

ARBITRATION DECISION NO.:

419

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Environmental Protection
Agency
Southeastern Office

DATE OF ARBITRATION:

December 9, 1991

DATE OF DECISION:

February 13, 1992

GRIEVANT:

Steven Williams

OCB GRIEVANCE NO.:

12-00-(89-09-29)-0028-01-13

ARBITRATOR:

Rhonda Rivera

FOR THE UNION:

Mike Muenchen
Gene Freeland

FOR THE EMPLOYER:

William Kirk
Rachel Livengood

KEY WORDS:

Promotions
Reclassifications

ARTICLES:

1986-1989 Contract

Article 5-Management Rights

Article 17-Promotions and

Transfers

§17.01-Promotion

§17.02-Vacancy

§17.03-Posting

§17.04-Bidding

§17.05-Selection

§17.07-Transfers

§17.08-Demotions

1989-1991 Contract

Article 5-Management Rights

Article 17-Promotions and

Transfers

§17.01-Promotion

§17.02-Promotional

Probationary Period

§17.03-Vacancy

§17.04-Posting

§17.05-Applications

§17.06-Selection

§17.08-Transfers

§17.09-Demotions

FACTS:

Grievant was a Geologist 3 in the Southeastern office of the Ohio Environmental Protection Agency, the Division of Groundwater. In June of 1989 it was determined simultaneously that the Division needed senior level staff at the Geologist 4 level, and that all employees within the Division of Groundwater would be classified in the geologist series. Three Geologist 4 positions were posted at the Northwest, the Northeast, and the Southwest offices, but no posting was made at the Southeast office. At the Southeast office, it was determined that an Environmental Engineer 2 was the most senior person at that level in terms of her "functions." Although she made no request for reclassification, she accepted reclassification from an Environmental Engineer 2 position to the Geologist 4 position. The Personnel Action specified that her class number changed, but that her pay range and PCN remained the same. The Personnel Action indicated that the action was a "Reassignment," and remarks stated that she was "Reassigned per updated P.D."

The grievant, a Geologist 3 in the Southeastern office, grieved the personnel action "reclassifying" the Environmental Engineer 2. The grievant asserted that the action was actually the filling of a vacancy, and that the placing of another employee in the Geologist 4 position violated Section 17.05 of the Contract, which requires that vacancies be posted. The Employer and Union stipulated that if the Geologist 4 position had been posted as a vacancy, the grievant would have been entitled to the position pursuant to Section 17.05(A) of the contract.

At the Step III hearing the Employer asserted that there had been no vacancy, and that prior to the reassignment, the employee reassigned was improperly classified. The Geologist 4 classification most accurately described the Environmental Engineer's duties and the position reassignment reflected this. At the Step 4 review the Office of Collective Bargaining made the finding that the reclassification of the position was undertaken so that there would be consistent classification series used in the division, and that the two classifications were in the same pay range.

At the Arbitration Hearing, the employee reassigned testified that upon becoming a Geologist 4, she was given "oversight" duties over other geologists, including the grievant. The oversight function had not been exercised by the reassigned employee while she held the position of Environmental Engineer 2. In addition, upon reclassification the employee began to review Geologist 3's time cards and keep track of the number of hours expended per program. During her testimony, she agreed that she had received a position description with "new duties" but with the same PCN, and that her responsibilities had "substantially changed." Her new duties included oversight review of report preparation, and attending meetings "in the Supervisor's case," neither of which she had performed as an Environmental Engineer 2.

UNION'S POSITION:

Both the failure to post the position and the placement of the Environmental Engineer into the position violated Article 17. The action taken by the employer fell within the scope of Section 17.05 of the Contract and constituted a vacancy which had to be posted.

EMPLOYER'S POSITION:

No vacancy existed because the duties of the reassigned employee did not change, the PCN remained the same, and the pay range remained the same. The personnel action was a reclassification; there was no intent to circumvent the Contract, and no violation of the Contract occurred. The decision to reclassify was based solely on the efficient and effective operation of the Agency, and was within Management's rights under Article 5.

