ARBITRATION DECISION NO.:
617

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

EMPLOYER:
Department of Mental Retardation and Developmental Disabilities
Tiffin Developmental Center

DATE OF ARBITRATION:
August 21 and 29, 1996

DATE OF DECISION:
November 8, 1996

GRIEVANT:
George Shumway

OCB GRIEVANCE NO.:
24-13-(95-01-12)-0259-01-04

ARBITRATOR:
James M. Mancini

FOR THE UNION:
John Hall, Staff Representative

FOR THE EMPLOYER:
Ed Ostrowski, Chief, Office of Labor Relations, MRDD
Pat Morgan, OCB, Second Chair

KEY WORDS:
Lateral Transfers
Seniority
Demonstrably Superior
Disparate Treatment
Bias of Supervisor
Probationary Period
Admissibility of Evidence

ARTICLES:
Article 17 - Promotions, Transfers, and Relocations
- § 17.02 - Definitions
- § 17.05 - Applications
- § 17.06 - Selection

FACTS:

The grievant was employed as Therapeutic Program Worker by the Tiffin Developmental Center of the Department of Mental Retardation and Developmental Disabilities, Division of Developmental Centers. The

grievant applied for the position of Carpenter 2 which was posted on December 19, 1994. Three other employees also applied for the position; however, two of the applicants later withdrew from consideration. On January 9, 1995 the job was awarded to an employee who was less senior than the grievant.

The applications for the Carpenter 2 position were to be submitted by December 29, 1994, and the Civil Service Application had to be completed by 12 noon on January 3, 1995. The application required the grievant to submit evidence that he met the minimum qualifications for the Carpenter 2 position. The Employer contends that the grievant was not awarded the position of Carpenter 2 because he failed to meet the requisite eighteen (18) months carpentry experience.

The grievant filed a grievance contending that the Employer violated Article 17 of the Contract because the Employer did not contact the grievant's references with respect to his carpentry experience. Further, the grievant alleges that the Employer's decision to award the Carpenter 2 position to the other employee was predetermined and based on a bias against the grievant.

UNION'S POSITION:

The Union contends that the grievant met all of the qualifications for the Carpenter 2 position. The Union produced evidence demonstrating that the grievant had the requisite eighteen (18) months carpentry experience gained through operating his own general repair business, performing various paid carpentry jobs for several fellow employees, and working for various home improvement companies. Further, the Union argued that the evidence of the grievant's carpentry work produced at arbitration were admissible since both the State and the Union typically rely on copied documents in arbitration. In fact, the Union maintained that the State failed to prove that the other candidate was demonstrably superior to the grievant. As a result, the grievant should have been awarded the Carpenter 2 position since he was most senior.

In addition, the Union maintained that the selection of the other candidate over the grievant was predetermined and based on the bias of the supervisor against the grievant. As evidence of this disparate treatment, the Union introduced testimony from one of the applicants who claimed he was asked by Management to withdraw from consideration for the Carpenter 2 position. This applicant stated that Management informed him that he would be upgraded in return for his withdrawal. Further, to demonstrate bias toward the grievant, the Union introduced testimony of disparaging comments made by the grievant's Supervisor.

Finally, the Union argued that the other applicant should not have been permitted to apply for the Carpenter 2 position since Article Section 17.05 prohibits employees in initial or promotional probationary periods from bidding on job vacancies.

EMPLOYER'S POSITION:

The State argued that the Employer's assessment of the grievant's job qualifications should be limited only to the materials submitted by the applicant. Further, the State maintains that even if all of the other materials were referenced, the grievant would still be unable to maintain that he met all of the qualifications for a Carpenter 2 position. The grievant's application reflected no experience in carpentry.

The State also contended that based on all of the evidence, the other applicant was demonstrably superior to the grievant. The other applicant had three years experience as a carpenter and was more qualified for the Carpenter 2 position than the grievant who was more senior. Further, the State denied that the Carpenter 2 position was granted to the other candidate based on pre-determination. The State asserted that the same standards and methods of assessment were equally applied to both candidates.

