greene on October 2, 1986. Grievant Thomas applied on September 4, 1986. The face of her application listed this Course Work: Algebra 2 courses, Geometry 1 course, Trigonometry 1 course, Economics 1 course, and Records Control 1 course. At the time of her application, she had 12 years and 9 months seniority with the State. She was interviewed by Mr. Greene on October 3, 1986. The questions asked in both of the interviews were standardized and were as follows:

Tell us some things about your current job: What do you do?

What do you like most about the job?

What kind of supervision have you received on your current job and/or previous jobs?

Do you have any particular likes or dislikes about those supervisory styles?

What changes, if any, would you make to your current position?

Of all the jobs you've held, which one did you like most/least? Why?

Why do you want the job you've applied for?

What type of work interests you most?

Is there another type of work you've considered doing? Why?

Here's the position description for the job. Please read and let me know if you have any questions.

Section x section:

What experience/training do you have that can transfer to this position?

Do you have any special job-related training, skills, hobbies, or interests?

Do you have any feelings about the quantity of work expected in the job?

Education/Training

How does your educ. background qualify you for this position?

Do you have any work-related course work?

Where attained?

What training/education have you received since high school?

If voc. training/college, why did you choose that school?

Why that major/concentration?

What were your plans/goals after graduation?

Have you had any training or experience in public speaking/presentations?

Any experience/training/course work in statistics?

What are your long-term career objectives?

How does the position you're applying for relate to your long-term career objectives?

What additional training would you like?

If you could change anything in the Department, or in the job for which you're applying, what would it be?

Have you brought any samples with you of the work you can do or have done?

Do you have any questions you'd like to ask or any job-related information you'd like to give us?

Anything to add to what has already been addressed? (emphasis added)

On October 14, 1986 Dixie Sommers, Director of Labor Market Information Division, by IOC informed Director Nichols that K.M. had been selected for the position at issue. She stated:

“Her (K.M.) educational background includes course work in survey research methods, including sample selection methodology; and statistics, including several courses in statistical analysis at the doctoral level, knowledge of which is required in the Statistician 3 position. She is the most qualified applicant for the position.

None of the other applicants had educational background or experience approaching K. M.”
(emphasis added)

The memo indicated that 5 other persons had been interviewed, including the two grievants.

On November 17, 1986, the grievance was filed alleging a violation of §17.05(A) and all other related articles (Joint Exhibit J-1). On December 3, 1986, Director Sommers denied the grievance by IOC. In that IOC, she stated (in part)

“The selection was based on consideration of each applicant's education, experience, and job performance. Ms. M was judged to be the superior applicant because of her excellent educational background and experience in the area of statistical analysis.

It is essential that individuals working at the Statistician 3 level in this program have familiarity and experience with sampling theory, sampling methodology, and various statistical measures for evaluating and interpreting the quality of the sample and the resulting estimates. Ms. M was the only applicant who possessed this knowledge and experience.

Our meeting on November 21 to discuss your grievance, as well as information you provided in

your application and during your interview, indicate that you are not familiar with basic sampling theory and statistical measures, such as variance and standard error, used in selecting and evaluating samples and estimates.” (Emphasis added)

On January 13, 1987, the grievance came up for a Step 3 Hearing. On February 11, 1987, the designee of the appointing authority rendered her decision and denied the grievance.

In that decision, the qualifications of the Grievants were described as follows: (in part)

Grievant Castle

The mathematical computations she performs in her position are averaging and percent changes. She has no training or experience in sampling theory, though she stated at the hearing that she believed she would be able to learn the job.

Grievant Thomas

The mathematics used in that position [Stat II] are limited to averaging, percents and percent changes. She stated that, like Ms. Maynard, she has no knowledge of sampling theory. She has a high school diploma.

The designee found (in part) that

The position of Statistician 3 in the OES section, however, has particular requirements for understanding sophisticated statistical methodology which these grievants do not meet and cannot be trained to meet in a reasonable period of time; further, the type of training which would be required is not available internally.

and

In this case, it is clear that the person selected for the promotion was "demonstrably superior" to the grievants as that term is used in Article 17.05(A) of the contract.

