

ARBITRATION DECISION NO.:

529

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Natural Resources
Division of Reclamation (Abolished)

DATE OF ARBITRATION:

October 4, 1993

DATE OF DECISION:

December 28, 1993

GRIEVANT:

George Mychkovsky

OCB GRIEVANCE NO.:

25-14-(93-03-15)-0003-01-13

ARBITRATOR:

Harry Graham

FOR THE UNION:

Donald W. Conley

FOR THE EMPLOYER:

Jon Weiser

KEY WORDS:

Layoff
Exercise of Bumping Rights
Job Qualifications Necessary
to Bump
Adjustment Period After
Bumping
Displacement Rights

ARTICLES:

Article 18 - Layoffs
§ 18.04 - Bumping in the Same Office, Institution or County

FACTS:

The grievant was employed by the Ohio Department of Natural Resources, Division of Reclamation, as a Geologist 3, when his job was abolished in early February, 1993. With a Master's degree and fifteen years professional geologist experience, the grievant sought to exercise his Article 18 rights by displacing the current Geologist 3 in the Division of Water, whose qualifications were an undergraduate degree and ten years experience. The State denied the grievant's request but permitted him to bump into the Division of Oil

and Gas.

Article 18, section 18.04 of the Agreement, permits employees to bump those less senior employees depending on position, class series, and place of employment, provided the employee who is bumping is qualified to perform the duties. At issue in this case was the bumping employee's qualification for the position he sought.

UNION'S POSITION:

The position sought by the grievant dealt with providing groundwater data to the public, along with hydrogeologic modeling and the use of a specialized mapping technique. The Union proffered the grievant's experience and extensive knowledge of hydrogeologic methods as his qualification for the job, and asserted that he could quickly learn, the specialized hydrogeologic mapping technique.

The Union also pointed out that the State had not divided geologists into specialized positions, nor had any Geologist in the Division, including the employee already holding the position, taken the four college level courses in hydrogeology which the State claimed were necessary. Thus, the State required that the grievant have specialized knowledge and training not possessed by the incumbent, nor required by the job description.

The contract does not require qualified persons to be able to satisfy all job tasks immediately, and the grievant's vast training and experience would require only a minimal orientation period for adjustment. Finally, the Union countered the State's concern over the grievant's adaptability by pointing out that the grievant, while working at the Division of Reclamation, was responsible for daily review of the work done by Geologist 3's at the Division of Water - the very position for which the State claimed he was not qualified.

EMPLOYER'S POSITION:

The State focused its argument on the language of Section 18.04, allowing an employee to bump another less senior, "provided the affected employee is qualified to perform the functions." Classification specifications list related tasks from which specific position descriptions are then developed. The classification specification of a Geologist 3 listed hydrogeology as one area in which specialized knowledge may be required. While not every geologist position calls for an expert in hydrogeology, the position of Geologist 3 at the Division of Water specifically requires this expertise. According to the State, not all geologists qualify for every geologist position, and because the grievant lacked this requisite knowledge, this grievance should be denied.

As evidence of the grievant's alleged lack of hydrogeologic knowledge, the State relied on testimony from the Supervisor of Hydrogeology at the Division of Water, who refuted the grievant's claim of expertise. She stated that the grievant performed liaison work rather than professional tasks on hydrogeologic projects, and she stated that he admitted in his interview that he would need additional training to perform the tasks of a Geologist 3 in the Division of Water. The State asserted that the relevant evaluation of experience should be the amount of hydrogeologic coursework and specialized professional experience. By these standards, the incumbent was much more qualified. The incumbent also underwent a probationary period for this position, which the grievant would not be subjected to. Section 18.04 requires that an employee exercising bumping rights be qualified to perform his new tasks. The State claimed that the grievant was not able to do so. The grievant was permitted to exercise his bumping rights, maintained the same class, pay, and benefits as before, but was not qualified for the Geologist 3 position in the Division of Water.

ARBITRATOR'S OPINION:

The Agreement allowed employees who had been laid off to bump less senior employees, when they were qualified to perform the duties. Upon further refinement of the language, this modified seniority clause became a "sufficient ability" clause, meaning that a bumping employee was not required to have more ability than the incumbent, but must have been qualified.