Finally, the State claimed that the other candidate was not barred from applying for the Carpenter 2 position because the Union asserted him to be in the probationary period under Article Section 17.05(A), which restricts employees from applying for job vacancies. Rather, the State maintained that the candidate made a lateral transfer, under Article Section 17.02(F), and therefore was not barred from applying for the Carpenter 2 position.

ARBITRATOR'S OPINION:

The Arbitrator noted that the parties stipulated to two issues. The first issue was whether the grievant

should have been granted an interview for the Carpenter 2 position. The Arbitrator concluded that since the Union presented no arguments on this issue, the State did not violate the Contract by not granting the grievant an interview. The second issue was whether the state violated the Contract by not awarding the Carpenter 2 position to the grievant under Article Section 17.06 which states "the job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee."

The Arbitrator held that the grievant did not meet the requirement for eighteen (18) months experience in carpentry. Further, he was not persuaded by the prior employment experience the grievant listed on his civil service application which indicated that he had carpentry experience. In fact, looking beyond the application itself, the Arbitrator stated that the various reference letters contained in the grievant's personnel file did not even satisfy the carpentry requirement. The Arbitrator held that the Union's argument that documentation of the grievant's job experience was lacking, based on the fact that the grievant suffered a divorce and changed residences, was unpersuasive.

In addition, the Arbitrator stated that the Employer was not obligated to investigate the grievant's qualifications beyond the information submitted, since it was not the Center's employment policy to do so. The Arbitrator also rejected the Union's argument that the selection of the other candidate was pre-determined. The Arbitrator found that Management was only expressing concern for the other candidate's possibility of being laid off. This concern was not bias toward the grievant, but merely sympathy for the other applicant. The evidence presented by the Union charging bias of the supervisor did not adequately demonstrate that the Supervisor's comments played any role in the selection process.

Finally, the Arbitrator agreed with the State's contention that the other candidate was not barred from applying for the Carpenter 2 position since the applicant merely made a lateral transfer as defined by Article Section 17.02(F) and was not within a probationary period.

AWARD:

The grievance was denied.

TEXT OF THE OPINION:

ARBITRATION DECISION

November 8, 1996

In the Matter of:

State of Ohio, Department of Mental Retardation and Developmental Disabilities

and

Ohio Civil Service Employees Association, AFSCME Local 11

Case No.:
24-13(1-12-95)259-01-04

George Shumway, Grievant

APPEARANCES

For the State:
Ed Ostrowski, Chief, Office of Labor Relations, MRDD
Pat Morgan, Office of Collective Bargaining, Second Chair
John A. McNally, Office of Collective Bargaining
Karen Pringle, Human Resources Specialist, Tiffin Center
Patrick M. Herron, Human Resources Administrator, Tiffin Center
Greg Leopold, Operations Director, Tiffin Center
Raymond Lee, Maintenance Head, Tiffin Center

For the Union:
John Hall, Staff Representative
Tanya Duncan, Dispute Resolution Clerk
George Shumway, Grievant
Patricia Foist, OCSEA
Daniel Waltermeyer, Witness
Dwayne McQuistion, Witness
Joe Schock, Witness

Arbitrator:
Nels E. Nelson

BACKGROUND

On December 19, 1994 a notice of a vacancy for a carpenter 2 position was posted. The qualifications listed for the position were:

18 Mos. trg. or 18 mos. exp. in carpentry work; 1 course or 3 mos. exp. in blueprint reading; 1 course or 3 mos. exp. in hand & power tool operation; formal education in arithmetic that includes addition, subtraction, multiplication, division, fractions & percentages & in reading & writing common English vocabulary.

Those interested in the position were required to submit applications by December 29, 1994 describing how they met the minimum qualifications for the position.

Four employees submitted applications -- Harold Lucius, Joe Schock, Tony Selhorst, and George Shumway, the grievant. Schock and Selhorst withdrew their applications leaving the grievant and Lucius. Patrick Herron, the director of human resources, reviewed their applications and on December 29, 1994 invited both to submit notarized civil service application forms by 12 noon on January 3, 1995. Both Lucius and the grievant submitted the notarized applications on January 3, 1995.

