

ARBITRATION DECISION NO.:

487

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Public Utilities Commission

DATE OF ARBITRATION:

DATE OF DECISION:

January 27, 1993

GRIEVANT:

Suzanne Jackson

OCB GRIEVANCE NO.:

26-00-(90-02-05)-0005-01-14

ARBITRATOR:

Lawrence R. Loeb

FOR THE UNION:

Maxine Hicks

John Fisher

FOR THE EMPLOYER:

Larry Ringer,

Labor Relations Officer

Tim Wagner, Representative,

Office of Collective Bargaining

KEY WORDS:

Promotion

Posting

Selection

Minimum Qualifications

ARTICLES:

Article 2 - Non-Discrimination

§2.01-Non-Discrimination

Article 17 - Promotions, Transfers,

and Relocations

§17.04-Posting

§17.05-Applications

§17.06-Selection

Article 25 - Grievance Procedure

Article 36 - Wages

§35.05-Classifications and

Pay Range Assignments

FACTS:

On September 11, 1989 PUCO posted a vacancy for a Utility Rate Analyst 3 position. The grievant was a Utility Rate Analyst 2 at the time of the job posting; she graduated from Ohio State University with a Bachelor's degree in economics. The grievant applied for the position but was not selected. Instead, PUCO selected a less senior Utility Rate Analyst 2 who had been working in the Forecasting Division since she began her employment with PUCO in 1986 as a college intern. In selecting the former intern, PUCO reasoned that a successful candidate must be proficient in using the statistical procedures, the computer software and the economic forecasting models utilized by the Forecasting Division in addition to possessing the minimum qualifications set forth in the position description, the vacancy announcement and the classification specification.

UNION'S POSITION:

The State violated Article 17.06 by awarding the position to a less senior employee. The State discriminated against the grievant in that she was not afforded the same in-service training opportunities as the intern. Nonetheless, the grievant was more senior than the intern and exceeded the minimum qualifications set forth in the classification specification. Moreover, the State rewrote the classification specification to pre-position a favored employee. The Union argued that the State must be prohibited from violating the Contract in this manner; otherwise, the Contract would be rendered meaningless.

EMPLOYER'S POSITION:

There was no violation of Article 17.06 because the intern was "demonstrably superior" to the grievant. Having previously worked in the Forecasting Division for 2 1/2 years, the former intern was proficient in using the computer software and the statistical and analytical tools utilized in performing the position. The grievant did not receive the same training as the intern because she was employed in a different section of PUCO. Due to the training differential, the grievant could not meet the minimum qualifications for the position. The grievant conceded that she was not familiar with the necessary tools and software. The grievant would have needed extensive training before she could perform the work for the Utilities Analyst 3 position. Moreover, Article 17.05 required the grievant to demonstrate the requisite knowledge and skills to perform the position at the time she applied for it.

Thus, the State denied that it discriminated against the grievant or pre-positioned the intern for the disputed position and countered that the Union failed to prove that the State employed any discriminatory tactics in favor of the intern. Alternatively, the State argued that the Union failed to raise the discrimination issue during the grievance procedure; therefore, the Union was precluded from raising the issue at the arbitration hearing.

ARBITRATOR'S OPINION:

The Arbitrator disregarded the State's claim that it would be unfairly prejudiced by the Arbitrator's considering the Union's discrimination claim. The State was neither unfairly surprised nor disadvantaged because it should have recognized that the Union was relying on Article 36.05 as the basis for its pre-positioning charge. Likewise, the Arbitrator rejected the argument that the grievant did not meet the minimum qualifications for the Utility Rate Analyst 3 position. The Arbitrator reasoned that the State effectively conceded that the grievant was minimally qualified for the position by granting her an interview. Nonetheless, the Arbitrator noted that the grievant admittedly lacked the necessary familiarity and proficiency with the computer software as required by the position description. Consequently, the grievant failed to demonstrate her proficiency for the promotional position and therefore had no contractual right for the promotion.

