

**ARBITRATION DECISION NO.:**

382

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Bureau of Employment Services

**DATE OF ARBITRATION:**

June 21, 1991 and

August 14, 1991

**DATE OF DECISION:**

October 15, 1991

**GRIEVANT:**

Karen Castle and

Linda Thomas

**OCB GRIEVANCE NO.:**

G-87-0411

**ARBITRATOR:**

Harry Graham

**FOR THE UNION:**

Linda K. Fiely

**FOR THE EMPLOYER:**

Tim Wagner

**KEY WORDS:**

Demonstrably Superior Standard

Substantial Difference Standard

Promotion

Minimum Qualifications

Position Description

Classification Specification

**ARTICLES:**

Article 5 - Management

Rights

Article 17 - Promotions

and Transfers

§17.01-Promotion

§17.03-Posting

§17.04-Bidding

§17.05-Selection

**FACTS:**

The grievants, Karen Castle and Linda Thomas, have been employed by the State as Statistician 2's in the Columbus, OBES office. At the time the grievance was filed, Ms. Castle had eighteen years of service while Ms. Thomas had thirteen. In August, 1986 the employer posted for a vacant position of Statistician 3 Position. A number of people including the grievants applied. Also applying for the position was Karen Miller who was a Statistician 2 with one year of State service. Notwithstanding the greater seniority of Ms. Castle and Ms. Thomas, the position was awarded to Ms. Miller. The employer stated that the grievants did not meet the minimum qualifications for the position and that, even if they were qualified, Ms. Miller was demonstrably superior to the grievants.

**UNION'S POSITION:**

The union asserts that the only argument the employer raised during the lower levels of the grievance procedure was that Ms. Miller was demonstrably superior to the grievants. The employer did not raise a minimum qualifications issue until the arbitration and thus the employer should be precluded from raising such an argument. The union asserts that during contract negotiations, the union agreed to a limitation on the pool of applicants for vacant positions. In return, the employer agreed that seniority would be the determining factor for applicants from the pool. The parties also agreed that the position description would be the controlling document for determining what qualifications were appropriate for the job. These agreements, according to the union, secured strong seniority rights for employees in promotional situations.

The State must carry the burden to show that the junior employee is demonstrably superior to more senior qualified applicants. The employer failed to meet this burden. According to the union, the standard must demonstrate beyond doubt that he or she stands "head and shoulders" above senior applicants. Although the selected applicant possessed more statistical education than the grievants, Ms. Castle and Ms. Thomas have far more years of experience as Statistician 2's than Ms. Miller. Thus, it cannot be said that Ms. Miller is demonstrably superior to the grievants.

**EMPLOYER'S POSITION:**

The employer argues first that the grievants are not qualified for the posted position. In this case, the grievants are not able to perform the job on which they bid due to their lack of formal education in statistics. Both applicants did not have advanced education in the field and thus are not qualified for the Statistician 3 position.

Even if the grievants are deemed to be qualified, the employer argues the Ms. Miller was demonstrably superior. Ms. Miller was working on a Ph.D. in statistics; she had 13 courses in statistics and/or research methods. The grievants only had a high school education. The employer argues that the demonstrably superior standard is more akin to a "relatively equal" standard. In the opinion of the State, it means that the burden is upon the employer to show that a less senior applicant exceeds the more senior applicant in rank or quality. If the employer can do so, it may promote the junior applicant.

**ARBITRATOR'S OPINION:**

The language in Section 17.05(A) of the Contract places upon the State the burden to "show that a junior employee is demonstrably superior to the senior employee." There must be a "substantial difference" in favor of the junior applicant in order for the State to promote the junior over the senior bidder. This imprecise definition is more stringent than "relatively equal" but less demanding than "head and shoulders." This is assuming that both bidders are qualified for the position. If neither the senior nor the junior applicant bring precisely the relevant qualifications to the position, the State must promote the more senior applicant unless it can show that the junior applicant has greater potential for success in the new position.

