ARBITRATION DECISION NO.:
423

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Natural Resources
Senacaville State Fish Hatchery

DATE OF ARBITRATION:
December 13, 1991

DATE OF DECISION:
February 21, 1992

GRIEVANT:
Gary D. Long

OCB GRIEVANCE NO.:
25-18-(89-10-02)-0007-01-06

ARBITRATOR:
David Pincus

FOR THE UNION:
Butch Wylie

FOR THE EMPLOYER:
Rachel Livingood

KEY WORDS:
Arbitrability
Promotions
Which Contract Does a
Promotion Fall Under

ARTICLES:
1989-1991 Contract
Article 17-Promotions and
Transfers
§17.01-Promotions
§17.03-Vacancy
§17.05-Applications
§17.06-Selection

1986-1989 Contract
Article 17-Promotions and
Transfers
§17.04-Bidding

§17.05-Selection
Article 43-Duration
§43.05-Duration of Agreement

FACTS:

The grievant, a Conservation Aide with the Senacaville State Fish Hatchery, bid on the position of Fish Hatchery Coordinator but did not receive the position. The vacancy was posted on June 19, 1989 with a deadline for applying of June 28, 1989. The posting stated that the position would be filled pursuant to the provisions of Article 17 of the Contract. On August 16, 1989, the grievant was interviewed for the position. However, on September 11, 1989, the grievant was notified that he did not receive the position but that someone who was not a state employee was awarded the job. As a result, a grievance was filed. The state, however, rejected the grievance, stating that the grievant, a Conservation Aide, fell into job grouping D under the 1986-89 Contract and thus had no right to grieve his non-selection. The union disagreed, stating that the 1989-91 Contract governed this grievance and that the grievant had rights to grieve because under the new Contract his classification fell under Group B which gave him a vested right to move his grievance to arbitration. Thus, the issue of the case was whether the dispute was arbitrable.

UNION'S POSITION:

The union argues that even though the vacancy was posted on June 19, 1989 and the deadline for all applications was specified as June 28, 1989, the contract violation giving rise to the grievance (the non-selection of the grievant) took place after the 1989 Contract had been ratified. The union used a prior arbitration case where the arbitrator ruled that the "cutting" of the Personnel Action by the Department of Administrative Services is the final step in the promotional decision. The union argued that since DAS did not approve the promotion in this case until after the 1989-91 Contract had been ratified, the grievance should be governed by the new Contract.

EMPLOYER'S POSITION:

The employer argues that the 1986-89 Contract should govern this dispute because it was prior to July 1, 1989 that the vacancy was posted. Further, the posting notified the applicants that the vacancy would be filled pursuant to the old Contract. The employer also alleges that there was an agreement between the chief negotiators for the union and the state which would allow all promotions posted during the old Contract to be governed by its provisions, no matter when it was filled.

ARBITRATOR'S OPINION:

The arbitrator held that the grievance was arbitrable since he found that the 1989-91 Contract governed the situation. Evidence and testimony indicate that the selection process was ongoing but not finalized at the conclusion of the 1986 Agreement. Critical elements of the selection process occurred after the new contract had been implemented, including the interview, notification of non-selection and the personnel action. Prior to the grievant's notification of non-selection, he had no basis for filing a grievance. The incidents that took place after the new Contract gave the grievant cause to grieve. Further, there is no evidence to indicate that an agreement was made between the chief negotiators of the parties during the 1989-91 Contract negotiations that would indicate that the old contract should govern this situation.

AWARD:

The grievance is arbitrable. The employer is required to make a selection from the original applicant pool with the understanding that the 1989-91 Contract governs the selection process.