Having decided that the grievant was unqualified due to her lack of proficiency, the Arbitrator concluded that it was unnecessary to decide whether the State was guilty of pre-positioning in violation of Article 36.05. In any event, the Arbitrator agreed that the State could have properly used the "demonstrably superior" language of Article 17.06 to select the intern over the more senior grievant even if the grievant met and was

proficient in the minimum qualifications. The Arbitrator suggested that because of the different training the members of each department received and the specialized duties and responsibilities of the Utility Rate Analyst 3 position, it was virtually impossible for a candidate working outside of the Forecasting Department to compete with a candidate with inside knowledge and experience. Despite the unfair results, the Arbitrator concluded that the State had not violated the Contract.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

IN THE MATTER OF ARBITRATION
BETWEEN

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

and

**Public Utilities Commission,
State of Ohio**
Employer

CASE NO.

26-00-(90-02-05)-0005-01-14

GRIEVANT:

SUZANNE JACKSON

OPINION AND AWARD

APPEARANCES:

On Behalf of the Union

Maxine Hicks, Staff Representative
John Fisher, Staff Representative
Suzanne E. Jackson, Grievant
Vicky Susman, Assistant
Michael H. Smith,
Associate Professor, OSU, Witness

On Behalf of the Employer

Larry Ringer, Labor Relations Officer
Tim Wagner, Representative,
Office of Collective Bargaining
Thomas Flynn, PUCO, EEO Officer
Galip Feyzioglu, Section Chief, PUCO
Hisham Choueiki,
Energy Specialist, PUCO
Jeff Devore,
Public Utilities Administrator I

David Wang, Public Administrator 1
James Kennedy,
Public Utilities Administrator 3

Arbitrator:

LAWRENCE R. LOEB
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I. STATEMENT OF FACTS

On September 11, 1989 the Public Utilities Commission of Ohio (hereinafter identified as "PUCO") posted a vacancy for the job classification of Utility Rate Analyst 3 in the Forecasting Division of the Utilities Department. As described in the vacancy announcement, the basic job functions of the classification were:

"Conducts independent analyses and assessments of the historical trends and patterns in economic, demographic and energy systems, and in the dynamic deterministic relationships among them. Generates 5/10/20 year forecast scenarios and forecasts of the same utilizing linear and nonlinear spline models and other appropriate methods. Reviews and analyzes utility forecasts. Prepares and presents oral and written reports and oral and written testimony on results from forecasting research, reviews and analyses. Disseminates historical and forecast information through oral and written responses, reports and publications."

As set forth in the position description created by the Ohio Department of Administrative Services, the successful applicant for Utility Rate Analyst 3 position had to have minimal acceptable characteristics in a number of areas, including being adept at using differential and integral calculus and had to be able to use SAS Basic and Statistical PROCs (Procedures), the computer software which the Forecasting Division uses in its work. Neither of those requirements nor the requirement that the applicant have a working knowledge of econometrics and economic modeling in general or linear and non-linear splines (the economic forecasting model which was designed and is used by the PUCO's Forecasting Division to create its own forecasts) in particular were set out in either the position description, the vacancy announcement or the class specification for the Utility Rate Analyst 3 classification which was also created by the Ohio Department of Administrative Services. The latter simply provides that the successful applicant must have the following minimum qualifications:

"Completion of undergraduate core program & 12 mos. exp. or 36 mos. exp. in one of following fields (e.g. accounting, finance, business administration, public administration, economics, engineering, mathematics); 6 mos. trg. or 6 mos. exp. in state & federal laws, regulations & procedures governing utility company operations; 6 mos. trg. or 6 mos. exp. in training in rate & or tariff schedules, financing & securities or economics as applied to utility companies; 6 mos. trg. or 6 mos. exp. & training in cost recovery &/or cost adjustment & methods & procedures for designated area of utility; 3 courses or 9 mos. exp. in application of mathematical, statistical or analytical methods used in formulating & solving problems or in decision making."