The person selected for the Statistician 3 position was to work with a manual supplied by the Bureau of Labor Statistics and the Employment Training Administration. In conjunction with the BLS manual the employer indicated that it was necessary to know sampling theory, estimation of variance and standard deviation. Nothing on the record indicates that either of the grievants possessed knowledge of the concepts of sampling theory, estimation of variances or standard deviation. On the other hand, Ms. Miller is knowledgeable in those concepts by virtue of her undergraduate and graduate coursework. Ms. Miller

possess a substantially higher degree of statistical skills than do either of the grievants. Given the task to be performed by the Statistician 3, the State has succeeded in proving that the successful applicant, junior though she was, was "demonstrably superior" to the more senior grievants.

**AWARD:**

The grievance is denied.

**TEXT OF THE OPINION:**

In the Matter of Arbitration  
Between

**OCSEA/AFSCME Local 11**

and

**The State of Ohio, Bureau  
of Employment Services**

**Case No.:**

G-87-0411

**Before:**

Harry Graham

**Appearances:**

**For OCSEA/AFSCME Local 11**

Linda K. Fiely

General Counsel

OCSEA/AFSCME Local 11

1680 Watermark Dr.

Columbus, OH. 43215

**For State of Ohio**

Tim Wagner.

Office of Collective Bargaining

65 East State St.,

16th Floor

Columbus, OH. 43215

**Introduction:**

Pursuant to the procedures of the parties a hearing was held in this matter on June 21 and August 14, 1991. A transcript of the proceedings was taken and furnished to the Arbitrator. Post hearing briefs were filed in this dispute. They were exchanged on September 15, 1991 and the record was closed on that date.

**Issue:**

At the hearing the parties agreed upon the issue in dispute between them. That issue is:

"Did management violate the Collective Bargaining Agreement at Article 17.05 by promoting a junior

employee over a senior employee for the position of Statistician 3? If so, what shall the remedy be?"

### **Background:**

The facts in this case are straightforward and not in dispute. The Grievants, Karen Castle and Linda Thomas, have been employed by the State as Statistician 2's in the Ohio Bureau of Employment Services. (OBES). Ms. Castle had eighteen years of service at the time the incident prompting her grievance occurred. Ms. Thomas had thirteen years of service. In August, 1986 the Employer posted for a vacant position of Statistician 3. A number of people including the Grievants applied. Among those who applied for the position in addition to the Grievants was Karen Miller. At the time of the posting Ms. Miller had one year of State service. Notwithstanding the greater seniority of Ms. Castle and Ms. Thomas the position was awarded to Ms. Miller. A grievance protesting that action was filed by Ms. Castle and Ms. Thomas. An arbitration proceeding was had and award issued finding that the State had violated the Agreement in promoting the junior employee over her more senior counterparts. This decision was appealed by the Employer in the Court of Common Pleas for Franklin County, OH. That Court overturned the decision of the Arbitrator. Upon appeal, the decision of the Court was affirmed by the Court of Appeals. The original arbitrator recused herself from further involvement in this case. Accordingly, the dispute came to be heard once again before a different arbitrator.

### **Position of the Union:**

The Union points out that during the long years of hearing in this dispute the Employer has consistently stated that the selection of Ms. Miller was due to the fact that she was "demonstrably superior" to the Grievants. At the initial arbitration hearing on this matter it claimed for the first time that they did not meet the minimum qualifications for the Statistician 3 position. The Union urges this claim be dismissed out of hand. It was not raised during the grievance procedure. The State consistently defended its award of the position to Ms. Miller on the basis of her allegedly demonstrably superior qualifications for the position. The issue in this proceeding is one of demonstrably superior, not minimum qualifications according to the Union. As the State never defended its action on the grounds of minimum qualifications but rather consistently acted on its view that Ms. Miller was demonstrably superior should be interpreted to mean that the Grievants met the minimum qualifications for the position.

Furthermore, in remanding the case back to the arbitration forum the Court of Appeals indicated its view that the State had conceded the minimum qualifications of the Grievants for the position. It directed that "the arbitrator's task is limited to the application of the phrase 'demonstrably superior'...." State v. OCSEA, Docket No. 90AP-332 at 4149, 10th Dist. Ct. App. September 25, 1990. As the Court directed the arbitrator to consider solely the demonstrably superior issue, no consideration should be given to the question of minimum qualifications the Union insists.

As the Union relates the history of negotiations on the issue of promotion it asserts that the language represents a compromise. The Union agreed to a limitation on the pool of applicants for vacant positions. In return, the Employer agreed to seniority as the determining factor for applicants from the pool.