ARBITRATOR'S OPINION:

Although Article 5 of the Contract gives the Employer the right to rename a position to facilitate good management, an Employer may not use the renaming to disguise an attempt to disrupt the seniority benefits of bargaining unit employees. In assessing the nature of the personnel action, Arbitrators have attempted to look behind the form of the change to the substance of the change. The crucial factor must be found not in words but in the actual functioning of the position. The right and duty to supervise others indicates a different level of responsibility and accountability-- opportunities that are valuable in order to move up the career ladder. The change in the reassigned employee's duties upon her change in classification could be characterized as "substantial," and "significant." Placing an employee in the Geologist 4 position in the Southeast office without the use of Article 17 violated that Article.

AWARD:

Grievance sustained, with grievant awarded Geologist 4 position retroactively with full back pay and benefits. The wrongfully reassigned employee is to be restored to her former position or its current equivalent, with the State not to recoup any pay or benefits from her for the period during which she held the Geologist 4 position.

TEXT OF THE OPINION:

**In the Matter of the
Arbitration Between**

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

and

**Ohio Environmental
Protection Agency
Employer.**

Grievance No.:

12-00-(09-29-89)-28-01-13

Grievant:

S. Williams

Hearing Date:

December 9, 1991

Closing Date:

January 11, 1992

Award Date:

February 13, 1992

For the Union:
Mike Muenchen
Gene Freeland

For the Employer:
William Kirk
Rachel Livengood

Present at the Hearing in addition to the Grievant and Advocates were Nancy Henderson Tock, Geologist 4 (witness), Carol Bowshier, Class specialist (witness) , Clarissa Gereby, Geologist 4 (witness) , Meril Price, Executive Assistant to Director of OCB (witness) , Thomas M. Allen, Assistant Chief - DDAGW (witness), Susan Day, Human Resources Specialist (witness).

Preliminary Matters

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

Joint Exhibits

1. a) Contract `86-'89
b) Contract `89-'91
2. Grievance Trail
3. Arbitration Request
4. EHOc of Nancy Henderson Tock
5. EHOc of Grievant
6. Ohio EPA Tables of Organization for Ground Water
 - a) January 16, 1989
 - b) November 1, 1989
 - c) November 1, 1990
7. Position Descriptions for Geologist 4 positions in NE, SW, SE District Offices (1989)
8. Personnel Actions relevant to Henderson Tock's employment with OEPA 1986-1989
9. Position Descriptions relevant to Henderson Tock's employment with OEPA

Employer's Exhibits

1. Position Control Roster EPA - Groundwater dated September 23, 1989
2. Position Control Roster EPA - Groundwater dated October 18, 1989

3. Position Control Roster EPA - Groundwater dated May 21, 1989
4. Position Control Roster EPA - Groundwater dated July 30, 1989
5. Personnel Action for C. Gereby dated July 16, 1989 (Promotion)
6. Classification Specification for Environmental Engineer 2
7. Classification Specification for Geologist 4

Union Exhibit

1. ORCA 1231-47-01(45) - (72)

Stipulated Facts

1. Seniority dates:

Nancy Henderson Tock - 01/06/86

Steven Williams - 02/01/88

Douglas Snyder - 09/26/88

Eric Adams - 03/27/89

2. The Geologist 4 position PCN 70302.0 was not posted for bid.

Issue for the Union

Did the Employer violate the Contract when it placed Environmental Engineer, Nancy Henderson Tock, into a Geologist 4 position in the Southeast District Office of the Ohio Environmental Protection Agency, Division of Groundwater on October 8, 1989? If so, what is the remedy?

Issue for the Employer

Did the Employer violate the contract when it changed the classification title from Environmental Engineer 2 to Geologist 4 while said position (PCN 70302.0) was occupied by Nancy Henderson Tock? If so, what shall the remedy be?