The Grievant, who had been hired by the PUCO in July, 1983 and was classified as a Utility Rate Analyst 2 in September, 1989, applied for the Utility Rate Analyst 3 opening because she believed she met the minimum requirements called for in the vacancy posting and as set forth in class specifications and position description. She had received a Bachelor's Degree in Economics from Ohio State University and had more than twelve months experience in economics, having been assigned to the PUCO's Rate of Return and Performance and Analysis Sections. The only other applicant for the position was a young woman who had initially been placed in the Forecasting Division as a College Intern in July, 1986. She stayed in that position until she graduated from college with a degree in Business Administration in 1987 at which time she was hired as a Utility Rate Analyst 2. The change in classification brought no change in assignment and the

young woman continued to work in the Forecasting Division. Over the three years that she was in that department, that individual worked with and was trained in the use of the types of computer software and economic modeling which the Division Supervisors felt that the successful applicant for Utility Rate Analyst 3 had to have to be considered for the opening.

The selection process for the open position consisted of two stages. The first involved a review of all of the applications submitted to determine if the applicants met the minimum qualifications specified in the vacancy announcement. That review was performed by the PUCO's personnel office. Those applicants who survived the review process were then interviewed by the supervisor they would work for. The interview consisted of asking both women nineteen questions which were designed to determine not only their general backgrounds and why they desired the position, but also their specific knowledge of economic modeling and statistical and regressive analysis. Specifically, the interviewer asked both of the applicants how familiar they were with five different SAS PROCs, what they understood by such terms as mathematical models, functional models, stochastic models, least square adjustments, blind functions and s curves as well as to state the distinguishing features of four least square adjustment techniques and describe under what circumstances they would utilize them. The Grievant, who knew almost nothing about those areas, answered only 40.5 percent of the total questions correctly, while the other applicant answered 94.6 percent of them correctly. As a result, the position was offered to the other applicant, the Grievant being notified of the PUCO's decision by letter dated January 31, 1990.

Believing that she had been improperly passed over in favor of an applicant who had far less seniority than her, the Grievant, on February 1, 1990, protested the PUCO's decision complaining that:

"Suzanne E. Jackson applied for the position of Utility Rate Analyst 3. Though she is well qualified for the job and has more seniority than the other applicants, she was not awarded the job. Thus, management violated Section 17.06 of the Contract."

As a remedy for the contractual breach, the Grievant sought:

"Promotion to utility rate Analyst 3 position 8841.0 or similar position with back pay to be awarded and to otherwise be made whole."

Article 17, to which the Grievant's protest made reference, provides in pertinent part:

17.04 - Posting

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

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.

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.

On March 6, 1990 Management, relying upon the language of Article 17.06, denied the grievance on the basis that the individual selected for the Utility Rate Analyst 3 position was "demonstrably superior" to the

Grievant even though she was the senior employee.

Management continued to deny the grievance throughout the various steps of the grievance procedure and most especially denied that the Grievant had been discriminated against because she was not afforded the same in-service training opportunities as the woman who was selected for the open position or that that individual had been pre-positioned for the selection. Thus, in its Step 3 response, Management noted:

“With regard to the issue on in-service training, I have found that some inconsistencies do exist in the way these opportunities are transmitted within the Utilities Department. On the other hand, I was unable to find any evidence that any discriminatory tactics were employed nor was there any evidence of pre-positioning.”

“The selected applicant was hired into the Forecasting Division first as a College intern on 10/14/86 and then on 10/9/88 was appointed to a permanent full time position as a Utility Rate Analyst 2 in the same division. Because she was in the division in which these in-service training opportunities were designed for, she was required to attend. It is my judgment that this type of requirement can not be interpreted as pre-positioning in anyway. On the other hand, the Grievant was in a different division and therefore not required to attend which is only logical.”

Not satisfied with the Agency's Step 3 response, the Union pursued the grievance to Step 4 at which time the Employer again refused to relent, arguing that no contractual breach had occurred because:

“The Agency contends that the grievant does not meet, and cannot demonstrate that she is proficient in, the minimum qualifications of the position description. It bases this conclusion on the fact that during the Step 2 and Step 3 grievance hearings you admitted that you had no experience with, and did not know how to use, SAS Basic and statistical PROCs, econometrics, time series analyses, linear splines, non-linear splines, forecasting and energy consumption analyses. Additionally, the grievant responded in the negative to 19 of the 38 interview questions and sub-questions.”