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, OHIO DEPARTMENT OF NATURAL RESOURCES

- and -

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

GRIEVANT:
Gary D. Long (Arbitrability)
OCB CASE NO.:
25-18-891002-0007-01-06

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: February 21, 1992

APPEARANCES

For the Union
Gary D. Long, Grievant
Marianne Steger, Assistant Executive Director
Bruce Wyngaard, Director of Arbitration Svcs.
Harold Bumgardner Jr., Staff Representative
John Feldmeier, Arbitration Clerk
Butch Wylie, Advocate

For the Employer
N. Gene Brundidge, Neutral and Prior Deputy Dir.
Greg Rees, Labor Relations Officer
Jon Weiser, Labor Relations Administrator
Rachel Livingood, Advocate

INTRODUCTION

This is a proceeding under Article 25, Sections 25.03 and 25.05 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Ohio Department of Natural Resources, 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 July 1, 1989 to December 31, 1990 (Joint Exhibit 2).[1]

The arbitration hearing was held on December 13, 1991 at the Office of Collective Bargaining, 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 they would not submit briefs.

ISSUE

Is the grievance arbitrable because the Grievant, Gary D. Long, can legitimately grieve his non-selection under Article 17 of the Agreement negotiate in 1989 (Joint Exhibit 2)? If so, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

ARTICLE 17 - PROMOTIONS AND TRANSFERS

Section 17.01 - Promotions

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

. . .

Section 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.

(Joint Exhibit 2, Pg. 29)

. . .

Section 17.05 - Application

Employee may file timely applications for promotions. Upon receipt to 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 positions 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.

Section 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 filling bids under 17.05 (C) and 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.

. . .

(Joint Exhibit 2, Pgs. 30-31)

ARTICLE 17 - PROMOTIONS AND TRANSFERS

. . .

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.

. . .

(Joint Exhibit 1, Pgs. 26-27)

ARTICLE 43 - DURATION

. . .

Section 43.05 - Duration of Agreement

This Agreement shall continue in full force and effect for two and one-half (2-1/2) years from its effective date of July 1, 1989, and shall constitute the entire Agreement between the parties. All rights and duties of both parties are specifically expressed in this Agreement. This Agreement concludes the collective bargaining for its term, subject only to a desire by both parties to agree mutually to amend or supplement it at any time. No verbal statements shall supersede any provisions of this Agreement.

(Joint Exhibit 2, Pg. 72)

STIPULATED FACTS

1. Class modernization changed the classification title of the position in question.

2. The Grievant, Gary Long, was the applicant with the lowest (oldest) seniority date of the applicants, 1/2/78.

3. The Grievant held the classification of Conversation (sic) Aide at the (time) he made application and interviewed for the position.

4. Under the 1986 Agreement, the Grievant fell under Section 17.05 (D).

CASE HISTORY

Gary D. Long, the Grievant, is presently employed at Senecaville State Fish Hatchery as a Fish Hatchery Technician. He has been employed by the State of Ohio, the Employer, for approximately fifteen years. In October of 1990, a classification modernization study caused a change in his job title. At the time of the study he was classified as a Conservation Aide. The change in job title is presently reflected in his job classification.

The present dispute has as its genesis a Job Vacancy Posting posted on June 19, 1989 for a Fish Hatchery Coordinator position. The posting specified an application deadline of Wednesday, June 28, 1989. It, moreover, informed all interested applicants that the position would "be filled pursuant to the provisions of Article 17 (Promotions), of the OCSEA, Local 11, AFSCME, AFL-CIO contract with the State of Ohio" (Joint Exhibit 3).

The Grievant formally applied for the position on June 24, 1989 (Union Exhibit 6). On August 7, 1989, the Grievant was invited to an interview for the contested position. The interview was scheduled for August 16, 1989 (Joint Exhibit 5). The Grievant testified the interview took place as scheduled.

On September 11, 1989, the Grievant had a conversation with his Supervisor. He maintained the Supervisor informed him the position was awarded to Dave Zacharias. This decision and Zacharias' appointment were confirmed by a letter sent to the Grievant on September 12, 1989.

Upon notification of his rejection, the Grievant filed a grievance on September 11, 1989. The Statement of Facts contains the following particulars:

"...
I Gary D. Long was informed on Sept. 11th 1989 by my immediate supervisor Pat Keyes, that the job position of Fish Hatchery Coordinator (PCN 20223.4) was awarded to Dave Zachias (sic). To my knowledge the selected individual is not a Ohio Division of Wildlife employee or a state employee. I recently interviewed for the Fish Hatchery Coordinator job position. I certainly feel that I was very competitive for the job position at the interview.
..."