At the Arbitration hearing held October 25, 1988, the following additional facts were adduced.

Mr. Eugene Brundige testified for the employer. Mr. Brundige is currently Deputy Director of OCB and was the principal spokesperson during the negotiation of the current contract. Mr. Brundige testified both as to the employer's interpretation of Article 17 and to the negotiations behind Article 17 as well. Mr. Brundige described the promotion process as follows: First a job is posted, bids are received, these bids are divided into stacks pursuant to §17.04 A-E. Then the group (pursuant to B) are "reviewed in seniority order, those which appear to be qualified, if not ... they are not interviewed, if qualified the most senior is selected unless a junior is "demonstrably superior". Mr. Brundige testified at length on the purported meaning of the phrase "demonstrably superior". (However, the Arbitrator, for reasons stated below, will not review this testimony.)

Dixie Sommers, Director of the Labor Management Information Division, described the Occupational Info System (OIS) and described the qualifications needed for a Statistician III in that Section. A Statistician III in OIS needed "basic sampling theory, probability theory, and advanced statistical methods". A Statistician III in OIS requires greater statistical knowledge than a Statistician III in the Operations Report Section (ORS) (the Section where Grievants were currently Statistician II's) because, according to Ms. Sommers, the statistics collected by OIS are much

more sophisticated and complex. Ms. Sommers stressed the importance of the work of OIS in collecting statistics to meet the requirements of the Federal Government, Bureau of Labor Statistics. Ms. Sommers indicated the BLS provided OIS with a special manual for the collection and analysis of these statistics which defined the specific calculations required in "high detail". Ms. Sommers indicated that one could not learn "the theory" required on the job, but that if one knows the theory, one could learn the "applications" on the job. She indicated that an employee could not be trained in theory on the job. She said that the person would have to have learned the theory in college courses. Ms. Sommers said that the "desired qualifications" were placed on the posting by Personnel. As to the 6 courses listed, she expected they would be "introduction to statistics, probability, sampling theory, sampling error, and research design". Ms. Sommers indicated that neither Grievant had these courses, while the person selected did. She also indicated that she did not discuss the nature of the current work experience of the Grievants with their supervisor. Ms. Sommers indicated that she had some role in the questions used for the applicants. She said that the applicants were to "volunteer" about their specific qualifications during their interviews and that whether one volunteered such information was a "test" of the applicant.

The employer also offered the testimony of Ms. Down, Personnel Technician from DAS. Ms. Down indicated that unlike the Classification specification, the Position Description lists the "exact" duties as provided by the agencies. She testified that after a court decision in the late 70's, early 80's, that DAS is barred from listing "minimum qualifications on Classification Specifications;" however, DAS used "desired qualifications" to "let applicants know" what the qualifications are. Ms. Down stated that the "desired qualifications" listed on proposed Classification Specifications (J-18 and J-19) were the "most-up-to-date", the most "realistic", and if a person had one of the 3 items connected by "ors", he or she was minimally qualified. She also said that one could post qualifications higher than those listed on the class specification as long as they were found in the position description.

The employer also offered the testimony of Mr. Greene of OBES. Mr. Greene stated that to do the job at issue one needed a knowledge of sampling theory, and sampling theory could only be learned in appropriate college courses and could not be learned on the job. Mr. Greene testified that he had interviewed the two Grievants as well as the person selected. He said he used a standardized interview form provided to him. His opinion was that neither Grievant was qualified because they had not had sampling theory in college courses. He said he had not talked to the current supervisor of the Grievants, nor had he reviewed the Grievant's evaluations. He said that in the interviews, he had not asked them directly about their statistical skills, nor had he asked them to solve any relevant statistical problems.

Both the Grievants testified. In essence, they both indicated that when they read the qualifications they believed they were qualified. Ms. Thomas testified that when Mr. Greene described the job and showed her the position description, she thought she could do the job and learn what was necessary during the probationary period. Both Grievants indicated that Mr. Greene never mentioned sampling theory in the interview. Ms. Thomas further stated that since the job was regulated by the BLS manual, she could follow the manual to learn. Both Grievants indicated that they were currently doing what was called "statistical analysis"; both agreed they had never learned sampling theory.