It was upon these facts that this matter rose to arbitration and award.

II. POSITION OF THE UNION

Although this grievance ostensibly concerns only one individual who was improperly passed over for promotion, there is far more at stake in this case than just her rights. Rather, Management's attempt to alter the class specifications developed by the Department of Administrative Services so that it could select a junior employee over the senior one concerns not only this Grievant, but every other member of the Bargaining Unit as well. If Management can get away with changing the rules so that it can turn down the Grievant in favor of someone who was pre-selected as was the case here, the contractual protections written into the Labor Agreement will become meaningless because it can do the same thing whenever it so desires.

It is obvious that Management will claim that the Union is trying to intrude into its province, trying to take away Management's right to set the criteria by which positions are filled. It is a tired, worn and totally specious argument. In fact, nothing could be further from the truth. The Union is not challenging the State's right to establish minimum qualifications as set forth in the positions descriptions or the general requirements for positions as set out in the classification specifications. What it is seeking by way of this grievance is that Management adhere to the terms of the Collective Bargaining Agreement as it relates to the selection of candidates for a position and, more specifically, that the State not be permitted to re-write a position description so that it goes beyond the requirements of the classification specifications in order to selectively fill a vacancy.

That is what Management has done in this instance by selecting the junior employee over the Grievant who not only met, but far surpassed the minimum requirements for the Utility Rate Analyst 3 classification as those requirements are set out in the classification specifications for the position. According to that document, the successful candidate had to attain a certain education level. The Grievant met that standard.

She had a Bachelor's Degree in Economics while the junior employee who Management had obviously pre-elected for the position had only a Bachelor's Degree in Business Administration. Considering the nature of the work which the Utility Rate Analyst had to perform, the Grievant, on the basis of her education alone, was the demonstrably superior candidate. Further, she was the senior candidate having been with the PUCO for more than six years at the time she completed her application, while the other employee had been with the agency for under one year at the time the Utility Rate Analyst 3 position was put up for bid.

Because of the Grievant's educational credentials, work history and tenure with the PUCO, the State knew it had a problem justifying the selection of the junior employee over her. It tried to avoid the consequences of its action by claiming that the junior employee was demonstrably superior to the Grievant who, it claimed would need extensive training before she could perform the work required of the Utility Rate Analyst 3 in the Forecasting Division. Actually, the State went further, trying to portray the Grievant as someone who was lucky to be able to find her own desk without assistance. That kind of calumny was neither warranted nor justified as the Grievant, for a number of years, had successfully performed all of the duties and responsibilities of the Utility Rate Analyst 2 position she occupied.

What the State actually showed was that it had rigged the system such that no one who had not been in the Forecasting Department for a number of years and had been specifically trained for the position could have been awarded the Utility Rate Analyst 3 classification. At least they could not have without inservice training, training which was not afforded to the Grievant or anyone else outside of that division. The Contract, however, prohibits such pre-positioning.

The Grievant met the minimum qualifications for the Utility Rate Analyst 3 position and was the senior employee. Therefore, the Contract required that she should have been awarded the position, not the junior employee. As Management rigged the selection process in violation of the Agreement in order to promote the junior employee over the Grievant, the only remedy available, the only remedy which the Contract will permit, is to promote the Grievant and award her full back pay.

III. POSITION OF THE EMPLOYER

Management strenuously denies that it discriminated against the Grievant in violation of Section 2.01 of the Contract. Nor can the Grievant establish that any such discrimination took place. All that she can show is that she did not receive the same training as did the successful applicant for the Utility Rate Analyst 3 classification in question. The fact that she did not or that she was not afforded the same in-service training opportunities as that individual doesn't mean that the State discriminated against the Grievant or even that the Grievant was treated unfairly. All that it means is that the two women were employed in different divisions within the PUCO, the Grievant in the Performance and Analysis Division and the other individual in the Forecasting Division. Those two departments are separate and distinct sections of the PUCO and, to a very real extent, have little in common with each other. In some ways, it may be better to think of them not as two divisions of the same agency, but rather as two separate agencies which have different, though connected, missions. The result is that the employees in the two divisions, even though they may hold the same classifications such as Utility Rate Analyst 2 or 3 perform radically different jobs, each with its own skills, tools and education.