(Joint Exhibit 7)

A Step 2 grievance hearing was held on September 20, 1989. The Employer's response indicated the Grievant had no inherent right to the posted position. Since the Grievant fell within the guidelines of Section 17.04, category D, he had no right to grieve the non-selection (Joint Exhibit 7).

A Step 3 grievance hearing was conducted on November 7, 1989. Once again, the grievance was denied based upon application of Section 17.04 of the 1986 Agreement (Joint Exhibit 1). He had no contractual right to grieve non-selection (Joint Exhibit 7).

Dick Daubenmire, Contract Compliance Chief, authored a Step 4 Grievance Review response on December 21, 1989. He referenced the Step 3 response in his denial. Daubenmire, moreover, emphasized the Department properly utilized the 1986 Agreement (Joint Exhibit 1) when dividing vacancy bids into the proper groupings. The division process specified in Section 17.04 caused the Grievant to fall into group "D"; the grievance, therefore, was not arbitrable because the Grievant had no right to grieve non-selection (Joint Exhibit 7).

On December 27, 1989, the Union notified the Employer the present grievance was to be taken to arbitration. At the hearing, the Parties decided to limit argument to the arbitrability matter.

THE PARTIES' ARBITRABILITY CLAIMS

The Position of the Union

It is the position of the Union that the grievance is arbitrable. This conclusion is based on a series of

arguments which placed the grievance under the purview of Section 17 of the 1989 Agreement (Joint Exhibit 2).

Even though the vacancy posting was posted on June 19, 1989, and the deadline for all applications was specified as June 28, 1989, the contract violation giving rise to the grievance took place after the 1989 Agreement (Joint Exhibit 2) had been ratified. As such, the Grievant was properly vested with the opportunity of grieving his non-selection in accordance with Section 17.06 (C) of the 1989 Agreement (Joint Exhibit 2).

The focal point of the analysis, in the opinion of the Union, deals with the incident which gave rise to the grievance. The events which took place prior to the ratification of the 1989 Agreement (Joint Exhibit 2) were viewed as secondary and unimportant. David Zacharias attained the position on September 25, 1989 as evidenced by the Personnel Action initiated by the Department of Administrative Services (DAS). The final decision by DAS, therefore, served as the critical triggering event of the grievance in dispute. Since this event took place after ratification of the 1989 Agreement (Joint Exhibit 2), associated rights and responsibilities must be evaluated in light of terms and conditions agreed to by the Parties in the 1989 Agreement (Joint Exhibit 2), rather than the 1986 Agreement (Joint Exhibit 1).

The Union relied on several sources in support of its DAS personnel action date analysis. A prior award[2] rendered by Arbitrator Jonathan Dworkin dealt with a similar promotion timing issue. He concluded DAS' involvement served as the triggering event which also determined which contract was in effect. Testimony provided by Jon Weiser, a Labor Relations Administrator, supported this view. He stated DAS has to sign-off on any personnel actions before they become effective. DAS, moreover, had overruled a number of promotion decisions after reviewing the paperwork. Several statutes were referenced which indicate DAS has final approval of all promotion decisions. Final approval, in this instance, served as the grievable event.

The Union argued the previous Executive Director, Russ Murray, never verbally agreed to waive the promotion provisions contained in the successor Agreement (Joint Exhibit 2). The Union, more specifically, never agreed to apply the promotion provisions contained in the predecessor Agreement (Joint Exhibit 1) for positions posted during the period it remained in force and effect; but filled during the duration of the successor Agreement (Joint Exhibit 2). Bruce Wyngaard, Director of Arbitration, and Marianne Steger, Assistant Executive Director, testified they provided field reviews prior to the ratification vote. None of these reviews discussed the application of the old Agreement (Joint Exhibit 2) to newly filled promotions.

Even if Murray had entered into a verbal agreement, its terms would have been unenforceable because of Section 43.05. This Section prohibits verbal statements from superseding any provision of the Collective Bargaining Agreement.