In the course of negotiations it was the view of the State that the pool of applicants possessing seniority rights for vacancies be limited. The Union accommodated the Employer. This occurs in the Agreement in a number of places. For example, Section 17.01 of the Contract defines the concept of "promotion" narrowly. It is the movement of a person from a lower to a higher pay range. In addition, a vacancy is defined as only a permanent position covered by the Agreement. This had the effect of limiting the number of employees who have seniority rights for vacant positions.

Other contract provisions relating to the selection of employees for vacant positions on the basis of seniority are found in Section 17.04 and Paragraph (C) of Section 17.05 of the Agreement. Section 17.04 establishes a division of employees by geography and related class series. The term "job groupings" is synonymous with the term "related class series". The Union agreed to this concept of job groupings in exchange for the Employer's agreement to a very strong seniority clause. This quid pro quo must be enforced according to the Union.

Section 17.04(A) of the Agreement defines the smallest group in the Agreement. Sections 17.04 (B), (C), (D) and (E) are larger groups. The parties spent a great deal of time and effort bargaining specific groups of employees to be eligible for various types of seniority rights. The Union, as reflected in the Agreement, accommodated itself to the position of the Employer when it sought to limit the pool of applicants for promotion.

In return, the Union sought expansive rights for employees within each pool of applicants. Thus, in Section 17.03 the Agreement provides that vacancies shall be posted. It continues to specify that the posting will list the application deadline, the knowledge, abilities and skills to be required, the duties of the position "as specified by the position description." The Union's Chief Spokesman on this issue, Don Wasserman of the national office, testified at the arbitration hearing that the Union sought the language to prevent the State from tailoring the position for a particular applicant or to circumvent seniority. As the position description for various positions can list qualifications and the qualifications can be in excess of those found in the classification specification, the parties agreed that the position description could be used to determine the requirements for a specific position. It is another State agency, the Department of Administrative Services, that controls position descriptions. It approves them. In the opinion of the Union, that approval ensures a measure of integrity to the process and limits the possibility that position descriptions may be tailored to specific people.

The parties specifically agreed to use the position description to define job requirements. New employees are to be given copies of their position descriptions. (Section 19.02). When the position descriptions are changed, employees must again receive copies. In Case No. G-86-0335 Arbitrator Frank Keenan determined that when the parties have agreed to be bound by a technical term of art, an arbitrator has no authority to alter their bargain.

In the course of negotiations the Union demanded a strict seniority clause for employees in the two smallest pools of applicants. Their negotiator, Don Wasserman, testified that the language in Sections 17.03 and 17.05 are related. They go together in order to provide seniority protection to employees. They were secured as the Union's price for agreement to employer positions elsewhere in the Agreement.

The concept of "demonstrably superior" was discussed by the parties in the course of negotiations. The Union informed the State that the identical language existed in its contract with the State of Illinois. In the perception of the Union negotiators at the table, the State's negotiators were well aware of the Illinois contract. They know no new ground was being broken in this Agreement.

In Illinois there have been arbitration proceedings over this issue. In Case No. 27/8-373-78, Mary Miller grievance, (December 6, 1979, Dolnick arbitrator) the arbitrator sustained the grievance of senior employees who had been denied a promotion which had been granted to a junior employee. The junior employee had a college education while the senior applicant had a high school diploma. Arbitrator Dolnick was of the view that the demonstrably superior standard required that in order to promote a junior employee that employee must demonstrate beyond doubt that he or she stands "head and shoulders" above senior applicants. In strong language arbitrator Dolnick indicated that "there must be a demonstrably definite, distinct, substantial and significant difference. The burden of proof is on the Employer." In another case, Case No. 27/8-94-79, Ed Clarkin grievance, a similar issue was raised. (July 15, 1980 Hill arbitrator). The Clarkin case involved a question of education. Arbitrator Hill found that the greater education of the junior employee who was promoted was insufficient to overcome the greater seniority of the Grievant. As will be set forth more fully below, this case involves a question of the weight to be given to education as well. The Union urges that the same result prevail as that in the Hill decision.

The term "demonstrably superior" is a significant hurdle for the employer to clear if it wishes to promote a junior employee over a more senior qualified employee. Furthermore, it is the State that must demonstrate the superiority of the junior employee. Section 17.05 clearly states as much which it provides that 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." It is the State that must carry its burden to show that the junior employee is "demonstrably superior" to more senior qualified applicants. In this case, the Union asserts the State cannot meet that burden.