In order to maintain the highest level of efficiency, the employees in each of those divisions are required to constantly update their knowledge and skills relative to the mission they have to perform as members of those divisions. In practical terms, this means that while both the Grievant and the other applicant for the position in question were required to attend in-service training, they did not intend the same in-service training. Nor was there any reason why they should do so. In-service training is, by definition, training for individuals in a particular area. It is not intended to be a generalized training opportunity for everyone in the PUCO.

This is not to say that the Grievant or any other PUCO employee could not attend an in-service training put on by the Forecasting Department for its members. However, it is the responsibility of the individual employee who works outside of a particular division to learn what training is being given and to make the effort to attend that training. The Grievant did not avail herself of those opportunities. That is not the same

as saying that she was discriminated against.

Just as the Employer did not discriminate against the Grievant, neither did it violate the Contract when it offered the Utility Rate Analyst 3 position in the Forecasting Division to the other employee instead of the Grievant who admittedly had greater seniority than the successful bidder. The Contract is clear, however, that before the Grievant or any other employee can be promoted, they must meet the requirements mandated by Section 17.05 of the Contract. Those demand that the employee establish that he or she has the minimum qualifications called for in both the class specification and position description which cover the vacant position. If the employee can meet that prong of the test, then he or she must also show that they possess and are proficient in the minimum qualifications set forth in the class specification and the position description.

It is obvious that the Grievant did not meet either of those tests. She had little knowledge of SAS Basic and Statistical PROCs which are the computer software the Forecasting Division uses on a daily basis to create and manage the data base upon which all forecasting is done. She had even less knowledge of linear and non-linear splines, econometrics, time series analysis or forecasting energy assumption analysis, which are the tools that employees in the Forecasting Division use both to evaluate forecasts prepared by the utilities and to create the independent forecasts mandated by law. Obviously, if the Grievant was ignorant of those tools, she could not be proficient in their use.

The Contract does not provide that the Grievant is entitled to a long learning process after she has been awarded the job. Rather, just the opposite is true. Section 17.05, demands that in order to be considered for the job at all, the Grievant must demonstrate that she had the knowledge and skills necessary to meet the minimum qualifications of the job as set forth in the position description at the time she completed her application. The Grievant did not. The other applicant, who effectively had been employed in the Forecasting Division for almost three years on both a part time and full time basis at the time that the Utility Rate Analyst 3 position opened up, had more than just a passing acquaintance with the tools and methodology utilized by the Forecasting Division. She had, in fact, been deeply involved in preparing analysis of forecasts presented by utilities as well as preparing the independent forecasts that serve as the measuring stick against which the utilities' forecasts are judged.

She, therefore, not only met, but far surpassed the minimum qualifications for the position as set forth in both the class specification and position description. She was also proficient in the use of the tools utilized in the Forecasting Division. Thus, there is no question but that the individual who was ultimately awarded the job passed both prongs of the test mandated by Section 17.05, while the Grievant failed both tests. There is not even an issue, in that regard as the Grievant has openly and repeatedly admitted that she does not have any knowledge about the statistical and analytical tools nor the data base used in the Forecasting Division. Since she does not, she was not entitled to claim the Utility Rate Analyst 3 vacancy.

Even assuming that the Grievant met the minimum requirements of that classification, it is undeniable that the other individual who applied for the position, because of her background and training, was demonstrably superior to the Grievant. Since she was, the Employer had a right to promote her to the Utility Rate Analyst 3 classification. That is not a decision which the Arbitrator should set aside.

