

ARBITRATION DECISION NO.:

399

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Bureau of Employment Services

DATE OF ARBITRATION:

September 13, 1991

DATE OF DECISION:

November 21, 1991

GRIEVANT:

Dale R. Morgan
Deborah Kleckner

OCB GRIEVANCE NO.:

11-07-(88-06-02)-0015-01-09

ARBITRATOR:

David M. Pincus

FOR THE UNION:

Louis Haynes

FOR THE EMPLOYER:

Rachel L. Livengood

KEY WORDS:

Promotions
Transfer of Person
Remedy for Improper
Transfer

ARTICLES:

Article 5 - Management
Rights
Article 17 - Promotions
and Transfers
§17.01-Promotion
§17.02-Vacancy
§17.03-Posting
§17.04-Bidding
§17.05-Selection
§17.06-Civil Service
Examinations
§17.07-Transfers

§17.08-Demotions

§17.09-Nepotism

Article 25 - Grievance

Procedure

§25.01-Process

§25.03-Arbitration

Procedures

FACTS:

A Claims Examiner 2 position in the Napoleon OBES Office was vacated by the resignation of Sammy Rodriguez on November 6, 1987. The PCN for that position was 60513.0. The vacancy for this position was not posted. A Claims Examiner 2, Debra Kleckner from the Akron OBES office, was transferred to the Napoleon office effective May 22, 1988. The Napoleon office and the Akron office were not in the same district. The PCN for the position occupied by Ms. Kleckner in the Akron office was 20228.0. This position was not filled. The PCN for the Claims Examiner 2 position occupied by Ms. Kleckner in the Napoleon office was 60514.0. The employer concedes that Article 17 was violated as a result of the above-referenced transfer. The only dispute in this case is the appropriate remedy.

UNION'S POSITION:

The union argued that the Claims Examiner 3 position in the Napoleon office should be vacated by the grievant. The position should then be posted and filled in accordance with Article 17. The union also asserted that back pay and benefits should be granted. Payment was to be made to the most senior employee who would have had the right and opportunity to bid on this position if it had been properly posted. This payment is necessary, according to the union, because of the length of time since the illegal transfer was made and so the employer would realize that similar violations would be penalized in the future. Otherwise, the employer could continue to circumvent the contract without sustaining any punishment. The union also requests that the employer be forced to restore Ms. Kleckner to her former position in the Akron OBES office.

EMPLOYER'S POSITION:

The employer urged the arbitrator to order the posting and filling of the Claims Examiner position, PCN 60514.0, in accordance with Article 17. All other remedial requests offered by the union were argued to be excessive by the employer. Back pay to the most senior employee is inappropriate because there is no evidence that this employee would have applied for the position had it been posted. The employer urged the arbitrator not to force the retention of the grievant at the Napoleon office. Such a remedy would result in the enlarging of the Napoleon work force if she was not the successful applicant. This would impinge on management's right to determine the size of the work force, an exclusive right held by the employer under Article 5 and ORC 4117.08(C).

ARBITRATOR'S OPINION:

The Claims Examiner position in the Napoleon office is to be vacated by the grievant. In accordance with the terms of Article 17, the position needs to be posted as quickly as possible. Since the grievant has a right to bid on this position, she should not be reassigned until her status at Napoleon is determined. If the grievant fails to obtain the Napoleon position, she should be restored to her former position in the Akron office. The grievant will retain the title and pay equivalent to the position she vacated. Thus, she would lose no pay or suffer any job status reduction in position.

No damage payments by the employer are ordered. A ruling in the union's favor would result in the award of punitive-type remedies, damages inappropriate in an arbitral forum. Compensatory damages for any loss suffered by the grievant are appropriate. To complete the restoration process, the person who would have attained the grievant's position but for the illegal transfer needs to be identified and made whole in terms of back pay and benefits.

TEXT OF THE OPINION:

**STATE OF OHIO AND OHIO
CIVIL SERVICE EMPLOYEES
ASSOCIATION LABOR ARBITRATION
PROCEEDING**

IN THE MATTER OF THE
ARBITRATION BETWEEN

**THE STATE OF OHIO, BUREAU OF
EMPLOYMENT SERVICES**

-and-

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

GRIEVANCE:

Dale R. Morgan (Article 17 Rights)

OCB Case No.:

11-07-880602-0015-01-09

ARBITRATOR'S OPINION AND AWARD

Arbitrator:

David M. Pincus

Date:

November 21, 1991

APPEARANCES

For the Employer

Valerie Butler,
Contract Compliance Officer
Janice Viau,
Labor Relations Manager
Rachel L. Livengood, Advocate

For the Union

Deborah Kleckner, Grievant
Louis Haynes, Staff Representative
John Feldmeier, Arbitration Clerk
Linda Fiely, General Counsel

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.04 entitled Arbitration Procedures and

Arbitration Panel of the Agreement between the State of Ohio, the Bureau of Employment Services, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for the period July 1, 1986 through July 1, 1989. (Joint Exhibit 1).