The Union also offered the testimony of Ray Findley, currently a Statistical Supervisor I and a former Statistician III in the Operations Report Section. Findley indicated that the Operations Section (the current section of the Grievants) does not do "true" sampling theory. However, he stated his opinion that sampling theory "could be learned on the job."

The Union offered the testimony of Don Wasserman with regard to negotiation of the term

"demonstrably superior". For the reasons indicated below, that testimony will not be described. Mr. Wasserman said that from the Union's perspective, qualifications are tied to Position Descriptions to make sure that qualifications are reasonably related to the job, to prevent arbitrary decisions, to prevent pre-positioning of favorites, and to keep the system "honest".

Discussion

§17.03 requires that vacancies be posted conspicuously. In addition, §17.03 requires that "[v]acancy notices will list the deadline for application, pay range, class abilities, skills, and duties as specified by the position description."

When the notice for Statistician III was posted, the "class abilities, skills, and duties" were listed under "desired qualifications," to wit, 3 courses in management and supervision (or 3 mos. exp.) 6 courses in statistical analysis (or 6 mos. exp.) or equivalent. (Emphasis added) The notice referred specifically to the position number, i.e., No. 66913. If one consulted that description, the minimum acceptable characteristics were Knowledge (1) office practices and procedures; ability to (2) cooperate with co-workers, (3) apply principles to solve practical problems and (4) write reports. Ability to (5) interpret technical manuals. Ability to (6) write technical correspondence. Ability to (5), (7) use statistical analysis, and (8) understand formulas and equations.

The Grievants read the posted notice and could have consulted the position description. They concluded that they met the qualifications. No one has seriously questioned items (1) through (6) under the position description so I will concentrate on the "statistical analysis criteria", namely (7) and (8).

The Grievants claim that when they read these criteria, they believed they were qualified. Were they justified in this belief? The title Statistician III would justify a belief in a career civil service that a Statistician II was a logical person to seek a Statistician III job. However the testimony is clear that in Ohio which uses broad Classification Specifications, such a belief is only superficially logical. However, that inference was supported by the "desired qualifications" attached to the Position Description. The job ostensibly required "6 courses statistical analysis or 6 mos. experience." The Grievants clearly had 6 mos. experience in "statistical analysis"; the Position Description of Statistician II in the Operations Report Section specifically delineates "use statistical analysis" as a major function of their jobs. (Joint Exhibit No. 8)

Both Grievants were selected along with 4 others for interviews from among 16 applicants. They were interviewed even though on the face of their applications only high school courses were listed. How were the applicants to interpret this conduct? The employer's witnesses support the conclusion that unqualified persons are not interviewed. Mr. Brundige stated that only those that "appear to be qualified" are to be interviewed. Ms. Downs said only those who are "minimally qualified" are interviewed. At the interview, the Grievants were asked a set of standardized questions. (See pages 7-8 supra.) The great majority of these questions had little to do with the substance of the job. The most relevant question occurred when Grievants were given the position description and asked if they had any questions about it and how their past training and experience transferred. Note that only 5% of the job as described on the Position Description ostensibly required "statistical analysis". Mr. Greene agreed that he never mentioned the need for "sampling theory" or other complex statistical background. Ms. Sommers said that the interview was a "test" to see what the interviewees mentioned. The Grievants were never asked whether they could do specific tasks, nor were they given any notice of what tasks they should ask about in order to pass this "test".

Neither of the Grievants were selected. In her memo of October 14, 1986 (Joint Exhibit No. 11), Ms. Sommers called the selected applicant "the most qualified" -- which implies to this reader that some others were qualified. She then said that "[n]one of the other applicants had educational background or experience approaching [the selected applicant]."