On January 9, 1995 Herron informed the grievant that he had not been awarded the position because he did not meet the qualifications and indicated that the job had been awarded to Lucius. The grievant immediately filed a grievance complaining that Herron had failed to contact his references which impacted his ability to make a proper choice. The grievance asked that the grievant be awarded the carpenter 2 position and be made whole.

When the grievance was not resolved, it was appealed to arbitration. The arbitration hearing began on August 21, 1996 and was concluded on August 29, 1996. Post-hearing briefs were received on September 23, 1996.

ISSUE

The issue as agreed to by the parties is as follows:
Did the state violate the collective bargaining agreement when it failed to grant the grievant an interview for

the position of Carpenter 2 in the Department of MR/DD, Division of Developmental Centers, Tiffin Developmental Center, and/or when it did not award him the position? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 17 - Promotions, Transfers, and Relocations

* * *

17.02 - Definitions

* * *

F. "Lateral transfer" is defined as an employee-requested movement to a posted vacancy within the same agency which is in the same pay range as the classification the employee currently holds.

* * *

17.05 - Applications

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

A. For the vacancies that the Employer intends to fill by promotion the applications shall be divided as follows:

* * *

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

17.06 - Selection

A. 1. 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." If the position is in a classification which is assigned to pay range thirty (30) or lower, 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...

UNION POSITION

The union argues that the grievant clearly met the qualifications for carpenter 2. It claims that during that time the requirement for 18 months experience in carpentry wassatisfied by the 11 years the grievant operated Shumway Electric and General Repair. The union points out that the grievant performed carpentry jobs for several employees at the center. It notes that he submitted several bills for carpentry work he did. The union claims that the rest of the grievant's records were lost because of his divorce in 1991 and his move in September 1995.

The union dismisses the state's complaint that it did not see the bills until the night before the arbitration hearing. It states that the bills were not withheld in bad faith and were furnished as soon as reasonably possible. The union questions the state's contention that it needed time to verify the bills because it did not verify other union exhibits.

The union rejects the state's objection that the copies of the bills for carpentry work are not the best evidence. It points out that the federal rules of evidence provide for the submission of copies of documents unless there are questions regarding authenticity of the documents or unless it is unfair to admit copies. The union claims that neither exception applies in the instant case and notes that it is the practice of the parties to rely on copies in arbitration.

The union contends that the grievant met the requirement for one course or three months experience in

reading blueprints. It indicates that the grievant is pursuing a degree in mechanical engineering at Terra Technical College where he built projects from blueprints. The union states the grievant read blueprints for eight months as a machinist at Trebor, Inc. and for three months at Tiffin Scenic Studios.

The union claims that the grievant satisfies the need for one course in the use of hand and power tools or three months experience using hand and power tools. It reports that the grievant took courses in tool and die making at Terra Technical College and that he owned and used power and hand tools in his business. The union observes that the maintenance repair worker 2 classification which the grievant held for 13 months requires some knowledge of hand and power tools.

The union maintains that the grievant fulfills the requirement for formal education in arithmetic and reading and writing common English vocabulary. It points out that the grievant has a general equivalency diploma. The union notes that for 13 months the grievant held the maintenance repair worker 2 position which has the same requirement.

The union observes that the grievant provided letters of reference regarding his carpentry experience. It points out that his application referred to his personnel file which contained a letter from David Klaiss of Klaiss Home Improvements which states that the grievant performed carpentry work "numerous times in the last three years" and a letter from H. E. Guss of H. E. Guss Plastering and Stucco which indicates that the grievant did carpentry work in addition to other work. The union notes that the grievant submitted a letter from Jeff Kuhn of J. & J. Builders stating that he "worked for this company in the capacity of carpenter both rough and finish for over two years." It acknowledges that Kuhn's letter was not received until January 19, 1995 but complains that the grievant did not get the request to complete a civil service application until 6:30 P.M. or 7:00 P.M. on January 2, 1995 and it was due at 12:00 noon on January 3, 1995.

The union argues that the position description for maintenance repair worker 2 and the grievant's actual work in the position indicate that he had the required carpentry experience. It reports that the position description states that 50% of the work involves repair and maintenance work including carpentry and that one of the minimum qualifications is a knowledge of carpentry. The union further maintains that when the grievant held the position from September 20, 1992 through November 13, 1993, he did carpentry work such as repairing doors and windows.