IV. DISCUSSION

As stipulated by the parties, the issue presented for decision is deceptively simple: Did Management select a junior candidate in violation of Article 17, Sections 17.05 and 17.06, and Article 2, Section 2.01 of the Contract? In answer to that question the Employer maintains that the outcome of the dispute is a foregone conclusion as the facts are not in issue and the controlling contractual provisions are not open to interpretation as they have been repeatedly and uniformly applied by a number of arbitrators in the past. Not surprisingly, the Union does not share the Employer's view of the situation. Thus, while it may agree that there is no dispute between the parties relative to certain basic facts such as when the Grievant and the other woman were hired by the PUCO, it strenuously argues that much of what the State put into evidence is irrelevant because Management is essentially attempting to rewrite the Contract in order to justify the pre-selection of the candidate for the Utility Rate Analysis 3 position.

The Union, though, does share Management's view that this is a simple matter. Thus, it asserts that all the Grievant needed to show in order to be awarded the vacancy is that she was the senior applicant and that she met the minimums set out in the classification specification and position description, which she did. Further, the Union maintains that the Employer is contractually prohibited from doing what it did here, altering the minimum qualifications set forth in those two documents by adding certain selected criteria in order to justify steering the choice to the candidate it pre-selected.

Not only does the Employer vehemently deny that it engaged such tactics, but it asserts that the Arbitrator cannot even consider the Union's argument because it failed to raise it at any of the prior steps of the grievance procedure. In essence, the Employer asks the Arbitrator to disregard the Union's argument because it was disadvantaged by the surprising reference to it in the final stages of the arbitral proceeding. While the State's argument is logical, the undersigned must nonetheless reject it for a number of reasons.

In the first place, while the Contract provides that when the Union reduces a grievance to writing at Step 1 it must set out the contract provisions it relies upon, Article 25, which creates the grievance procedure stops well short of penalizing either party by expressly prohibiting it from raising an issue or making an argument at arbitration which it did not identify at an earlier stage of the grievance procedure. It is, of course, possible to argue that because Article 25 provides that when the Union fills out the grievance form it must specify all of the contract provisions it intends to rely upon, the signatories to the Agreement intended to prohibit either party from raising any issue or argument which it does not fully disclose at the earliest stages of the grievance procedure. Such a position is not only logical, but is in keeping with the idea that the grievance procedure is simply an adjunct to the collective bargaining process and that the parties cannot possibly bargain in good faith unless each fully discloses all of the salient facts and arguments of their position.

Even if the Arbitrator were to adopt that line of reasoning, though, it would still be necessary to reject the Employer's demand that he ignore the Union's argument that the State violated Article 36 of the Contract because it changed the minimum qualifications for the Utility Rate Analyst 3 position. What mitigates against taking the State's side in this dispute is that whenever a claim of surprise is made it is incumbent upon the Arbitrator to determine if the surprise is not only genuine, but is of such a nature that it would affect the outcome of the dispute. Put another way, the issue is whether or not an experienced labor relations practitioner should have reasonably foreseen the argument in question being raised and, therefore, would not be disadvantaged when it was ultimately put forward even if that was not done until arbitration. Applying that test to the State's claim that it was disadvantaged by the Union's contention that the Employer had impermissibly altered the basic requirements for the Utility Rate Analyst 3 classification, the undersigned must conclude that the claim is unfounded.

The Union had been maintaining throughout the grievance procedure that the Grievant met the minimum qualifications for the Utility Rate Analyst 3 classification as those qualifications are set forth in classification specification and position description for that position. Additionally, it asserted all along that the Employer chose a junior employee instead of the Grievant to fill the vacancy on the basis that the junior employee possessed certain knowledge which the Grievant did not have, which knowledge the State has consistently maintained was part of the minimum qualifications the successful applicant for the Utility Rate Analyst 3 classification in the Forecasting Division had to have. While the Union failed to point to the specific contractual provision which precludes the Employer from changing the minimum qualifications set forth in the classification specification, it should have been obvious to the Employer's representative that the gravamen of the Union's complaint in this instance was that the State had deliberately changed the minimum requirements of the classification in order to pre-select a specific individual to fill the vacancy in the Forecasting Division.