The arbitration hearing was held on September 13, 1991 at the office of the Ohio Civil Service Employees Association, Columbus, Ohio. The Parties had selected David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would submit briefs. After a number of mutually agreeable extensions, briefs were finally submitted on October 21, 1991.

STIPULATED ISSUE

What is the remedy for the Employer's violation of the Contract by transferring Debbie Kleckner to the position of Claims Examiner 2 without posting and filling the vacancy in accordance with Article 17 of the Parties' Collective Bargaining Agreement (Joint Exhibit 1)?

PERTINENT CONTRACT PROVISIONS

ARTICLE 25 - GRIEVANCE PROCEDURE

Section 25.01 - Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances.

...

(Joint Exhibit 1, Pg. 37)

Section 25.03 - Arbitration Procedures

Both parties agree to attempt to arrive at a joint stipulation of the facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its own witnesses who are not employees of the Employer.

Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than thirty (30) days after the conclusion of the hearing, unless the parties agree otherwise.

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement.

If either party desires a verbatim record of the proceeding, it may cause such a record to be made provided it pays for the record. If the other party desires a copy, the cost shall be shared.

(Joint Exhibit 1, Pg. 40)

ARTICLE 17 - PROMOTIONS AND TRANSFERS

Section 17.01 - Promotion

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

Section 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.

Section 17.03 - Posting

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

Section 17.04 - 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).
- B. All employees within the geographic district of the Agency (see Appendix J) where the vacancy is located, who presently hold a position in the same, similar or related class series (see Appendix I).
- C. All other employees of the Agency in the same, similar or related class series.
- D. All other employees of the Agency.
- E. All other employees of the State.

Section 17.05 - Selection

A. The 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.

B. If no selection is made in accordance with the above, then the same process shall be followed for those employees identified under 17.04(B).

C. If no selection is made in accordance with the above, then the agency will first consider those employees filing bids under 17.04(C) and then 17.04(D), and then 17.04(E). Employees bidding Under 17.04 (C), (D) or (E) shall have no right to grieve non-selection.

Section 17.06 - Civil Service Examinations

Where a Civil Service Examination has been given, all eligible employees within the county, office or institution of the Agency in which the vacancy exists who passed the examination, shall be considered in filling the vacancy as described above.

Section 17.07 - Transfers

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

Section 17-08 - Demotions

Job movements to a lower pay range are demotions. Employee requested demotions shall only be done

with the approval of the Employer.

Section 17.09 - Nepotism

No employee shall be directly supervised by a member of his/her immediate family.
(Joint Exhibit 1, Pgs. 26-27)

STIPULATED FACTS

1. The Grievance is properly before the arbitrator.
2. The facts of the grievance are not in dispute.
3. A Claims Examiner 2 position in the Napoleon OBES office was vacated by the resignation of Sammy Rodriquez on November 6, 1987. The PCN for that position was 60513.0.
4. The vacancy for this position was not posted.
5. A Claims Examiner 2, Debra Kleckner from the Akron OBES office was transferred to the Napoleon office effective May 22, 1988.
6. The Napoleon OBES office and the Akron OBES office were not in the same district.
7. The position control number used for the Claims Examiner 2 position occupied by Ms. Kleckner in the Akron office was 20228.0. This position was not filled. The position control number for the Claims Examiner 2 position occupied by Ms. Kleckner in the Napoleon office was 60514.0.
8. As a result of the classification modernization study, the position occupied by Ms. Kleckner in the Napoleon office was upgraded to the position of Claims Examiner 3 effective March 26, 1990, assigned to pay range 27.
9. OBES Claim Examiner 2's were upgraded to Claims Examiner 3's as a result of the classification modernization study. No change in pay range.
10. The employer concedes that Article 17 was violated as a result of the above-referenced actions. (See employer's revised Stet) 4 position).
- II. The parties agree that in making alternative remedy arguments that if the Arbitrator determines that Ms. Kleckner should be returned to the Akron OBES office that it would be at no loss of pay or position, the State reserves all rights of argument.
12. The parties agree that if the Arbitrator determines a posting is proper in the Napoleon office the position should be posted as a claims Examiner 3.