The union contends that since the grievant was senior to Lucius, he should have been granted the carpenter 2 position pursuant to Article 17, Section 17.06 of the collective bargaining agreement. It states that this provision has been interpreted to mean that if the state wishes to promote a junior employee over a senior employee, it must show that the junior employee is "demonstrably superior" to the senior employee. The unionasserts that the state did not argue that Lucius was "demonstrably superior" to the grievant let alone meet its burden of showing that he was "demonstrably superior."

The union contends that Lucius could not have been granted the carpenter 2 position because Article 17, Section 17.05 prohibits employees in initial or promotional probationary periods from bidding on job vacancies. It states that Lucius was due to be laid off on December 30, 1994 but that prior to that he was placed in a position as a therapeutic program worker and held that position until February 5, 1995. The union stresses that he was still serving his initial probationary period when he was awarded the carpenter 2 position. It claims that the decision of the State Employment Relations Board in Wheeland v. SERB, 1994 SERB 4-86 (CP, Franklin, 9-2-94) supports its position.

The union charges that the selection of Lucius was pre-determined. It acknowledges that Raymond Lee, the supervisor of the maintenance department, stated on direct examination that he had no role in Lucius getting the carpenter 2 position but stresses that he had no credibility because he answered the questions of the state's advocate almost before they were asked and claims that he responded in the same way on cross-examination. The union states that he admitted on cross-examination that he told Lucius that "they" wanted him to have the carpenter 2 job so that "they would not lose him."

The union contends that Greg Leopold, the operations director, was also involved in the pre-determined selection of Lucius. It points out that he testified that he did not have any input in the selection and that he was unaware of Lee's input. The union notes, however, that Lee admitted that he and Leopold had a conversation about the selection of Lucius which undermines Leopold's credibility.

The union challenges Herron's testimony that the grievant did not meet the minimum qualifications for the

carpenter 2 position because his application did not explicitly state that he had 18 months of carpentry experience and because his blueprint experience was questionable. It asserts that the grievant's application showed that he wasqualified and that additional evidence of his qualifications was presented at the arbitration hearing. The union maintains that if Herron questioned the grievant's qualifications, he should have contacted his references or checked his background.

The union argues that the way Herron distributed the civil service applications proves the pre-positioning and disparate treatment of the grievant. It points out that the grievant's application was placed in his mailbox at work but because of the holiday weekend did not receive it until the night before it was due. The union claims that Herron hand-delivered an application to Lucius.

The union maintains that the testimony of Schock about his conversation with Herron supports its contention that the selection of Lucius was pre-determined. It observes that he testified that after he bid on the carpenter 2 position, he was called into Herron's office where Herron asked him to withdraw his bid because he wanted to give the job to Lucius. The union reports that Schock told Herron that he would withdraw his bid but he wanted to be upgraded to maintenance repair worker 3 in return. It notes that Schock indicated that Heron stated that he would have to check with Jerry Johnson, the superintendent of the center, and that the grievance filed by the grievant would have to be resolved before he could be upgraded.

The union contends that Schock's testimony about his conversation with Lee also indicates that the selection of Lucius was pre-determined. It points out that Schock testified that when he told Lee that he had told the union about his request for upgrading to maintenance repair worker 3, Lee told him that he had better watch what he said because he had his job to worry about. The union claims that this statement reveals that Lee was involved in the "conspiracy" to award the carpenter 2 job to Lucius.

The union complains that Lee was biased against the grievant. It points out that Daniel Waltermeyer, a plumber 2 in the maintenance department, testified that Lee told him that the grievant "will never get a bid in maintenance because he is too fat to be of any use." The union notes that Dwayne McQuistion, a therapeutic program worker, statedthat Lee claimed that the grievant was "not worth a shit" and that he could not wait to get him behind a push lawn mower in the 90-degree heat to sweat the fat off him or to get him to quit.

The union maintains that the circumstances surrounding the grievance filed by the grievant in February 1990 regarding a maintenance repair worker 2 position supports its allegation of disparate treatment. It indicates that in the earlier case, just as in the instant case, a position was awarded to a less senior employee. The union notes that the grievance resulted in the grievant being awarded the position.