Testimony provided by N. Eugene Brundidge, prior Deputy Director of the Office of Collective Bargaining, was rebutted. He discussed an alleged conversation that took place on March 31, 1989 regarding the application of Article 17. He told Murray the posting date would dictate any promotion matter, but Murray did not respond. By not responding, Murray never properly acknowledged the offer uttered by Brundidge. Meeting notes (Union Exhibits 1 and 2, Employer Exhibits 1, 2 and 3) presented by the Parties evidenced a continuing controversy concerning the proper application of a specific Collective Bargaining Agreement. As such, there was no meeting of the minds, and Brundige's characterization of the March 31, 1989 conversation was, indeed, inaccurate. The January 21, 1990 meeting notes also evidence an acknowledgement by Brundidge that promotion matters under Article 17 will be reviewed on a case by case basis. On occasion, the Parties have entered into Letters of Understanding when a clarification of a contract provision is viewed as a necessary outcome. Here, the present matter could have required such an outcome, but the Parties never entered into such an arrangement.

As a remedy, the Union requested the Grievant be awarded the position dating back to September 25, 1989 with full back pay, seniority classification, without a probationary period. The Union proposed an alternative remedy which would require an arbitrator to rule on minimum qualification and demonstrably superior qualifications of the applicant pool as of June 28, 1989.

The Position of the Employer

The Employer opined that the grievance in question was not arbitrable. As a consequence of Section 17.05 (C) of the 1986 Agreement (Joint Exhibit 1). The Grievant had no right to grieve non-selection based upon his bid application standing.

The particulars characterizing the vacancy (Joint Exhibit 4) were quite clear and unambiguous. The posting and application guidelines specifically designated June 28, 1989 as the application deadline. This document, moreover, indicated the position was to be filled in accordance with Article 17. The Union never proffered a reliance argument to rebut the Employer's interpretation. The Grievant held no expectation at the time of application that the 1989 Agreement (Joint Exhibit 2) would be used as the standard in resolving any promotion dispute.

For a number of reasons, the Employer distinguished the Dworkin decision from the present situation. First, the time frame in question dealt with a period where there were no vested rights under the Collective Bargaining law to a period where rights did exist. In the instant case, the Parties are dealing with an interpretation of two collective bargaining agreements. Second, the Ohio Revised Code definitions referred to by the Union are irrelevant in this instance. Both Agreement (Joint Exhibits 1 and 2) clearly define promotions, vacancies and the mechanisms to be used in making selections. Third, DAS's role in promotion decisions was also minimized by the Employer. Weiser testified since the onset of collective bargaining, DAS has not vetoed a departmental promotion decision. Within this collective bargaining context, DAS could never be the ultimate authority over promotion decisions. If the Employer failed to comply with Article 17 requirements and DAS agreed with the Employer's decision, an arbitrator would render a final and binding decision.

The Union's arguments appear suspect in light of inconsistent application of the Collective Bargaining Agreement. Steger testified the job audit process was eliminated in the 1989 Agreement (Joint Exhibit 2). And yet, even though this right no longer existed, employees who filed claims in 1986 still had their cases reviewed. Similarly, the Employer posted positions in 1986 and filled them pursuant to the controlling 1986 contractual language. The Union could not properly differentiate the reasons for this proposed inconsistent practice.

Brundidge’s testimony was incorrectly characterized. He never spoke about a sidebar agreement, but rather, discussed a conversation he has with Murray which resolved a dispute concerning Article 17. As such, Brundidge provided intent testimony based on his understanding of the Union's position. Murray's non-response was viewed by Brundidge as acquiescence to the manner promotion issues would be handled by the Parties.

The Employer provided two remedy alternatives in the event the Arbitrator rules in the Union's favor. If 1989 rights are to be extended, they should be extended to everyone in the bargaining unit. The position, therefore, should be reposted and selection should be made under the 1989 Agreement (Joint Exhibit 2). If reposting was not required by the Arbitrator, the selection should be made from the original applicant pool. Again, the 1989 guidelines should be used in determining selection. In either case, the Employer should not be forced to employ two Fish Hatchery Coordinators.

THE ARBITRATOR’S OPINION AND AWARD DEALING WITH THE ARBITRABILITY CLAIM

From the evidence and testimony presented at the hearing, and a complete review of relevant contract provisions, it is my opinion the grievance is arbitrable. Under Section 17.06 of the 1989 Agreement (Joint Exhibit 2), the Grievant has a right to grieve his non-selection.