Relevant Contract Provisions

ARTICLE 5 - MANAGEMENT RIGHTS (1986-1989 Contract)

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9.

ARTICLE 17 - PROMOTIONS AND TRANSFERS (1986-1989 Contract)

§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

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 - 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.

§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.

§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.

§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.

ARTICLE 5 - MANAGEMENT RIGHTS (1989-1991 Contract)

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08(C), Numbers 19.

ARTICLE 17 - PROMOTIONS AND TRANSFERS (1989-1991 Contract)

§17.01 - Promotion

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

§17.02-Promotional Probationary Period

Employees who are promoted shall serve a probationary period of one hundred twenty (120) days for classifications paid at grades one (01) to seven (07) and grades twenty-three (23) to twenty-eight (28) or one hundred eighty (180) days for classifications paid at grades eight (08) to twelve (12) and grades twenty-nine (29) to thirty-six (36). However, the Disability Claims Adjudicator 1 shall have a probationary period of nine (9) months. During a promotional probationary period, the Employer maintains the right to place the employee back in the classification that the employee held previous to the promotion if the employee fails to perform the job requirements of the new position to the Employer's satisfaction.

§17.03 - 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.

§17.04 - 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. Posted vacancies shall not be withdrawn to circumvent the Agreement.

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

§17.05 - Applications

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

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

description.

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

E. All other employees of the Agency.

F. All other employees of the State.

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

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

§17.06 - Selection

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

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

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

§17.08 - Transfers

If a vacancy is not filled as a promotion pursuant to 17.05 and 17.06, 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. The Agency shall consider requests for lateral transfers before considering external applications. Denial of such transfer requests shall not be grievable.

§17.09 - Demotions

Job movements to a lower pay range are demotions. Employee requested demotions shall only be done with the approval of the Employer.

Facts

The venue of this Grievance is within the Ohio Environmental Protection Agency, the Division of Groundwater. Mr. Thomas M. Allen testified on behalf of the Employer. Now the Assistant Chief of Drinking and Ground Water, he was, at the time of the Grievance, Assistant Chief of Groundwater. Mr. Allen said that in June of 1989, the Division was determined to need senior level staff at the Geologist 4 level. A simultaneous decision, according to Mr. Allen, was to have all "persons" within the Division of Groundwater be classified in the geologist series. Three Geologist 4 positions were posted at the NW, NE, SW offices. No posting was made at the SE office. At the SE office; Mr. Allen said that the Division management had concluded that it already had personnel at the Geologist 4 level, namely -Nancy Henderson Tock who was

then classified as an Environmental Engineer 2. Mr. Allen said that Ms. Henderson Tock was the most senior person at that level in the Southeastern office, senior in terms of "her functions," not senior in the Geologist series. Ms. Henderson Tock was a geologist in education and training and was at pay range 32, the same pay range as a Geologist 4. In October 8, 1989, Ms. Henderson Tock was reclassified from an Environmental Engineer 2 to a Geologist 4. This action was not taken as the result of any request by Ms. Henderson Tock. Rather, she was asked by management if she would accept such a re-classification, and she agreed. The Personnel Action specified that her class number changed from 85712 to 83824 but that her pay range (32) remained the same as before. Her PCN number was also unchanged but the class title changed from Environmental Engineer 2 to Geologist 4. Under the change column in the Personnel Action, "Reassignment" was marked, and in the remarks section, the Personnel Action read "Reassigned per updated P.D (Position Description)."

On September 22, 1989, the Grievant, a Geologist 3 in the Southeastern office learned that Ms. Henderson Tock had been designated a Geologist 4, and on September 29, 1989, he grieved that action. The Grievant maintained that placing Ms. Henderson Tock in the Geologist 4 position violated the Contract at §17.05. He maintained that the Geologist 4 position constituted a "vacancy" and should have been posted. The Employer and Union have stipulated that if the Geologist 4 position been posted as a vacancy that the Grievant was entitled under §17.05(A) to be promoted to the position.