The union concludes that the grievance should be granted. It asks the Arbitrator to award the carpenter 2 position to the grievant without the requirement of a probationary period and to grant the grievant back pay.

STATE POSITION

The state argues that the assessment of a job candidate's qualifications is restricted to the materials submitted by the candidate. It points out that Herron screens more than 500 applications each year so that operational needs limit his review to the materials submitted by the applicants. The state notes that this is a long-standing practice which is known by employees including the grievant.

The state contends that limiting the assessment of candidates to the materials they have submitted is consistent with the contract. It indicates that the agreement sets out a process of screening decisions based on applications rather than on interviews. The state maintains that this position is supported by this Arbitrator's decision in State of Ohio, DMR/DD and OCSEA/AFSCME, Case No. 24-01(92-10-27)091-01-14 and Arbitrator Harry Graham's decision in OCSEA/AFSCME v. State of Ohio, Dept. of Health, Case No. 14-00(90-03-05)021-01-13.

The state contends that the grievant's application failed to demonstrate that he was proficient in the minimum qualifications of the carpenter 2 position. It claims that hisapplication reflects absolutely no employment experience in carpentry. The state asserts that neither the grievant's 12 months as a machinist nor his 15 years as a therapeutic program worker qualify as carpentry. It indicates that the grievant's 13-

month employment as a maintenance repair worker 2 does not qualify him because he spent six or seven months in the power house tending boilers and he submitted no work orders to show that he did carpentry work while in the power house.

The state maintains that the fact that the grievant occupied the maintenance repair worker 2 position does not show that he was qualified for the carpenter 2 position. It points out that a January 1990 posting for the position which was introduced by the union requires 300 hours of combined experience in building maintenance and repair including experience with electrical, plumbing, masonry, sheet metal, painting, plastering, steamfitting, refrigerators, and heating as well as carpentry. The state stresses that this is not equivalent to 18 months or 3120 hours of experience in carpentry.

The state argues that the grievant's job description as a power house maintenance repair worker 2 requires similar combinations of skills and duties. It points out that the job description indicates that the maintenance and repair involves plumbing, painting, and electrical work as well as carpentry. The state claims that the indication that 50% of the job consists of maintenance and repair work is an overstatement since the job involves tending the boilers for six or seven months and cutting grass for the rest of the time.

The state rejects the grievant's listing of Shumway Electric and Repair on his application as meeting the carpentry requirement for the carpenter 2 position. It observes that the grievant's application lists framing, roofing, finished carpentry, and cabinet building as subjects covered as well as a litany of what appears to be do-it-yourself projects. The state stresses that this information is included in a section that asks for "hobbies that have taught you qualifying skills" which reveals the true nature of the grievant's moonlighting experience where he "performed minor home repairs for hisfamily, friends, and co-workers and charged them unknown amounts for his service even though it was a hobby."

The state maintains that the only evidence offered by the union that purports to affirm the grievant's carpentry experience are letters from J. & J. Builders, Klaiss Home Improvements, and H.E. Guss Plastering and Stucco and a group of receipts from Shumway Electrical & Repair Service. It points out that at the time Herron screened the applications only the Klaiss and Guss letters and the Shumway receipts were available to him. The state claims that the Klaiss and Guss letters on their face fail to communicate 18 months of carpentry experience. It charges that the Shumway receipts do not reveal carpentry experience but rather disprove the grievant's claimed carpentry experience.

The state contends that despite having 18 months to prepare for the arbitration hearing, the union failed to submit evidence at the hearing that the grievant was qualified for the carpenter 2 position. It characterizes the grievant's testimony that his former wife kept his business records and that his records were lost when he moved as patently absurd. The state notes that the grievant offered no pay stubs or tax records relating to work done for Klaiss Home Improvements, Guss Plastering and Stucco, J. & J. Builders, or Shumway Electric.

The state challenges the package of receipts from Shumway Electric for carpentry work. It maintains that the grievant testified that he got original receipts or copies from customers but points out that the documents submitted by the union were identical in appearance and although some were supposed to be more than ten years old, none showed any signs of age. The state claims that the documents appear to have a shared origin.