Only the position description for the posted Statistician 3 vacancy may be used by the Employer in

determining whether or not the Grievants were qualified and whether or not the junior successful bidder was demonstrably superior to her more senior colleagues. The Court of Appeals mandated as much in its remand of this case when it directed that the Arbitrator interpret the phrase "demonstrably superior" in light of the factors set forth in Section 17.03 of the Agreement. Both Grievants meet the minimum qualifications for the posted Statistician 3 vacancy. Ms. Castle's position description references the requirement of "supervision" and the use of "statistical analysis." Ms. Thomas' position description contains similar entries.

In this situation the Union asserts that the Employer erred when it included on the posting educational requirements that are not found in the position description. The vacancy notice indicated the Employer's desire that applicants possess three courses in management and supervision or three months of experience. It also indicated the Employer's desire that applicants possess six courses in statistical analysis or six months of experience or the equivalent. The position description makes no such requirements. It references a requirement of knowledge of:

1. office practice and procedure
2. ability to cooperate with co-workers
3. ability to apply principles to solve practical problems.
4. ability to interpret technical correspondence
5. ability to write technical correspondence
6. ability to use statistical analysis
7. ability to understand formulas and equations.

Based upon the ranking of factors in the position description, the bulk of the Statistician 3 position, 55%, requires knowledge of the office practices and procedures, the ability to cooperate with co-workers, the ability to apply principles to solve practical problems and to write reports. Nothing indicates that Ms. Miller was superior to Ms. Castle or Ms. Thomas in these factors. In the Union's view, given Ms. Castle's 18 years of service and Ms. Thomas' 12 years of service, the Union asserts the reverse is likely to be true. It is they who would score higher in the ability to cooperate with co-workers and in knowledge of office practice and procedures. Furthermore, comparison of the position descriptions of the Grievants with the Statistician 3 position description indicates that there is a great deal of overlap. There is no great distinction between the two positions. The Employer cannot defend its action in this case on the basis that the Statistician 3 position requires use of sophisticated statistical procedures when those procedures are not set forth in the position description.

Nor may the Employer defend its selection of Ms. Miller for the position on the ground that she possesses greater training in statistics. The position description for the Statistician 3 vacancy indicates that use of statistical analysis represents 5.0% of the duties of the Statistician 3. The Grievants do statistical analysis as well. Given the small amount of statistical work actually attendant upon the Statistician 3 position, it is not to be believed that the Employer could successfully defend its action in this case based upon the asserted greater training and competence of Ms. Miller in statistics according to the Union.

Nothing in the Statistician 3 position description indicates the need for sampling theory, sampling methodology, and familiarity with inferential statistical techniques. The Employer may not assert that those characteristics are required when they do not appear in the position description. The State could have placed those requirements in the position description. It did not do so. As it did not do so in advance of the posting, it cannot do so afterwards according to the Union.

As noted above, the Grievants are of long service with the State. The Statistician classification series is 1, 2, and 3. The Statistician 3 vacancy was a natural step in both Ms. Thomas' and Ms. Castle's career. Their long service with the State must weigh heavily in determining the application of the demonstrably superior standard in this case. The Grievants are not inferior to Ms. Miller. Granted that Ms. Miller possesses more statistics education, that cannot be the determinative criterion in this dispute. The posting equates education and experience. Three management and supervision courses equal three months experience. Six months of statistical experience equate to six statistics courses. The State service of the Grievants far outweighs the educational experience of the successful bidder. The Employer could have

written a position description calling for education or a degree in statistics. It did not do so. It may not retrospectively impose such requirements in the Union's view.

Only a paper trail serves to show the alleged superiority of Ms. Miller over the Grievants. No tests were administered. No evaluation of the competence of the various bidders took place. The many years of Statistician 2 experience the Grievants possess more than compensate for any lack of formal education that they have. The Union urges that the only appropriate remedy in this situation is back pay. During the pendency of this proceeding both Grievants were upgraded. The Union seeks an award for the Grievants from the time they were improperly denied the promotion and the date of their upgrading.