The Arbitrator recognized that shifts in personnel result in a temporary loss of efficiency, that employees are not interchangeable, and that a learning period is unavoidable, even if not provided for in the contract. Noting that the Agreement was silent as to the length of adjustment period for movement between jobs, the

Arbitrator listed education, experience, and adaptability as keys for determination of bumping qualification. Based on these criteria, the Arbitrator determined that the grievant's academic and work history qualified him for the position in question. The grievant was to be offered the opportunity to bump into the disputed position of Hydrogeologist (Geologist 3) in the Division of Water.

AWARD:

The grievance was sustained.

TEXT OF THE OPINION:

**In the Matter of Arbitration
Between**

OCSEA/AFSCME Local 11

and

**The State of Ohio, Department of
Natural Resources**

Case Number:

25-14-(31593)-03-01-13

Before: Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on October 4, 1993 before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on November 18, 1993 and the record in this dispute was declared to be closed.

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

Did Management violate the Labor Agreement by not allowing the Grievant, a Geologist 3 with the Division of Reclamation, to displace a Geologist 3 with the Division of Water? If so, what shall the remedy be?

Background: The facts of this dispute are not a matter of controversy. The Grievant, George Mychkovsky, is employed by the State of Ohio as a Geologist 3. His date of hire was May 6, 1986. At the beginning of February, 1993 he was working in the Ohio Department of Natural Resources, Division of Reclamation. Early in February, 1993 Mr. Mychkovsky's position in the Division of Reclamation was abolished. Under the Agreement between the parties he had available to him displacement rights. In the exercise of those rights he sought to displace William Haiker, a Geologist 3 in the Division of Water. The State denied that particular move to the Grievant. Instead, he was permitted to bump into the Division of Oil and Gas. Mr. Mychkovsky and the Union believed that the denial of movement to the Division of Water constituted a violation of the Agreement. A grievance protesting that action was filed. It was not resolved in the procedure of the parties and they agree that it is properly before the Arbitrator for determination on its merits.

Position of the Union: At Article 18, Section 18.04 the Agreement provides that:

“The affected employee may bump any less senior employee in an equal or lower position in the same or similar or related class series within the same office, institution or county (See Appendix I) provided that the affected employee is qualified to perform the duties.”

In this situation Mr. Mychovsky was the senior displaced employee. He possesses both a Bachelor's and a Master's degree in Geology. His graduate specialized training was in geochemistry, a major part of work related to work with ground and surface water. During the course of his employment with the Department the Grievant worked in the Division of Reclamation. During his tenure in Reclamation he was specifically concerned with permit review. This included consideration of surface and groundwater protection. Consequently, he utilized his knowledge of hydrogeology extensively. He often constructed models of surface and groundwater flows. He also frequently dealt with other state and federal agencies having responsibility for water supply and quality.

The position that Mr. Mychkovsky sought to secure deals with providing data regarding groundwater to the public. It requires knowledge of hydrogeologic methods. Mr. Mychkovsky possesses such knowledge. The ability to model the hydrogeology of a particular area is also required. The Grievant has such abilities as well. In essence, the Union insists that the Grievant is well suited to the disputed position in the Division of Water by both education and experience.

A reason proffered by the State for rejecting the Grievant's bumping preference was that he was not knowledgeable in a hydrogeologic mapping technique with the acronym of DRASTIC. This is a spurious defense according to the Union. Use of DRASTIC requires basic hydrogeologic skills which the Grievant can readily learn. The second reason advanced by the State not to offer the position to Mr. Mychkovsky was his alleged inability to design a pump test. Testimony from witnesses on behalf of the Department at the hearing indicated that the Geologist 3 in the Division of Water does not design the test. The incumbent merely selects the test based upon knowledge of the hydrogeologic features to be studied. Based upon his extensive education and training the Grievant would require minimal training to fill the position in dispute. The Agreement does not require that a qualified person be able to fulfill all tasks associated with the position into which he or she is bumping immediately.

In this case the Grievant has substantially more education and experience than the incumbent, Mr. Haiker. He has fifteen years of professional experience as a geologist. This experience has spanned both the private and public sectors. Within the Department he has worked in the Divisions of Oil and Gas and Reclamation. He has a Masters degree with honors. The incumbent has an undergraduate degree and ten Years experience. Within the Department Mr. Mychkovsky has supervisory experience. Mr. Haiker does not. During his work at the Division of Reclamation the Grievant was responsible for reviewing work product of Geologist 3's at the Division of Water. It is insupportable for the State to now claim he lacks the qualifications to perform hydrogeologic work when he has supervised those who do that work on a daily basis.