The state charges that the grievant's testimony is not credible. First, it points out that the grievant testified about how difficult it was to obtain the letter from Guss on January 3, 1995 but later, when he found out that it was already in his personnel file, he indicated that he was referring to the letter from J. & J. Builders, ignoring the fact that that letter was not received by the center until January 19, 1995. Second, the state notesthat the grievant's application for another position in September 1992 indicates that he was pursuing two degrees at Terra Technical College yet his college transcript shows that the grievant attended only from Winter 1977 through Winter 1978 and from Winter 1989 through Spring 1989. Third, it observes that the grievant stated that he believed Herron accepted the arguments in his January 9, 1995 letter yet he drafted a grievance that same day and filed it three days later before the deadline for a response he had imposed on Herron in his letter.

The state argues that the evidence shows that Lucius was a demonstrably superior candidate to the grievant. It reports that Lucius had three years experience as a carpenter where he earned a living and

supported his family based solely on his carpentry skills. The state observes that Lucius was the site foreman for large commercial projects and built 20 to 25 single family homes.

The state denies that management of the center engaged in an effort to keep the grievant out of the maintenance department. It points out that Lee's comments regarding the grievant were made in 1989 before the grievant's successful transfer to maintenance repair worker 2. The state notes that the grievant voluntarily left the maintenance repair worker 2 position and that if he had stayed, he would have had the seniority to stay in maintenance when the power house closed.

The state contends that in the instant case Herron did not change the procedure he follows when a job is posted. It states that he assessed the grievant's application using the same standards and methods as other cases. The state indicates that Herron's request that Schock withdraw his bid was motivated solely by his concern that Lucius, who has a large family, would otherwise be laid off rather than any bias against the grievant. It maintains that Schock could have had the carpenter 2 position but withdrew his application because he understood the position of Lucius.

The state rejects the union's argument that Lucius was barred from the position because he bid on it while he was in the probationary period for therapeutic programworker. It states that Lucius bid on the carpenter 2 position while he was a maintenance repair worker 2 rather than a therapeutic program worker. The state observes that Lucius transferred to a therapeutic program worker position after the power house closed but notes that he remained on vacation until the incumbent carpenter 2 retired and he then assumed that position

The state charges that the union's reliance on Article 17, Section 17.05(A) is misplaced. It claims that this section does not apply because when Lucius moved to therapeutic program worker, it was a short term, lateral transfer under Article 17, Section 17.02(F) so that he was free of the restrictions in Article 17, Section 17.05(A). The state maintains that the facts in Wheeland vs. SERB bear no resemblance to the instant case.

The state concludes that the union has not met its burden of proof. It asks the Arbitrator to deny the grievance in its entirety.

ANALYSIS

The basic facts leading to the instant grievance are clear. A carpenter 2 position was posted on December 19, 1994. Lucius, Schock, Selhorst, and the grievant applied for the position. Schock and Selhorst withdrew their applications leaving Lucius and the grievant. On January 9, 1995 the job was awarded to Lucius who was less senior than the grievant. The grievant filed a grievance charging that the state had violated Article 17 of the collective bargaining agreement. When the grievance was not resolved, it was appealed to arbitration.

The parties stipulated as to the issue before the Arbitrator. Two specific issues were raised. The first issue is whether the grievant should have been granted an interview for the position of carpenter 2. The union, however, presented no arguments relating to this issue. Since the union bears the burden of proof to establish the alleged contract violation, the Arbitrator must conclude that the state did not violate the contract by not interviewing the grievant.

The second issue is whether the state violated the collective bargaining agreement when it did not award the carpenter 2 position to the grievant. The selection of an applicant to fill a promotional position is governed by Article 17, Section 17.06. It requires that "the job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee."

The qualifications for the carpenter 2 position are contained in the vacancy notice posted December 19, 1994. They are:

18 Mos. trg. or 18 mos. exp. in carpentry work; 1 course or 3 mos. exp. in blueprint reading; 1 course or 3 mos. exp. in hand & power tool operation; formal education in arithmetic that includes addition, subtraction, multiplication, division, fractions & percentages & in reading & writing common English vocabulary.