### **Position of the Employer:**

The State points to the text of the Agreement at Section 17.05A and argues it is clear on its face. The language found at 17.05A provides that the position shall be awarded to the qualified employee with the most state seniority...." Presuming the bidding requirements set forth in Section 17.04 are met, the first criterion to be applied to an applicant for promotion is that of qualifications. As the State urges the language be read, it expresses the intent of the parties that applicants be qualified for the position upon which they are bidding. The State points to the transcript of these proceedings as furnishing support for this view. As it interprets testimony from both Don Wasserman, negotiator for the Union, and Gene Brundige, negotiator for the State, both testified that the parties agreed that applicants must first be qualified before being eligible for promotion. As that is the case, the State asserts that seniority does not come into play in the promotion decision until after an applicant is found to be qualified for the promotion he or she is seeking.

During negotiations, the parties recognized that the most appropriate document for establishment of qualifications was the position description. Testimony from Meril Price, the State's expert on personnel matters, indicated that the position description is the document most specific to a particular job or position in State service.

There is another proceeding between the parties in which questions surrounding the concept of minimum qualifications for positions the State proposes to fill are being arbitrated. There are other types of qualifications beyond the minima that the State imposes when filling vacant positions. These are listed on the posting as "desired qualifications." The State argues it is its exclusive management right under Article 5 of the Agreement and Section 4117.08C of the Ohio Revised Code to determine such qualifications. The Union may grieve application of the qualifications. It may not get involved in the establishment of the qualifications the State asserts.

In this dispute, the qualifications the State established and set forth on the vacancy posting came from the position description. They were germane to the position the State was seeking to fill. They were reasonable as is set forth more fully below. As that is the case, the Union cannot prevail in this dispute according to the State.

In examining the meaning of the term "qualified" the State asserts it means exactly what the man in the street would believe it to mean. That is, according to both Gene Brundige of the State and Don Wasserman of the Union, that it means the ability of an applicant to perform the duties of the position on which they are bidding. The bidder must bring to the bid the ability to do the job. In this situation, the Grievants are not able to perform the job on which they bid due to their lack of formal education in statistics. The State has no obligation anywhere in the Agreement to train applicants for positions they seek to fill.

Turning to the question of the meaning of the contractual term "demonstrably superior" found in Section 17.05A the State insists that when read in conjunction with the preceding language in the sentence, "The job shall be awarded to the qualified employee with the most state seniority..." it must mean that the phrase calls for qualifications to be established before seniority is evaluated. Only qualified employees have rights. As the Grievants were not qualified in the opinion of the State that they have more seniority than the person who was selected to fill the position is irrelevant.

While the contracts between Ohio and AFSCME and Illinois and AFSCME both use the term "demonstrably superior" it is used in different ways in the two Agreements. In Illinois, it is restricted to employees with superior skill and ability. Furthermore, the Illinois agreement sets forth a definition of

qualifications. "Any employee who meets the minimum training and experience requirements shall be eligible to bid thereon and deemed qualified and may sign the bid form during the bid period." No such language is in the Ohio Agreement. The decision of Arbitrator Dolnick in Illinois is irrelevant to this case given the different circumstances surrounding the use of the term "demonstrably superior" in Illinois and Ohio according to the State.

The Union proposed use of the term "demonstrably superior" in the course of negotiations. It was aware of Arbitrator Dolnick's decision. Yet it did not present his interpretation of the concept in the course of negotiations. It was incumbent upon the Union to do so as it proffered the language. As it did not do so, its interpretation should be given little weight in the State's view. (Citing Elkouri and Elkouri, How Arbitration Works, 4th ed. p. 362).

The State differs with the Union over the nature of the bargain that was struck in 1986. As it views the history of negotiations, the Union sought to eliminate civil service promotional standards. The State sought to ensure qualified employees would be promoted. Their mutual concerns were met in the language of 17.05A. The question of the precise meaning of the term "demonstrably superior" was left for interpretation. The Union urged in negotiations and urges here that it connotes application of the proverbial "head and shoulders" test as set forth by Arbitrator Dolnick in Illinois. The State wanted a "relatively equal" standard. In this proceeding it acknowledges the term cannot be read to mean "relatively equal." It does not mean "head and shoulders" either in the State's opinion. Consequently, it must mean some standard between "head and shoulders" and "relatively equal." In the opinion of the State it must mean that the burden is upon it to show that a less senior applicant exceeds the more senior applicant in rank or quality. If it can do so, it may promote the junior applicant.