The Grievants protested the selection. The need for "sampling theory" and the failure of the Grievants to possess it, first surfaces in Ms. Sommers' grievance response of December 3, 1986. Both the written record and testimony of the employer's witnesses support the conclusion that no notice was given the Grievants of a requirement of "sampling theory" until the first step of the Grievance process. Moreover, according to the testimony at the hearing, mere knowledge of sampling theory was insufficient, the candidate had to have studied "sampling theory" at college. The position of Ms. Sommers and Mr. Greene at the hearing was quite clear: a Statistician III in OIS could not do the job without "an understanding of sampling theory" which could not be attained on-the-job and which could only be attained in college; in addition, one could not learn the functions of the job in 6 months by following the manual supplied by BLS supplemented by supervisory guidance. The position supported by Ms. Sommers and Mr. Greene at the hearing was that the Grievants were unqualified completely and that only the selected applicant was qualified. This rigid interpretation of the job criteria is not supported by the Position Description and was at least reasonably questioned by Mr. Findley's testimony that much of the task could be learned on the job.

The employer based its argument at the hearing on the position that the selected applicant met the standard of "demonstrably superior" under §17.05. (The Employer's brief did select an alternative theory consistent with the testimony, i.e., the selected applicant was the only qualified person.) Reliance on "demonstrably superior" implies that the selected person, although junior, is demonstrably superior to the qualified senior person. The Arbitrator will not reach the question of the meaning of demonstrably superior. Bad cases make bad law, and the facts of this case indicate that the contract was violated by the employer at §17.03. The breach of the contract committed by the Employer has, in the Arbitrator's opinion, so muddled the issues that any attempt to use this case to clarify the meaning of "demonstrably superior" would be futile. To seek to define and discuss "demonstrably superior" in this context would not only be stretching for the issue but would in effect constitute dicta.

In addition, the Arbitrator has some fairly strong doubts that the Statistician III (OIS) absolutely requires a college study of "sampling theory" and some fairly strong doubts that an experienced Statistician II could not learn the functions in six months with adequate supervision and use of the manuals. No doubt an employer might prefer a person with a college education in statistics; however, such a preference is not contractually mandated.

Assume, *arguendo*, that the Statistician III job does require a person trained in sampling theory in college. Then the Position Description is misleading and erroneous. Moreover, the selection of Grievants to be interviewed is also misleading. The questions used in the interview then were inadequate to determine the criteria supposedly crucial. Section 17.03 is violated because promotion was made on criteria never posted. The result is a personnel and personal mess.

First, the current occupant of the job has a position for which the evidence indicates she is eminently qualified, yet her job is tainted with the suspicion of favoritism. Absolutely no evidence was provided which indicated that this person was anything but qualified nor was in any way inappropriately involved in this decision.

Secondly, the two Grievants are two employees with long service whose evaluations revealed them to be exemplary employees, hard working, competent, and dedicated. These employees have been misled as to their opportunity for advancement and disappointed in legitimate expectations fostered by the Employer's conduct.

Thirdly, the Job Description system clearly needs revision and the revision needs immediate

implementation or more situations such as this one will occur needlessly.

Lastly, the Arbitrator is faced with the need to construct a remedy which fairly responds to the violation of §17.03, yet does justice to the individuals involved. Quite frankly, the Arbitrator feels a bit like Solomon faced with a baby, two mothers, and a knife!

Award

The Grievance is sustained.

OBES will calculate the difference in the salary of a Statistician II and a Statistician III from the date the current occupant of the position was promoted until the date of this award, February 9, 1989. This lump sum shall be divided equally between the Grievants.

OBES will raise the salary of the most senior Grievant as of the date of this award (2/9/89) to that of a Statistician III (taking into account fairly levels of pay range etc.) and shall maintain her at that pay range until such time as she is promoted naturally to a Statistician III (or a comparable position).

OBES will have conducted a Job Audit of the Statistician III (OIS) position which shall be completed within three months and then OBES and DAS shall conform the Job Description of Statistician III (OIS) to the findings of that Audit.

The Arbitrator retains jurisdiction sufficient to ensure that all questions of salary are fairly determined.

February 9, 1989

Date

Rhonda R. Rivera

Arbitrator