CASE HISTORY

The circumstances surrounding the present matter do not appear to be in dispute. Sammy Rodriquez, a Claims Examiner 2 in the Napoleon OBES office, vacated his position on November 6, 1987 by resigning. This position had a Position Control Number (PCN) of 60513.0. It should be noted that this position was never formally filled nor posted as a vacancy.

On May 2, 1988, Deborah Kleckner, the Grievant and a Claims Examiner 2, requested a transfer from the Akron local office to the Napoleon local office. She, moreover, acknowledged that moving and travel expenses would not be realized by the Employer if the request was granted (Joint Exhibit 4).

On May 25, 1988, the Grievant was informed her request for transfer was being honored. She was transferred with no change in step or salary effective May 22, 1988. The Personnel Requisition Form and Position Description Authorization indicated a change in person and position (Joint Exhibit 4). A personnel action of this type meant that the Grievant's position as well as her person were transferred to the Napoleon office from the Akron office.

The method and process used in the above-mentioned transfer were challenged by the Grievant. On May 27, 1988, she filed a grievance which contained the following particulars:

". . .

The claims Examiner 2 position in the Napoleon OBES office, vacated by the resignation of Sammy

Rodriguez, November 6, 1987, has not been posted for bids. A Claims Examiner 2 from Akron office was reassigned May 23, 1988 to fill that position, with the intent of making it a Permanent lateral transfer. Fourteen days notice was not given to the reassigned employee or the Union. Verbal notice was given EMPLOYEE MAY 16, 1988 and to THE UNION (steward Napoleon) MAY 17, 1988.

..."

(Joint Exhibit 2)

The remedy portion of the grievance included the following demands:

"...

The CLAIMS EXAMINER 2 VACANCY, be POSTED for bid. The EMPLOYEE which was erroneously reassigned, be made whole for all damages and expenses resulting from the reassignment. Any other remedy judged appropriate by an arbitrator.

..."

(Joint Exhibit 2)

The grievance was not settled during the early stages of the grievance procedure. On September 9, 1991, Dick Daubenmire, Chief of Contract Compliance, entered a revised Step 4 answer. As a result of two recent arbitration awards, the Haberney and Carpenter cases, the Employer decided to grant the present grievance to a limited extent and with some major limitations. The Employer realized it had violated Article 17 requirements. As such, it decided to post a Claims Examiner 2 position in the Napoleon office, and have it filled in accordance with Article 17 of the Collective Bargaining Agreement (Joint Exhibit 1).

The revised Step 4 answer did not totally settle the disputed matter. The Parties were unable to reach a settlement regarding the appropriate remedy.

THE PARTIES' POSITIONS REGARDING THE APPROPRIATE REMEDY

The Position of the Union

The Union argued that the Claims Examiner 3 position in the Napoleon office should be vacated by the Grievant. The position should then be posted and filled in accordance with Article 17 requirements. These desired moves would return the status quo regarding District Seniority to bargaining unit members and reflect the illegal nature of the Employer's initial decision. Without a ruling requiring vacating the position, bargaining unit members' seniority rights might be adversely affected in the District in which the Napoleon office is located.

In addition to the posting described above, the Union asserted that back pay and benefits should also be granted. Again, the restoration of the status quo was urged by the Union in support of this remedy. Payment was to be made to the most senior individual who would have had the right and opportunity to bid on this position, if it had been posted in accordance with the Agreement (Joint Exhibit 1). Mary Hopkins was identified as the individual enjoying the seniority status in question.

Even though much time had elapsed, payment was necessary because of the contractual obligations involved. It was also necessary so the employer could realize that similar violations would require reasonable consideration in the future. Otherwise, the Employer could continue to circumvent the contract, admit its error once confronted, and yet, never realize any economic loss for its transgressions.

The Employer's admitted contractual violation should not serve as a bar against the lawful rights enjoyed by the Grievant. The violation itself, resulted in the improper filling of the Napoleon position. The Grievant had occupied a valid and proper bargaining unit position prior to the illegal transfer. The Employer must therefore be forced to restore her to her former position in the Akron OBES office. Such a remedy would not serve as an illegal transfer under Article 17.

If the Arbitrator restored the Grievant to her former position in Akron, certain additional remedies were

requested. The Employer was to compensate the Grievant for any costs, expenses and damages incurred by the Grievant in obtaining reinstatement to her prior position; which includes any costs incurred or associated with the move back to Akron. It was also requested that the Grievant be allowed to remain in the Napoleon office until the contested position is posted and filled. Such an option would allow the Grievant with maximum flexibility should she be fortunate enough to become the successful applicant.