The history of negotiations reveals the ambiguity attached to the phrase "demonstrably superior" by the parties. Article 17 was negotiated after tentative agreement had been reached by the parties. In the State's mind, there is not now and never has been a quid pro quo of strict seniority for a restriction upon those eligible to bid. Section 17.05A does not mandate strict seniority. Rather, it is a combination of seniority and qualifications. Only after applicants demonstrate qualifications does their seniority receive weight. In addition, Article 17 dealing with promotions was negotiated in conjunction with Article 18, dealing with layoffs. There is no strict seniority language in the layoff article. Similarly, there is none in the promotion article the State insists.

Turning to the specific promotions at issue in this proceeding, the State argues that the Grievants were not qualified for the vacant Statistician 3 position in question. The Ohio Bureau of Employment Services (OBES) has two sections relevant to this dispute. These are the Operations Reports Section and the Operations Information Section. The Operations Reports Section receives data from OBES offices throughout the State. It tallies the data and uses it to monitor unemployment claims in the State. No bona fide statistical knowledge is required. The tasks performed on the data involve addition, subtraction, multiplication and division. Detailed manuals guide the statisticians who are performing arithmetical tasks. Officials of OBES testified that this is the case. On the other hand, the Operations Information Section conducts a sample survey, the Occupational Employment Statistics Survey, for the Bureau of Labor Statistics of the United States Department of Labor. The Statistician 3 in the Operations Information Section performs sample design, uses standard deviation, relative error and analyses of variance. This is true statistical work, rather than arithmetical work as is performed by the Statisticians in the Operations Reports Section. The job classifications are the same but the tasks are completely different. That classifications are the same but different tasks are performed is common throughout the State. Given the multitude of tasks performed in State service it is to be expected that people in the same classification would not perform nor be able to perform the same tasks. In this case, the work of a Statistician 3 in the Operations Reports Section and the Operations Information Section is very different. Different skills and abilities must be brought to the positions according to the State. Neither of the Grievants possessed the statistical ability to perform the tasks required of the Statistician 3 in the Operations Reports Section. In the State's view, the Statistician 3 in the Operations Reports Section must possess a substantially higher level of statistical training than his or her counterpart in the Operations Information Section. The State makes the analogy of a person who passed ground school in the course of study to be a pilot. That person might be able to fly the plane. Only for



takeoffs and landings would he be unqualified. In this case, the Grievants can examine, solicit and tabulate data. They cannot perform the statistical tasks associated with generating data or analyzing it. The State insists that the Grievants were not qualified for the posted vacancy.

Even if it is found that they were qualified for the vacancy, the State insists that the successful bidder was "demonstrably superior" within the language of the Agreement. It engages in the following comparison:

Castle and Thomas have a high school education. They have no coursework in statistics. Karen Miller is working on a Ph.D. in statistics. She has 13 courses in statistics and/or research methods.

Castle and Thomas have developed a section of the applications and reporting manual for the Operations Reports Section. Miller has professional statistics publications.

Castle and Thomas have developed tables for the Bureau of Labor Statistics. Castle has experience with the five percent unemployment sample. Miller, the successful bidder, has two years of experience on the Occupational Employment Statistics Survey which is routinely used by the Statistician 3 in the Operations Information Section.

This review of the qualifications brought to the position by the bidders demonstrates conclusively that Miller is "demonstrably superior" to the Grievants, at least in the opinion of the State.

There are a number of points made by the Union that the State feels necessary to explicitly rebut. In its view, there has never been an acknowledgment by the State that the Grievants are qualified for the Statistician 3 vacancy at issue in this proceeding. No where on the record is there any evidence to support the view that the State has waived its ability to make a claim that the Grievants are not qualified for the position. This dispute was remanded back to arbitration for a hearing on the specific issue of interpretation of Article 17.05. That State cannot be precluded from arguing its position in whatever fashion it finds to be most advantageous in its view.