On November 9, 1989, the Grievance was denied at Step III. The reason stated was as follows:

"The Union's allegation that a transfer took place is incorrect. **No lateral transfer has taken place and there has been no vacancy.** The classification of PCN 70302.0 was changed to properly classify it under the classification specifications utilized within the Office of Groundwater. Prior to the reassignment, the incumbent employee was improperly classified as an Environmental Engineer 2. Since the classification specifications for Geologist 4 most accurately describes the duties of the position and of the incumbent, the position was reassigned to reflect same.

Based on the foregoing, there has been no violation of the contract and this grievance is denied in its entirety."

On December 21, 1989, the Office of Collective Bargaining made following finding at Step 4.

"The Agency denied any intent to circumvent Article 17 of the collective bargaining agreement. Upon discussion with the Agency, most especially with the EPA, Division of Groundwater, it is the understanding of this office that the reclassification of the position at issue in this grievance was undertaken so that there would be a consistent classification series used in the division. The person in the position that was reclassified had this classification, Environmental Engineer 2, by way of a job audit. The Geologist 4 classification more appropriately specified the duties of the position. It is noted that the two classification are in the same pay range, and that there was no vacancy created or position available for which a vacancy listing should have been posted."

On December 27, 1989, the Union requested arbitration pursuant to Section 25.02 of the Contract (Joint Exhibit 3). A Arbitration Hearing was held on December 9, 1991.

At the hearing, the Grievant testified that since Ms. Henderson Tock had become a Geologist 4, she had been given "oversight" of other the geologists, including "oversight" over him. This oversight function had not been exercised by Ms. Henderson Tock when she held the position of Environmental Engineer 2. The Grievant said that at first Ms. Henderson Tock was given first line responsibility for Solid Waste, but that later on, she was given oversight responsibility for other programs, e.g., RECRA and Superfund Sites. The Grievant testified that he was told that the goal of the "oversight" was consistency between and among Districts. In addition to oversight, Ms. Henderson Tock began to review Geologist 3's time cards and keep track of the number of hours expended per program.

Ms. Henderson Tock was called by the Union under subpoena. She indicated she understood that the

Union's position and the Grievant's position were adverse to her interests. She said she only became aware of her imminent title change when she received a memo asking her if she would consent to being reclassified as a Geologist 4 from Environmental Engineer 2. She agreed, and on June 22, 1989, she received a position description with "new duties" (her words) but with the same PCN. She said the most significant new duty was the oversight review of report preparation. Geologist 3's send their drafts to Ms. Henderson Tock who makes sure that the reports follow the policy of central office. She said that she had, in her new position, gone to meetings "in the Supervisor's place," a task she had never done as an Environmental Engineer 2. She also said that in the Geologist 4 position she was also responsible for collecting and reviewing time cards and making sure time accounting forms are accurate and complete. She said in response to cross examination by the Employer's advocate that her duties and her responsibilities had "substantially changed" but that the number of staff in her area had remained the same, her location remained the same, and her supervisor remained the same. She also testified that, regardless of her various titles, she had always performed the work of a geologist.

Clarissa Gereby of the NE Office of the Division of Groundwater testified that in her office, the new Geologist 4 position had been posted and that as the senior Geologist 3 she was promoted to that position. She said her duties changed. As a Geologist 4, she said she was responsible as a "lead worker" for oversight of specific programs in terms of policy review. Her new job required that all IOC's drafted by Geologist 3's were reviewed by her to be consistent with EPA policy.

The Employer called Susan Day, Human Resources Specialist, whose job encompassed processing personnel actions for the EPA. She noted that when Gereby was "promoted" to Geologist 4 she received a new position description number, whereas Ms. Henderson Tock's position description number remained the same when she moved from Environmental Engineer 2 to Geologist 4. According to Ms. Day, the Position Description Number is unique to a position not a person and tells in which Division a position lies. The Employer also called Ms. Meril Price who, in a former position, had worked for DAS - Division of Personnel, writing class specifications. Ms. Price pointed out that lead worker duties occurred in both the position descriptions of Environmental Engineer 2 and Geologist 4. Ms. Price said that a position description could be rewritten as long as the duties fit within the class specification. To comply with DAS rules, such a newly rewritten position description must have at least 50% of the old job duties. She said that the pay range signified the level of responsibility and accountability. Ms. Price stated that a position was "not vacant" if "a human being with a PCN occupied it."