Under the circumstances, to allow the State to prevail on its claim that because the Union did not specify at any of the prior steps of the grievance procedure that it was relying upon Section 36.05 of the Contract to support its claim that Management had impermissibly altered the classification specification and position description in order to select the junior employee over the Grievant is to needlessly elevate form over substance. This is especially so where, as in this case, the parties have argued since day one over whether or not the Grievant had the minimum qualifications which would have entitled her under the Contract to be selected for the vacancy and exactly what those minimums were. Under the circumstances, the undersigned

must conclude that the Employee was not disadvantaged by the Union's failure to indicate that its argument was predicated on Section 36.05 of the Contract.

The Agreement leaves no doubt that the classification specifications and position descriptions are the controlling documents to which the Employer must turn when it intends to fill a vacancy. Specifically, Section 17.05 of the Contract declares that the Employer must consider those individuals who "possess and are proficient in the minimum qualifications contained in the class specification in the position description." In this case, Management asserts that the Grievant could not pass those tests and, therefore, it had the right to select the junior employee even though she had less than one/sixth of the Grievant's tenure with the PUCO. The Employer actually goes further, arguing that the Grievant did not even possess the minimum qualifications called for in the classification specification for the Utility Rate Analyst 3 classification. There are two reasons that claim must be rejected.

In the first place, the minimum qualifications as well as the major worker characteristics set out in the classification specification are extremely broad and apply to anyone who would hold the Utility Rate Analyst 3 Classification regardless of which division within the PUCO they were assigned. The Employer, however, obviously wanted much more from the individual who was to be assigned to the Forecasting Division in the Utility Rate Analyst 3 classification than just the minimums called for in the class specification. Whether it did or not, the Contract makes the classification specification controlling. If the Grievant met or surpassed the broad minimums called for in that document, then she met that part of the test imposed by the Agreement.

Besides certain educational minimums, the classification specification demanded that an applicant have either six months of training or experience in a number of areas and three courses or nine months experience in the ". . . application of mathematical, statistical or analytical methods used in formulating and solving problems or in decision making." Apparently, it is this component which the Employer feels the Grievant lacked because she was totally unfamiliar with the specialized statistical methodology used by the Forecasting Division. However, it must be remembered that the Grievant had been employed as a Utility Rate Analyst 2 by the PUCO in two of its other divisions for a significant period of time. So, while the Grievant may never have used the mathematical tools employed in the Forecasting Division, it is impossible to say, given her work history, that she did not have the minimal level of experience called for in the classification specification.

This brings up the second problem with the Employer's argument which is that its screening committee determined that the Grievant met the minimum qualifications set forth in the classification specification for the Utility Rate Analyst 3 classification. She had to meet those qualifications in order to be eligible for the interview she was given. Having once determined that she met the minimum qualifications, the Employer cannot now argue that the Grievant was not qualified or that the determination was a mistake.

The Employer is on safer ground maintaining that the Grievant was not proficient in and lacked the minimum qualifications set forth in the position description for the Utility Rate Analyst 3 classification assigned to the Forecasting Division of the PUCO. The position description is far more specific and demanding in terms of the job duties and minimum acceptable characteristics which an individual must have and be proficient in to be considered for a vacancy in that classification in that division. Thus, unlike the classification specification which speaks in broad terms of an applicant being experienced in mathematical, statistical or analytical methods, the position description is far more specific demanding that the successful applicant be able to use "SAS Basic and Statistical PROCs" as well as be proficient in differential and integral calculus. That, however, is as specific as the position description becomes. It is silent as to a candidate having any knowledge of linear and non-linear splines, least square adjustment techniques, mathematical modeling, econometrics or time-series analysis, which the Grievant and the other applicant were asked about during the course of their interview and which the Employer claims are part of the minimum qualifications for the Utility Rate Analyst 3 classification in the Forecasting Division.

The Union claims the Grievant's ignorance of these procedures and tools should not make a difference. The problem with the Union's position is that it ignores the fact that the Grievant admitted that she had, at best, only a passing familiarity with SAS Basic. She was, however, clearly not proficient in its use. Yet, that is one of the major attributes which the Utility Rate Analyst 3 in the Forecasting Division must possess according to the position description. Since the Grievant lacked that ability she failed to meet the test

specified in Section 17.05 and, therefore, could not be considered for promotion. Because the Grievant could not meet that test it is unnecessary to determine if the Employer violated the Contract by holding the Grievant to a standard prohibited by the Contract.