The Position of the Employer

The Employer recognized that it violated Article 17 by utilizing a person and position change. As such, the Employer urged the Arbitrator to order the posting and filling of Claims Examiner 3, PCN 60514.0 in accordance with Article 17. All other remedial requests offered by the Union were thought to be excessive and somewhat outside this Arbitrator's authority as specified in Section 25.03.

The issuance of an order for back pay was thought to be inappropriate. It becomes difficult to award back pay when the successful applicant is unidentifiable. The Union asserted that Mary Hopkins enjoyed this status. Evidence and testimony, however, were never brought forth indicating that she would have applied for the position but for the Grievant's illegal transfer.

A back pay award could also be punitive. The Employer could be forced to pay an employee for work never performed. An award of this type would result in punitive damages; the Union never established it was harmed yet the grievance was filed on behalf of the Union. The Union posited an alternative argument. Back pay should only be granted to the successful applicant after the probationary period has been completed.

The Employer argued that it would be inappropriate to transfer the Grievant back to the Akron office. Such an undertaking would result in an additional violation of Article 17.

With respect to the potential filling of a Claims Examiner 3 position in Napoleon, the Employer emphasized it should be the position occupied by the Grievant. That is, the position identified as PCN #60514.0 (Joint Exhibit 3) should be filled rather than Rodriguez's position which was identified as PCN #60513.0. The former position serves as the appropriate vacancy filling vehicle because it was indeed filled and gave rise to the present grievance. Also, if the Arbitrator ordered the Employer to fill the Rodriguez position, he would be making the determination rather than the Employer. If such an outcome does indeed arise, the Grievant's standing would have to be established; should she be considered an employee of Akron or Napoleon office? The Employer argued she be considered an employee of the Akron office for selection purposes. If the initial Napoleon position had been properly posted rather than assigned via an illegal transfer mechanism, the Grievant would have been housed in the Akron office.

The Employer urged the Arbitrator not to force the retention of the Grievant at the Napoleon office. Such a remedy would result in the enlarging of the Napoleon work force if she was not the successful applicant, a sole and exclusive right held by the Employer as specified in Article 5 and ORC 4117.08C. damages. She initiated the request and voluntarily accepted the transfer. As such, her actions serve as a waiver to these requested obligations. Also, these potential obligations are actually punitive in nature which precludes their payment.

THE ARBITRATOR'S OPINION AND AWARD REGARDING THE APPROPRIATE REMEDY

This present dispute represents a unique set of circumstances because the Employer admits to a contract violation, and yet, strongly disagrees with the Union in terms of relevant remedy considerations. The following remedy award was fashioned with a certain principal in mind. The status quo needs to be restored to where it was at the time of the illegal transfer from Akron to Napoleon. At the same time, certain seniority rights and obligations need to be maintained. After all a contract violation has been acknowledged. Without some semblance of a make whole remedy, the identified violation would prove almost meaningless.

The Employer is ordered to comply with the following remedy particulars?

First, the Claims Examiner 3 position in the Napoleon office is to be vacated by the Grievant. In accordance with the terms of Article 17 of the Agreement, the position needs to be posted as quickly as possible. Since the Grievant has a right to bid on this position, she should not be reassigned until her status at Napoleon is determined.

If the Grievant fails to obtain the Napoleon position, she should be restored to her former position in the Akron office. The Grievant will retain the title and pay equivalent to the position she vacated. She, therefore, would lose no pay or suffer any job status reduction in position.

This Arbitrator does not order the various damages suggested by the Union. Such an outcome seems most unreasonable in light of various equitable considerations. A ruling in the Union's favor would result in the award of punitive-type remedies, damages inappropriate in the arbitral forum. The Grievant is definitely entitled to compensatory damages to the extent she has been deprived of a contract benefit. The particulars described above make the Grievant whole for her loss. They also take into consideration the fact the Grievant asked to be transferred and that the Employer botched this personnel action. Compensatory damages have never been intended to serve as penalties or as deterrents to discourage future violations. I am unwilling to deviate from this basic axiom.

To complete the restoration process, the person who would have attained the Grievant's position but for the illegal transfer needs to be identified and made whole. The record indicates that Mary Hopkins was the most senior person who would have been in line for a promotion to Claims Examiner 3 pursuant to Article 17 of the Contract. The Employer shall make her whole in terms of back pay and benefits, for the difference between her pay at the time the illegal transfer became effective and what her pay would have been as a Claims Examiner 3.

Dr. David M. Pincus
Arbitrator

November 21, 1991