

In the Matter of the
Arbitration Between

OCSEA, Local 11
AFSCME, AFL-CIO

Union,

and

Ohio Department of
Transportation

Employer.

Grievance G-87-2634

Grievant (Swaldo)

Hearing Date: July 17, 1990

Closing: Received July 28, 1990

Award Date: September 5, 1990

#486

For the Union: John C. Demsey, Esq.

For the Employer: Tim Wagner
Rachel Livingood

Present in addition to the Grievant Dean Swaldo and the Advocates named above were the following persons: Meril Price, OCB Chief of Administrative Support (witness), Tom Dennis, ODOT Real Estate (witness), John Audet, ODOT (observer), John P. Feldmeier, Clerk, Steve Wiles, Staff Representative, Linda Lampkin, Director of Research - AFSCME (witness), Jim Eckard, Steward (witness).

Preliminary Matters

The Arbitrator asked permission to record the hearing for the sole purpose of refreshing her recollection and on condition that the tapes would be destroyed on the date the opinion is rendered.

Both the Union and the Employer granted their permission. The Arbitrator asked permission to submit the award for possible publication. Both the Union and the Employer granted permission. The parties stipulated that the matter was properly before the Arbitrator. All witnesses were sworn.

Issue(s)

Union

Was the Grievant in the "same similar or related class series" and, therefore, entitled to a promotion pursuant to § 17.04 (a) or (b) of the Agreement.

Employer

In this case does the Grievant have the right to grieve non-selection for the posted vacancy, Utilities Relocation Tech 3, P.C.N. 31170.0 under Article 17 of the Contract?

Stipulations

1. The Employer stipulated that for the purposes of Article 17.04 that the Grievant is in "same, similar or related class series." (Appendix I).

2. The Employer stipulated that if the Arbitrator finds that the Grievant falls under Article 17.05(A) or (B) then the Grievant is entitled to the promotion at issue.

Joint Exhibits

1. Contract
2.
 - A. Vacancy Notice, PCN 31170.0
 - B. Application for 31170 by Grievant
 - C. Memo to Grievant that another applicant had been selected.
 - D. Grievance
 - E. Response to Grievance which indicated that Grievant's "bid fell under Art. 17 § 04(c). Employees bidding under Article 17.04(c)(d)(E) have no right to grieve non-selection."
 - F. Third Step Response which reads, "[y]our current position is not in the 'same, similar or related class series' as the vacant position. . . . Therefore, as per Article 17.05(C), you have no contractual right to grieve non-selection."
 - G. Fourth Step Response which reads, "Your current position is not in the 'same, similar or related class series' as the vacant position. . . . You fall within the grouping 17.04(C). . . ."
 - H. Arbitration request by OCSEA.
3.
 - A. Letter from Director Jackson to the Grievant offering him his current position dated 1-19-77.
 - B. PCN 72590.0 which was attached to letter found in A.
 - C. Personnel Action transferring Grievant from PCN 31140.0 to PCN 72590.0 dated 3/22/77.
 - D. Memo signed by Grievant accepting PCN 72590.0 (undated).
 - E. IOC to Grievant from Administrator of Bureau of Resource Development, ODOT dated 3-28-77 which read "Since your assignment will be to the Northeast

Region, your payroll and project assignment activities will be coordinated by the Region staff.
..

- F. IOC from District Dep. Director of ODOT to Assistant Deputy Director for Real Estate Division which said, "[w]e are enclosing a copy of the approved Personnel Action effecting the transfer of [Grievant] to the Real Estate Bureau of Resource Development. Please forward the subject employee's personnel records . . . to: Administrator, Bureau of Resource Development Real Estate Administration . . . Columbus . . ."
 - G. Position Control Roster -- Central Office: Northeast Region (642).
 - H. Position Control Roster -- Central Office: Resource Development.
 - I. Position Control Roster -- District 11 - Right of Way.
 - J. Form showing PCN 72590 as Payroll No. 770-000 Sub Unit 549. Position Update approved 12-17-86.
 - K. Form for PCN 72590 showing: Assigned to Northeast Region -- receives assignments from PCN 77120.
4. Organization Charts
- A. ODOT District Eleven
 - B. ODOT Planning and Design
 - C. ODOT Real Estate Administration
 - D. ODOT Bureau of Resource Development
 - E. ODOT Northeast Region
5. Evaluations of Grievant
- A. 3-30-89 to 3-30-90
 - B. 3-30-88 to 3-30-89
 - C. 3-30-86 to 3-30-87
 - D. 3-30-84 to 3-30-85

- E. Request for Leave by Grievant dated 3-21-90
- F. Request for Leave dated 6-38-88
- G. Request for Leave dated 9-29-89

Relevant Contract Sections

§ 17.04 - Bidding

Employees may file timely applications for promotions.