The State has consistently asserted that it is necessary that a Geologist 3 in the Division of Water have

four college level courses in Hydrogeology. The incumbent lacks that qualification. No other Geologist in the Division has the four courses asserted to be necessary by the State. The Grievant does not have four courses either.

In the Union's view a Geologist 3 in the Division of Reclamation should be considered to be qualified to hold the same position in the Division of Water. The Classification Specification provides that graduate education is the most desirable manner of acquiring the knowledge necessary to the position. The State has not divided the geologist position into specialized types of geologist. That is, there is no petroleum geologist, no coal geologist, no hydrogeologist etc. There is only a geologist in State service. As that is the case, the Union asserts that it is improper to impose upon the Grievant a requirement that he possess certain specialized knowledge that is not required by the position description. The Grievant possesses the fundamental knowledge necessary for employment as a Geologist 3. As that is the case, he can easily familiarize himself with the specialized tasks attendant upon the Geologist 3 position in the Division of Water. He is more than conversant with all aspects of geological work. He might need a period of orientation to the specific duties attached to the Geologist 3 position in the Division of Water but both by education and training he is well qualified to fill the disputed position. As that is the case the Union urges that Mr. Mychkovsky be offered the disputed Geologist 3 position in the Division of Water.

Position of the Employer: According to the State the operative language at issue in this case is the final phrase of Section 18.04, "provided that the affected employee is qualified to perform the duties." In the personnel function of the State there is constructed a "classification specification." That constitutes a grouping of tasks that are related to one another. In this situation, those are tasks associated with the work of geologists. From the classification specification there is then developed a "position description." The position description is specific to a particular job in State service and precisely describes the duties associated with that job. With reference to this dispute, there was constructed a Position Description for a Geologist 3 in the Division of Reclamation. That Position Description was specific to the Grievant and called for expertise in Petroleum Geology. When the Grievant sought to bump under the Agreement he desired to move to a position calling for expertise in hydrogeology. Expertise in that area is called for by the Position Description for the job at issue in this case.

In order to function as a Geologist 3 a person must possess knowledge of "geology, hydrogeology or other specialized geologic science..." as called for by the classification specification. In this situation, the classification specification specifically references knowledge of hydrogeology. The Grievant lacks that specific knowledge. The State makes the analogy of permitting a heart surgeon to perform brain surgery since the skills of surgery are easily transferrable. Such a situation is ludicrous. So too is the analogous argument of the Union in this case.

The Agreement references "duties." In this situation the Grievant cannot perform the "duties" of the position into which he desires to bump. Applying the principle of contract interpretation which calls for specific phraseology or words to take precedence over general phrases or words, the reference to "duties" in Section 18.04 requires that the State prevail in this instance it asserts.

As the State reads the work history of the Grievant he is unable to perform the "duties" of the disputed position. That position is as "hydrogeologist." Rebecca Petty, Supervisor of the Hydrogeology section in the Division of Water is acquainted with the Grievant. She has had an opportunity to observe his work. She is unaware that Mr. Mychkovsky possesses any knowledge of hydrogeology. Though he had been involved in a project known within the Division as the Carrollton Project and had assertedly gained knowledge of hydrogeology while working on that project, that that is the case was sharply disputed by Ms. Petty. In her view, the Grievant performed liaison functions with the Division of Reclamation and the Division of Water. He did no professional tasks in Ms. Petty's view.

When Mr. Mychkovsky applied to bump into the Division of Water he was interviewed by Ms. Petty. She recalls that he indicated he would need training in order to perform the tasks associated with the position. This circumstance serves to weaken his claim on the job in the State's opinion.

The incumbent whom Mr. Mychkovsky seeks to displace worked in the Division of Water for one year as a Geologist 2 prior to becoming a hydrogeologist. In the Division he secured expertise in hydrogeology. He

also had college-level courses in hydrogeology. When he was promoted to the disputed position he served a probationary period. That period was successfully negotiated. If the Grievant is permitted to bump, no such probationary period will be served by him. If he fails to perform, the State is stuck.

The position at issue requires four courses in hydrogeology or the equivalent. The Grievant does not meet that standard. He attended two hydrogeology seminars. Coincidentally, these had been designed and taught to some extent by Ms. Petty. They were not the equivalent of college coursework.