It is easy to understand, though, how the Union can maintain that Management is playing fast and loose with the rules by deliberately manipulating the basic criteria for the classification in order to fill the vacancy with someone it pre-selected. The difficulty with the Union's argument is that it focuses on Section 17.05 and ignores Section 17.06 which provides a specific mechanism whereby the Employer can select a junior employee over a senior one, even if the senior employee meets and is proficient in the minimum qualifications of the class specification and position description. Thus, even assuming that the Grievant met the minimums imposed by the position description, the Employer would still have been justified in passing her over for promotion.

That conclusion flows, in large part, from the specialized duties and responsibilities of the Utility Rate Analyst 3 in the Forecasting Division and the tools with which that individual must be familiar in order to perform the duties of that classification in that division. Given the level of specialization, the evidence is overwhelming that it would be almost impossible for anyone from outside of the Forecasting Division to either possess the knowledge or have the required proficiency with the Division's statistical tools to be in a position to be selected for the Utility Rate Analyst 3 classification. Further, the record establishes that neither the Grievant nor anyone else from outside the Forecasting Division would be able to learn and become proficient in the methods and statistical tools which the Division uses in its work in a short period of time.

In a sense, the specialization of the Forecasting Division's work and tools did result in the woman who was selected for promotion being pre-positioned for the promotion. Such pre-positioning, if it can really be called that, while it may be difficult for the Grievant to accept, does not constitute a violation of Article 17 of the Contract. Rather, just the opposite is true. The signatories to the Agreement clearly envisioned that there may be junior employees who, for whatever reason, have superior credentials to a more tenured employee and on that basis the State is entitled to select them for promotion over the senior employee. In contractual terms, they are demonstrably superior to the senior employee. Such is the case in this instance.

The Union, though, charges that if the Grievant did not have the knowledge and proficiency level as the other candidate, it was because the Agency discriminated against her by failing to provide her with the same training opportunities as the other woman. That individual had been part of that Division, first as a college intern for two and one-half years and then as a Utility Rate Analyst 2 for the ten months or so that she was employed by the PUCO before the Utility Rate Analyst 3 vacancy was posted in 1989. While it is true that that individual, because of her assignment to the Forecasting Division, had in-service training opportunities which the Grievant did not have, the undersigned is convinced that even if the Grievant had the same training opportunities, she still would not have had the requisite knowledge of or proficiency with the statistical and analytical tools used in the Forecasting Division. More importantly, in contractual terms, the fact that the Grievant was not afforded the same in-service training opportunities as the other applicant for the Utility Rate Analyst 3 classification does not mean she was discriminated against as that term is used in Article 2. It only means that the Employer adopted a procedure that is designed to ensure that the employees in the various divisions of the PUCO maintain the highest level of knowledge and proficiency with regard to the issues with which each division must deal.

It may very well be that the Employer should make a greater attempt to break down the walls of specialization which exist within the Agency in order to ensure that it does not find itself in the position one day of not being able to have anyone who can perform the work of a particular division because no one outside of that division has any idea what has to be done or how it has to be done. Again, though, regardless of what Management does in the future, the fact that the Employer did not afford the Grievant the same in-service training opportunities as were afforded to the individual who was ultimately selected for the Utility Rate Analyst 3 position in the Forecasting Division does not mean that she was discriminated against.

Because of her tenure in the Forecasting Division, both as a college intern and as a Utility Rate Analyst 2 for almost one year and because of the specialized nature of the work done by the Forecasting Division and the methods and tools by which it performs that work, the individual who was selected by Management for promotion to the Utility Rate Analyst 3 classification in the Forecasting Division was demonstrably superior to

the Grievant. Therefore, the Employer had the right to promote her over the Grievant.

V. DECISION

For the foregoing reasons, the grievance is denied.

LAWRENCE R. LOEB, Arbitrator

January 27, 1993

Date