Carol Bowshier of OCSEA staff testified in rebuttal to Ms. Price. She distinguished the duties of an Environmental Engineer 2 from a Geologist 4. She noted that in Geologist 4 "oversight" is a rank 1 duty within the class specification (Employer Exhibit 7) while for the Environmental Engineer 2 oversight is a rank 3 duty (Employer Exhibit 6). Moreover, the Geologist 4 "plans" in rank 1 while the Environmental Engineer 2 only "assists" in rank 1. Ms. Bowshier maintained that the differentiating factor between the two positions is the movement of a duty from a minor function to a major function.

Union's Position

Both the failure to post the position and the placement of Ms. Henderson Tock into the position violates Article 17 of the Contract. Article 17 establishes the formula for posting and filling vacancies. Section 17.02 defines "vacancy" as "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." A "position" has been defined by other Arbitrators and by the Ohio Revised Code as a group of duties to be performed by an individual employee. The vacancy first becomes a promotional opportunity for members of the Bargaining Unit. It must be posted for a specified period of time and is open for bids from all State employees.

Articles 17.05 and 17.06 deal with the manner in which the successful bidder is to be selected. Article 17.05 requires the Employer to first divide timely applications for promotions into six groups. The first group, Category A, consists of employees within the office (or offices if there is more than one office in the county), institution or county, who presently hold a position in the same, similar or related class series (see Appendix I), and who possess and are proficient in the minimum qualifications contained in the class specifications and

position description. They are to be given first priority for the position.

As stated in Article 17.06, applications from Category A shall be reviewed first and "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."

The remaining five (5) groups which gradually broaden the selection post to "all other employees of the Agency" and "all other employees of the State" are prioritized in descending order. Article 17.08 states: "If a vacancy is not filled as a promotion pursuant to Article 17.05 and 17.06, then submitted bids for lateral transfers may be considered. Article 17.04 states "all vacancies within the bargaining units that the Agency intends to fill shall be posted."

Clear and concise language controls the dispute. A Geologist 4 position was created in the S.E. office; management determined to fill it with Nancy Henderson Tock, yet they did not post it for bidding for all interested applicants. Had they done so, a different outcome would have occurred.

Management will argue that no vacancy was created nor position available for which a vacancy listing should have been posted. The evidence will show this argument is absurd.

The incumbent to the position was given new job duties, a new classification, a new job title, and a new position description. To assert no new position was created defies logic.

Arbitrator Dworkin, when faced with a similar situation in Mayer vs. ODOT, stated on page 11:

"The Arbitrator is hesitant to admit it, but the logic of the State's case escapes him entirely. (T)he supervisor's classification changed; his duties changed from those of one classification to those of another; his work description changed. Yet it argues (as it must) that he did not occupy a new position. It seems clear to the Arbitrator that he did occupy a new position."

Employer's Position

The allegation by the Union is a matter of contract interpretation. The issue focuses on the Union's allegation that the State intentionally circumvented the agreement, specifically Article 17, when it reclassified Ms. Henderson Tock from an Environmental Engineer 2 to a Geologist 4. The Union alleges there was a vacancy. However, this is not the case. No vacancy existed. In actuality, the State was not outside of any contractual obligation when it changed the classification of Ms. Henderson Tock. The State has shown, through documentation and testimony, that no violation of the contract occurred. The State will also show that no vacancy ever existed in the Southeast District Office either before, during, or after the reclassification of Ms. Henderson Tock, which could have, or would have, bearing on the grievance.