The language of 18.04 specifies that a potential bumpee "is qualified to perform" the tasks associated with the position into which he or she desires to bump. That wording requires that the person be able to perform the tasks associated with the position. This was not the case with Mr. Mychovsky.

When reviewing what actually occurred in this case, the Grievant was accorded his bumping rights. He did not lose employment. He continued to work at the same classification, with the same pay and benefits as before his move. He did not move to the position he sought. That is not required by the Agreement according to the State. The State gave the Grievant every opportunity to show he was qualified for the position in the Division of Water. He was unable to do so. As that was the case, the Agreement permits the State to act as it did in this instance it asserts. Consequently, the State urges the Grievance be denied.

Discussion: The Agreement between the parties confers certain benefits to more senior employees over their less senior brethren. Among the benefits conferred are those set forth in Section 18.04 of the Contract. People affected by a layoff "may bump any less senior employee in an equal or lower position in the same, similar or related class series...." The Agreement continues to provide that the person must be "qualified to perform the duties" of the position into which he or she desires to bump. This sort of seniority clause is known as a modified seniority clause. A further refinement of the terminology regarding this type of clause would classify it as a "sufficient ability" clause. That is, the Agreement does not specify that an employee with seniority possesses more ability than an incumbent junior colleague in order to bump. Rather, it indicates that the senior employee merely be "qualified." In addition, the Agreement is conspicuously silent regarding when the bumper must be able to perform the duties previously performed by the bumpee. In this situation the State argues that a person who wishes to exercise his bumping rights must be able to step in and perform the position into which he has bumped with the same facility as the person whom he has displaced. In essence, the State argues that employees must be fungible, all being round pegs fitting into round holes. There is difficulty with that argument on its face. That is, no matter what movement of personnel occurs there is bound to be a temporary loss of efficiency attendant upon the move. The lowest rated employee in State service has acquired specialized knowledge of his or her duties. Should that person be laid off, the more senior employee who bumps into the vacated position cannot be expected to immediately possess the same facility, skill and knowledge of the duties associated with the position as the displaced employee. Of necessity there occurs some learning period, even if not formally set forth in the Agreement.

The Agreement at Section 18.04 provides that in a bumping situation the senior "qualified" employee has preference. The question concerns what constitutes qualifications? In determining whether or not a person is qualified attention must be devoted to whether or not the senior employee possesses a background of education, experience and adaptability as to give a neutral reviewer reasonable confidence that the senior bidder will be able to competently perform the requisite duties within a reasonable period of time.

In this case, the Grievant possess a Master's degree in geology. The incumbent has a Bachelor's degree. The Grievant has a longer work history (both within and without of State service) than does the incumbent. His work history is varied. During his career he has conducted tasks involving water supply. It cannot be said that he is ignorant of the field.

During the course of this proceeding the State has stressed the necessity of the hydrogeologist having four courses in hydrogeology. Examination of Mr. Haiker's resume, Employer Exhibit 11, shows he has had one course in hydrogeology Hydrogeology 651 at Ohio State University. It is not questioned that this course is more rigorous than the short courses taken by the Grievant. What is questioned is the stress placed upon the four course requirement when it has not been met by the incumbent.

In rejecting Mr. Mychkovsky's application for the hydrogeology position the State placed great stress

upon his alleged unfamiliarity with underground water supplies. Employer Exhibit 8 is the Grievant's detailed response to objections raised to his bumping application by the Employer. On page 2 it indicates that the Grievant has "dealt with the protection of freshwater aquifers in my position at the Divisions of Oil and Gas and Reclamation." While at Reclamation the Grievant reviewed the impact of mining on freshwater aquifers and wells. He also used earth conductivity equipment. These were experiences allegedly not possessed by the Grievant and factors in the rejection of his application.

The Agreement uses the word "qualified" in conferring rights upon senior bumpers. It cannot be concluded from the record of the Grievant that he was not qualified for the disputed position. By both education and experience he met the test specified by the Agreement. That test is the test of being qualified. The Grievant was qualified for the position into which he sought to bump.

Award: The grievance is sustained. The Grievant is to be offered the opportunity to bump into the disputed Position of Hydrogeologist in the Division of Water.

Signed and dated this 28th day of December, 1993 at South Russell, OH.

HARRY GRAHAM
Arbitrator