The Arbitrator does not believe that the grievant met the requirement for 18 months of training or experience in carpentry work. At the time the grievant applied for the position he was a therapeutic program worker -- a position he had held for approximately 11 years. This position involves working with residents of the center and bears no relationship whatsoever to carpentry.

The grievant's civil service application listed three jobs under prior experience. First, he was a maintenance repair worker 2 from October 1992 to November 1993. The grievant described his duties as "groundskeeping, assist all trade areas as needed, powerhouse engineer assistant, wire fixtures as requested in powerhouse, painted, repaired windows & doors." Not only does this description fall far short of showing 18 months of carpentry experience but testimony indicated that during the heating season the grievant spent the vast majority of time tending the boilers and the rest of the year he was assigned to cutting grass.

Second, the grievant was employed as a machinist at Trebor Incorporated from November 1978 to July 1979. He stated that he "read blueprints & fabricate[d] parts fromthem by using any machine needed and any power tools to fabricate jigs & fixtures." None of this has any relationship to carpentry.

Finally, the grievant was a machinist at Tiffin Scenic Studios from August 1978 to November 1978. He indicated that he "read blueprints & fabricate[d] parts from them by welding and using any machine needed." Again, there is no relevance to carpentry.

In addition to listing his prior jobs, the grievant included under the heading of "training and other qualifications," 11 years of carpentry with Shumway Electric and General Repair. He offered the following information:

I own and operate numerous machines associated with woodworking. I have built houses, garages, room additions, porches, desk, roofs, cabinets for kitchens and baths, remodel [illegible] and basements, poured & finished concrete, hung & finished drywall, [illegible] entire [illegible]. (Joint Exhibit 9).

The Arbitrator does not believe that the grievant's experience with his electrical and general repair business meets the requirement for 18 months of carpentry experience. First, it appears from the name of the company and the description of his work that carpentry was only part of the grievant's work. Second, while the above described work was being done, the grievant was employed as a full-time therapeutic program worker at the center. Even if the majority of the part-time work the grievant did was carpentry, it would not add up to 18 months of full-time carpentry experience.

The grievant's preliminary application for the position, which is dated December 26, 1994, refers to letters of reference in his personnel file. It contained two notes from contractors. First, a note from David Klaiss, the owner of Klaiss Home Improvements, states that the grievant worked for his company "numerous times in the last 3 years." It described his duties as including "electrical wiring, plumbing, carpentry work, concrete finishing, roofing, gutters, painting, building fence and decks, installing and finishing drywall and repairing plaster walls, repairing heating systems, installing vinyl and aluminum siding, bending custom sashes for window and door replacement, driving trucks to and from job sites, delivering materials and ordering material for some jobs."

The second note is from H.E. Guss of H.E. Guss Plastering and Stucco. He indicated that he used the grievant "many times in past several years" to perform "painting both interior and exterior, tarring roofs, electrical work, carpentry, plaster and stucco application and repair, plumbing repairs, set up of all equipment and materials and thorough cleanup of work areas when job was completed."

The Arbitrator does not believe that these two notes indicate that the grievant met the requirement for 18 months of carpentry experience. Only a small part of the work described by Klaiss and Guss is carpentry. Furthermore, a few years of occasional work for two contractors does not approach the 18 months of experience required by the job posting.

The grievant's personnel file also contained notes from seven individuals for whom he performed work. Four of the notes refer to electrical work, one to plumbing work, one to plumbing and electrical work, and one to furnace installation. None of them refer to carpentry work. They create the impression that the bulk of the grievant's business involved electrical and plumbing work rather than carpentry.

Ten days after the carpenter 2 job was awarded to Lucius, the grievant submitted a note from Jeff Kuhn of J. & J. Builders. It states that the grievant " worked for this company in the capacity of carpenter with both rough and finish for over two (2) years." The note indicates that his work involved "new construction of houses and additions also remodeling of existing structures."

Leaving aside the fact the Kuhn's note was not received until after the job was awarded to Lucius, it does not establish that the grievant met the carpentry requirement. Although the note reveals that the grievant had done rough and finish carpentry work, this occasional work does not meet the 18 months of experience required for the carpenter 2 job.