The State has shown, for the record, that in compliance with the contract, in the areas of the State which did not have an employee already in place, that new geologist 4 positions were created, posted, and filled under the rules promulgated in Article 17 of the master agreement.

Finally, the State has shown, that the decision to reclassify the lone Environmental Engineer 2 within the District's Groundwater program to a Geologist 4, was based solely on the efficient and effective operation of the Agency, was well within Management's rights and was not an effort to circumvent the contract.

Discussion

The Employer placed Ms. Henderson Tock in the position of Geologist 4. To accomplish this placement, the Employer neither declared a vacancy, posted a vacancy, or in any other way utilized Article 17 of the Contract. Rather, the Employer characterized this placement as a "reassignment" as a result of a "reclassification." Article 5 on Management Rights reserves to the Employer "all the inherent rights and authority to manage and operate its facilities and programs" "except to the extent expressly abridged . . . by the specific articles and sections of this Agreement." The Employer points to no specific section of the Contract which authorizes its action. Rather, the Employer maintains that the right to re-assign Ms. Henderson Tock pursuant to a reclassification is inherently a management prerogative which is not expressly abridged by a specific section of the Contract. The Union claims Article 17 applies and expressly abridges

the Employer's freedom of action in this instance.

The Employer claims that no vacancy existed, therefore, Article 17 could not apply. The term vacancy is defined within Section 17.02 as "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." Everyone agrees that a Geologist 4 is "a permanent full-time position within a specified Bargaining Unit." Moreover, the Employer clearly conceded that the Geologist 4 position was a position it (the Employer) was "determined to fill." Mr. Allen testified that the Agency wanted Geologist 4 positions in each district office to provide consistent review and application of Agency policy. In fact, the Agency did "fill" four Geologist 4 positions -- three positions by posting and promotion and one position by "reclassification." But, the Agency argues, no "opening" ever existed in the SE District: At one moment in time, Ms. Henderson Tock was an Environmental Engineer 2 and the next moment, she was a Geologist 4 -- so' no "opening" ever existed; the job was always filled; there was no "vacancy."

A variation on this argument was used in all five of the arbitrations cited by the Union (Carpenter, Ulery, Mayer, Haberny, and Jablonowski).^[1] In all of these grievances, the Employer argued that no vacancy had ever existed. In Mayer, "a supervisor was moved into the highest most desirable promotional position that a member of the Highway Worker Classification can attain" (Dworkin at p. 10 in Mayer). According to Arbitrator Dworkin, "the only rationale for the Employer's argument that a vacancy was not filled is that his PCN was not changed." (at p. 11) In this case, Henderson Tock's PCN was not changed. However, as Arbitrator Dworkin cogently noted "a PCN is nothing more than a number assigned by Employer. It may designate a position but it does not define one. A position is defined by the functions and duties which comprise it." (at p. 11) Therefore, to determine Henderson Tock's position, we must look to her functions and duties not her position description number.

In Jablonowski, Arbitrator Bittel found that a vacancy existed within the meaning of Article 17 when the Agency placed a decertified manager in a bargaining unit position which, prior to that placement, the Agency said it had no intention to fill. Therefore, according to the Agency, since the Agency did not intend to fill the position, no vacancy existed prior to the placement of the decertified supervisor in that slot. In Ulery, the Agency again claimed that no vacancy had ever existed. Rather, the employee was merely "reassigned" to a different institution. In support of this position, the Agency pointed out that the classification was the same, the salary was the same, etc. However, Arbitrator Silver concluded that while the job descriptions were the same, the actual "functioning" of the two supposedly identical positions involved significantly different caseloads, and this difference in caseloads made the reassigned position a singularly attractive position. That difference persuaded Arbitrator Silver that in fact a new position had been created, i.e. a vacancy had existed. In Haberny, Arbitrator Graham also found that a vacancy had existed where the agency said none existed. In Haberny, a person was moved to another town but in the same job without the use of Article 17. The Agency said since no vacancy pre-existed the movement of the employee, no transfer could have occurred. In all these cases, the Agencies took a metaphysical view of vacancies. They placed an employee in a job simultaneously with the job appearing in that location and then claimed that since the "appearance of the job and the "placement of the individual" were simultaneous -- no opening and hence no vacancy even existed. This argument is too clever by a half. In all these situations, the Arbitrators looked at substance rather than form and found vacancies. Lastly in Carpenter, the Agency again claimed no vacancy. In this case, the vacancy "disappeared" when filled by a person placed through a job audit. Arbitrator Dworkin again found a "vacancy" to have existed. The resolution in Carpenter differed from the resolution in the other four decisions: Article 17 was not violated in Carpenter because its application was "trumped" by the application of another express contractual provision -- job audit.