A claim that the State violated Section 17.03 of the Agreement is unfounded according to the State. All information relevant to the vacancy was on the posting. The Grievants and other applicants were given a thorough interview. Applicants were asked questions designed to secure information specific to their precise duties and tasks. The applicants were encouraged to tell the interviewers anything they felt relevant to a proper evaluation of their qualifications for the position. Article 17.03 deals with posting requirements. The requirements of that provision of the Agreement were met. The Grievants did not cite 17.03 in their grievance. No consideration whatsoever should be given to any claim of a violation of 17.03 in the opinion of the State.

Position descriptions are just that, descriptions. They cannot and do not list every aspect of the job. The Grievants knew the characteristics of the position they were bidding on. No violation of the posting requirements occurred in this instance.

In the final analysis the State insists that the Grievants were unqualified for the Statistician 3 position in the Operations Information Section of OBES. As the successful bidder was "demonstrably superior" to the Grievants by virtue of her education, the State acted properly in this instance it claims. The demonstrably superior standard in this particular Agreement is one lying somewhere between the concepts of "head and shoulders" and "relatively equal." The State must show the junior employee promoted in the stead of a more senior colleague to be superior. It has done so in this instance it insists.

Should it occur that the Grievances of Ms. Castle and Ms. Thomas be sustained, the State argues that it is only Ms. Castle who is entitled to any remedy. She is the senior Grievant. There was only one vacancy. Ms. Thomas is entitled to nothing in the event the Union prevails in this instance. If Castle is awarded some back pay judgment, the State urges that the amount be reduced due to the fact that she has received additional pay in the elapsed time since filing of the Grievance. This pay is above the standard wage increases and results from job audits, promotion and/or the effects of the classification modernization study carried out by the State.

## **Discussion:**

Testimony is on the record in this proceeding from Don Wasserman, chief union spokesman on the question of promotions, concerning the genesis of the language found in Section 17.05A of the Agreement. In particular, a great deal of his testimony is concerned with the manner in which the concept of "demonstrably superior" made its way into the Agreement and the interpretation to be given to the term. On page 83 of the transcript Mr. Wasserman indicated that he explained to the State's negotiator, Gene Brundige, that the term meant that except in exceptional cases, the senior qualified employee would receive a promotion. In instances when the senior employee was not promoted, it fell to the State to prove that the junior employee who was promoted was better. In Mr. Wasserman's mind, there had to be a "substantial difference" between the junior and senior bidders to justify the promotion of the junior applicant. By the language in Article 17.05A Mr. Wasserman is correct. There cannot be an interpretation of the phrase "demonstrably superior" to mean it is equivalent to "relatively equal." The language in Section 17.05A places upon the State the burden to "show that a junior employee is demonstrably superior to the senior employee." There must indeed be the "substantial difference" in favor of the junior applicant in order for the State to promote the junior over the senior bidder.

That difference, if it exists, must be evaluated against the "qualifications" for the position as indicated earlier in the relevant sentence in Section 17.05A. There is a two-tiered process. The senior bidder must be qualified. At the hearing the State's negotiator, Gene Brundige, was clear that from the outset of negotiations the State was concerned with the "qualifications" of bidders. (Transcript, p. 96.) Brundige continued to state his view that the language that is in the Agreement at Section 17.05A reflects the bargain of the parties that in the first instance senior qualified bidders would be promoted. The State negotiated an exception, the "demonstrably superior caveat." (Transcript, p. 99.) The testimony of Brundige is not contradictory to that of Wasserman. It may more accurately be characterized as being complementary to it. If the senior bidder is qualified, the burden shifts to the State to show that a junior employee is more qualified. In his testimony, Mr. Wasserman said as much. On page 64 of the transcript he indicates that "Among those qualified, the senior person gets the position." (Emphasis added) That was the position of the Union in negotiations and that is what it secured, subject to the proviso that if the State promotes a junior applicant, it may be required to prove that the junior applicant is superior to the senior applicant. The language confers substantial rights upon senior bidders. They do not have to be the "most qualified" or have the "greatest qualifications." They merely have to be "qualified." If a senior bidder is qualified, the State may select a junior applicant. If it does so, it may be required to show, to demonstrate, that the successful junior bidder brings superior attributes to the position. If the senior bidder is qualified, the State must convince a neutral reviewer in the event of a grievance that the junior bidder is superior. To do so, the State must show that the attributes brought to the position by the junior bidder more nearly fit the requirements of the position than to do those of the senior qualified bidder. In Mr. Wasserman's words, there must be a "substantial difference" between the junior and senior bidders. If neither the senior nor the junior applicant bring precisely the relevant qualifications to the position, the State must promote the more senior applicant unless it can show that the junior applicant has greater potential for success in the new position. In the context of the negotiations surrounding this language, the State did not secure its original object of a "relatively equal" test. The State's negotiator, Gene Brundige admitted as much at the hearing. (Transcript, p. 102.) Similarly, the "head and shoulders" test was not embraced by the State. (Transcript, p. 102.) Given this history of negotiations and the wording of Section 17.05A the Arbitrator believes that the construction of the language espoused by the State in its post hearing brief is the most accurate approximation of the true meaning of the term "demonstrably superior." That is, that the State must bear the burden of showing a junior employee promoted over a senior employee is greater in rank or quality. In order to do so, it must show there exists a "substantial difference" in favor of the junior over the senior bidder. This imprecise definition, is more stringent than "relatively equal" but less demanding than "head and shoulders."