At the arbitration hearing the grievant submitted 21 bills for work he did in his electrical and general repair business. Although it is obvious that Herron could not haveconsidered these bills at the time the job was awarded, they would not have established that the grievant met the qualifications for the position. Five of the jobs involved no carpentry. Seven jobs involved some carpentry but it was incidental to other work. Most of the remaining jobs consisted of small projects such as building flower boxes, repairing steps, and replacing a closet door. Clearly, these bills do not reflect 18 months of carpentry experience.

The union offered two reasons why the grievant was unable to verify 18 months of carpentry experience. First, it claimed that he could not provide more documents because he lost most of his business records when he was divorced and during a move. This contention cannot be accepted. As an operator of a business, the grievant knew that he was responsible for retaining business records for tax and other purposes. Divorces and changes in residence are not unusual events and cannot excuse the grievant's inability to produce records indicating the work that he performed. The grievant applied for a job requiring 18 months of carpentry experience and he cannot escape his obligation to establish that he satisfied that requirement.

Second, the union complained that the grievant had too little time to complete the civil service application for the job and to get letters of reference. While it appears that December 29, 1994 to January 3, 1995 is a short time -- especially considering the holidays -- the grievant knew when he decided to apply for the position that he would have to complete a civil service application and provide evidence regarding his carpentry experience. Furthermore, all of the applicants including Lucius had the same time to complete the application. Most significantly, the grievant had from January 9, 1995 when the grievance was filed until the second day of the arbitration hearing on August 29, 1996 to produce more information regarding his carpentry experience but provided little more than what he provided with his civil service application.

The union charged that Herron should have checked the grievant's references. The Arbitrator disagrees. It is not the procedure that is normally followed at the center and, infact, would be very difficult to do given the number of job applicants in a year. In any event, the grievant and Lucius were treated in the same fashion.

The union argued that the selection of Lucius was "pre-determined." While it is true that Herron prevailed upon Schock, who had extensive carpentry experience and was senior to Lucius, to withdraw his application for the carpenter 2 position, he explained that he was concerned that unless Lucius, who is the father of five or eight children, obtained the position, he would be laid off. Although the appropriateness of Herron's action can be questioned, his request for Schock to withdraw his application did not interfere with the grievant's rights under Article 17. In fact, given Schock's extensive carpentry experience, he would have been awarded the job and the grievant would have had no basis for a grievance since he has less seniority than Schock.

The union's complaint that Herron hand-delivered a civil service application to Lucius while he placed the grievant's application in his mailbox must be dismissed. First, there is conflicting testimony regarding the alleged hand-delivery of an application to Lucius. Second, it appears that Herron could not have hand-delivered an application to the grievant because the grievant testified that he was off work due to the holidays until January 2, 1995 when he found the civil service application in his mail box. Third, even if the grievant and Lucius got their applications in different ways, this would not have prevented the grievant from listing any relevant carpentry experience on his application.

The union also charged that Lee was biased against the grievant. Testimony revealed that Lee made remarks about the grievant's weight and his work. Although Lee's comments were ill-advised, there was no indication that he played any role in the selection process. Furthermore, the grievant was denied the

carpenter 2 position because he lacked the requisite experience.

The union's final argument was that Lucius could not have been awarded the job under Article 17, Section 17.05(A) because he had just assumed the position of therapeutic program worker. The Arbitrator disagrees. Article 17, Section 17.05(A)states that "employees serving either in an initial probationary period or promotional probationary period shall not be permitted to bid on job vacancies." However, the grievant's move from maintenance repair worker 2 to therapeutic program worker was a lateral transfer as defined in Article 17, Section 17.02(F) so there was no probationary period.

Based upon the above analysis, the Arbitrator must deny the grievance. The union failed to show that the state violated the collective bargaining agreement by not interviewing the grievant for the position of carpenter 2. Furthermore, it did not demonstrate that the grievant met the requirement for 18 months of experience or training in carpentry.

AWARD

The grievance is denied.

Nels E. Nelson
Arbitrator

November 8, 1996
Russell Township
Geauga County, Ohio