In assessing all these situations, arbitrators have attempted to look behind form at the substance of the position. Clearly, the employer can manipulate titles, numbers, and the naming of procedures. Arbitrator Silver in the Ulery decision captured the essence of the dispute in these words:

"There is no dispute in this case that Management has wide and exclusive rights reserved to it in determining the work to be done, the creation of positions to do the work, and the location of these positions. This

permits Management the power to. establish a table of organization and to distribute the work among positions as it sees fit. Bargaining unit members under Article 28 have a single privilege associated with positions created and located by Management, a privilege associated with selecting an appropriate incumbent for the position. This privilege interferes in no way with the exclusive authority of the Employer to determine where workers are to work and what they are to do. It does, however, guarantee to bargaining unit members the benefits of seniority in choosing among bargaining unit members who is to be selected for a vacant position." At p. 24.

On one hand, the Employer has the right to rename a position to facilitate good management. But, if the new name disguises an attempt to disrupt, what Arbitrator Silver calls the "single privilege" held by bargaining unit members -- the benefits of seniority in choosing among its members as to who is to be selected for a vacant position -- that action violates Article 17. When Ms. Henderson Tock became a Geologist 4 did she occupy a new position? This question is the crucial one. Both Employer and Union demonstrated an easy facility in their arguments based on position descriptions and classification specifications. To this Arbitrator's mind, either party's position was tenable depending on how one played the word game. The crucial factor must be found not in words but in the actual functioning of the position. In Ulery, the two positions at issue were semantically the same, but functionally, one position was much more attractive than the other. Mr. Allen claimed that the reason Ms. Henderson Tock was put into the Geologist 4 position was not that she was chronologically "senior" but "functionally" senior. The Arbitrator finds this characterization was not accurate. Ms. Henderson Tock was not given lead worker duties (oversight of IOC'S, keeping of time cards, attendance at meetings in her Supervisor's place) until after she became a Geologist 4. The Employer argues that all those duties were previously possible according to the position description of an Environmental Engineer 2. Maybe so, but she did not function in that manner. Obviously, her supervisor thought the change mattered. Ms. Henderson Tock thought the change mattered; she characterized her duty change as "substantial." The Grievant thought the change significant; he was now supervised by a former co-worker. The right and duty to supervise others indicates a different level of responsibility and accountability. Supervisory opportunities are valuable to hone skills needed to move up the career ladder. A job with supervisory duties is more attractive just like the job in Ulery which had a more challenging caseload. Placing an employee in the Geologist 4 position in the SE office without the use of Article 17 violated that Article and removed that "singular benefit" from the bargaining unit members.

Award

The Grievance is sustained. The Grievant is to be awarded the Geologist 4 position retroactively with full back pay and benefits, as if the promotion had occurred on October 8, 1989. Ms. Henderson Tock is to be restored to her former position or its current equivalent. The State is not to recoup any pay or benefits from Ms. Henderson Tock for the period from October 8, 1989 to the date she is returned to her former position or its equivalent.

Date: February 13, 1992
RHONDA R. RIVERA, Arbitrator

[1] Carpenter = G87-1313, Ulery = G29-02-(01-02-89)-115-0212, Mayer = G98-0643, Haberny = G11-06-(88-12-27)-0043-01-09, Jablonowski = G87-1287.