This finding is based on a distinction the Parties, themselves, have made between the process of application and the process of selection. Both the 1986 and 1989 Agreements (Joint Exhibits 1 and 2) provide for such a separation. Obviously, the application process was initiated during the duration of the 1986 Agreement (Joint Exhibit 1). As such, if the Grievant had been prevented from applying for the posted position, his application-related grievance would have been reviewed in light of the relevant 1986 provisions. The same analysis does not apply when one considers the timing of the selection process.

As long as the Grievant was properly part of the applicant pool, he can legitimately grieve his non-selection based on the timing of the selection process and the ultimate promotion decision. Evidence and testimony indicate the selection process was engaged but not finalized at the conclusion of the 1986 Agreement (Joint Exhibit 1). The Grievant, himself, interviewed for his position on August 16, 1989 (Joint Exhibit 5), and was informed of his rejection on September 12, 1989 (Joint Exhibit 6). David Zacharias' personnel action indicates the effective date of his new appointment to be September 25, 1989 (Joint Exhibit 9). It, moreover, appears the DAS approval also took place after the ratification of the 1989 Agreement (Joint Exhibit 2). These various events indicate critical selection procedures, and the final selection, were enacted during the term of the 1989 Agreement (Joint Exhibit 2).

The selection of Zacharias by the Employer and the subsequent approval of the decision by DAS served as independently viable triggering events for the grievance in dispute. Prior to these key events, the Grievant had no real basis for filing a grievance. Per the requirements contained in Section 25.02, these triggering events served as the “occurrence(s) giving rise to the grievance." They took place during 1989 which forces the application of all relevant provisions dealing with promotions contained in the successor (1989) Agreement (Joint Exhibit 2). As such, Section 17.06 does not preclude the filing of a grievance for non-selection.

The Employer's arguments in support of Brundidge's "intent" testimony proved to be unpersuasive. His testimony regarding his conversation with Murray on March 31, 1989 conflicts with his notes (Employer Exhibits 1, 2, 3 and 4) and comments regarding a joint meeting held on January 22, 1990. His observations regarding the need to analyze the promotion grievances on a case by case basis do not square with the alleged understanding he and Murray had regarding the application of the 1986 Agreement (Joint Exhibit 1) after the expiration of this contract. Testimony and evidence (Union Exhibits 1 and 2) provided by Wyngaard and Steger support this analysis.

This Arbitrator, moreover, finds it quite hard to believe that Murray's lack of response to Brundidge's suggestion regarding promotions can be equated to an explicit acquiescence by the Union. Even if one was able to share such a view, Section 43.05 states: "no verbal statements shall supersede any provisions of this Agreement." Any verbal agreement fashioned by Brundidge and Murray cannot supersede specifically articulated language negotiated by the Parties dealing with promotions.

AWARD

The grievance is arbitrable because the 1989 Agreement (Joint Exhibit 2) serves as the proper set of guidelines in evaluating selection promotion decisions. Since the Employer improperly applied the 1986 Agreement (Joint Exhibit 1), the Grievant and other similarly situated employees in the applicant pool were potentially prejudiced. To award the contested position to the Grievant would be improper because the potential rights of these other employees need to be considered. In a like fashion, a new posting would potentially widen the applicant pool to the detriment of those who had originally, and legitimately, applied for the position. An equally unjust result would be engendered by such a finding.

Within this context, I am forced to require the Employer to make a selection from the original applicant pool. With the explicit understanding that Section 17.06 of the 1989 Agreement (Joint Exhibit 2) shall be applied in any selections decision. Also, this Award should not be viewed as requiring the Employer to employ two Fish Hatchery Coordinators.

Date: 2/21/92
Dr. David M. Pincus, Arbitrator

---

[1] A dispute exists concerning whether the 1986 Collective Bargaining Agreement (Joint Exhibit 1) or the 1989 Agreement (Joint Exhibit 2) should be applied to the present dispute.

[2] The State of Ohio, Department of Taxation and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, Grievance No. 686-0285 (Dworkin, 1988).