The Economist recently shed light on this dispute. It facetiously defined a statistician as "somebody who is good with numbers but does not have the personality to be an accountant." (September 7th-13th, 1991, p. 56) It continued to amplify concerning the profession of statistician:

"But what is a statistician? Anybody who works mainly in statistics could reasonably claim the label? Few do, though: most self respecting economists are well trained in statistical methods, but even so they would not dream of calling themselves statisticians. (Ibid)"

In determining the outcome of this particular dispute it becomes necessary to examine the qualifications of the bidders in order to determine if the senior applicants, Castle and Thomas, were indeed qualified for the position of Statistician 3. This dispute cannot be decided without reference to the qualifications of the Grievants and the successful bidder, Ms. Miller. This is a new hearing and in order to determine if Ms. Miller was demonstrably superior to the Grievants comparison of their qualifications is inescapable.

As testified to by Meril Price, it is possible for employees in State service to have the same classification but to perform different duties. (Transcript, p. 321.) Several examples to this effect were provided by Ms. Price. In this case, the Statistician 3 vacancy to be filled was in a different section of OBES from that in which the Grievants worked. The Grievants worked in the Operations Information Section. The vacancy was in the Operations Reports Section. The tasks performed by the Operations Information Section from those performed by the Operations Reports Section. As testified to by Dixie Sommers of OBES, the duties of Ms. Castle and Ms. Thomas would involve:

"Compiling and adding, computing, percentages, making sure totals were verified, and presenting the information in table format, making sure that all the rows and columns of the table were correct and adequate and accurate. (Transcript, pp. 283-284.)"

In Ms. Sommers view, the computational activities involved were percentages and averages. (Transcript p. 285.)

The Statistician 3 vacancy in the Operations Reports Section was to work with manuals supplied by the Bureau of Labor Statistics and the Employment Training Administration. In conjunction with the BLS manual Ms. Sommers indicated that it was necessary to know sampling theory, estimation of variance and standard deviation. (Transcript, p. 290.) No high level statistical knowledge is needed to use the ETA manual. (Transcript, p. 291.) Nothing is on the record to indicate that either of the Grievants possessed knowledge of the concepts of sampling theory, estimation of variance or standard deviation. On the other hand, Ms. Miller is knowledgeable in those concepts by virtue of her undergraduate and graduate coursework.

The person who came to fill the Statistician 3 vacancy at issue in this proceeding would participate in sample design. According to Ms. Sommers this would require a higher level of statistical knowledge than other types of statistical work performed in the Bureau. (Transcript, pp. 314-315.) While there is overlap between the work of Statisticians in the Operations Reports Section and the Operation Information Section, there is a crucial difference between the tasks performed by the two Sections. The former may be characterized as manipulating and presenting data. The latter is concerned with the generation and production of data. Different skills are needed for statistical work in each Section. Ms. Miller, the successful bidder, possesses those skills to a substantially higher degree than does either of the Grievants. This is by virtue of her education in statistics. Given the task to be performed by the Statistician 3 in the Operations Information Section the State has succeeded in proving that the successful applicant, junior though she was, was "demonstrably superior" to the more senior Grievants.

### **Award:**

The grievance is denied.

Signed and dated this 15th day of October, 1991 at South Russell, OH.

Harry Graham  
Arbitrator