Upon receipt of all bids the Agency shall divide them as follows:

- A. All employees within the office, "institution" or county where the vacancy is located, who presently hold a position in the same, similar or related class series (see Appendix I).
- B. All employees within the geographic district of the Agency (see Appendix J) where the vacancy is located, who presently hold a position in the same, similar or related class series (see Appendix I).
- C. All other employees of the Agency in the same, similar or related class series.
- D. All other employees of the Agency.
- E. All other employees of the State.

§ 17.05 - Selection

A. The Agency shall first review the bids of the applicants from within the office, county or "institution." Interviews may be scheduled at the discretion of the Agency. The job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee.

B. If no selection is made in accordance with the

above, then the same process shall be followed for those employees identified under 17.04(B).

C. If no selection is made in accordance with the above, then the agency will first consider those employees filing bids under 17.04(C) and then 17.04(D), and then 17.04(E). Employees bidding under 17.04(C), (D) or (E) shall have no right to grieve non-selection.

Appendix J - Geographic Jurisdiction, p. 95 Ohio Department of Transportation

<u>District #1</u>	<u>District #2</u>	<u>District #3</u>	<u>District #4</u>
Defiance	Williams	Erie	Summit
Paulding	Fulton	Huron	Portage
Van Wert	Henry	Crawford	Stark
Putnam	Lucus	Lorain	Ashtabula
Allen	Wood	Ashland	Trumbull
Hancock	Ottawa	Richland	Mahoning
Hardin	Sandusky	Medina	
Wyandot	Seneca	Wayne	
<u>District #5</u>	<u>District #6</u>	<u>District #7</u>	<u>District #8</u>
Knox	Marion	Mercer	Preble
Licking	Morrow	Darke	Butler
Fairfield	Union	Auglaize	Hamilton
Perry	Delaware	Shelby	Montgomery
Coshocton	Madison	Miami	Warren
Muskingum	Franklin	Logan	Clermont
Guernsey	Pickaway	Champaign	Greene
	Fayette	Clark	Clinton
<u>District #9</u>	<u>District #10</u>	<u>District #11</u>	<u>District #12</u>
Brown	Hocking	Holmes	Cuyahoga
Highland	Vinton	Tuscarawas	Lake
Adams	Athens	Columbiana	Geauga
Ross	Meigs	Carroll	
Pike	Gallia	Harrison	
Scioto	Morgan	Jefferson	
Jackson	Washington	Belmont	
Lawrence	Noble		
	Monroe		

District #13

Central Office - Columbus

Real Estate Division

Northwest Districts 4, 11, 12
Northwest Districts 1, 2, 3

Southeast Districts 5, 6, 10
Southwest Districts 7, 8, 9

Facts

On October 16, 1987, the position of Utilities Relocation Tech 3 was posted in New Philadelphia, Ohio, District 11, Ohio Department of Transportation. The PCN was 31170: Division/Unit "Eleven/Right of Way." On 10/23/87, Grievant applied for the position. He listed his then current PCN as 770-000 (549). He indicated within the application that since 1977 he had served "as a Project Supervisor and Acting Acquisition Supervisor for the Northeast Region of Real Estate" (emphasis added). On November 19, 1987, Grievant was informed that he was not selected. He grieved on November 25, 1987. Both the Third Step and Fourth Step responses pointed to § 17.04(C) as the reason he could not bid, but both responses also indicated that the reason (C) was applicable was that the Grievant was not in a "similar or related class." The first response cited § 17.04(C) solely. Sometime prior to Arbitration and at Arbitration, the Employer stipulated that the Grievant was in a "similar or related class" but that the reason for his non-selection was that under 17.04(A) he was not "within the office, institution, or county where the vacancy is listed" nor in 17.04(B) was he "within the geographic district

of the Agency (see Appendix J) where the vacancy is located.
. . . " The Union argued in its opening statement at the Arbitration hearing that the Employer had forfeited its right to be heard because it had changed its position. However, while noting the same facts in its closing, the Union in its closing argument said "The only question to be resolved is whether his (Grievant's) current position is in the same district as the vacancy. . . ." One interpretation of the closing is that the Union had abandoned its objection. The Arbitrator indicated at the outset that she would take objection under advisement. Certainly fair notice is required in arguing disputes. Throughout, the Employer has argued that 17.04C applied to the Grievant. However, the basis for the argument was different in Steps 3 and 4 than at the first step or at Arbitration. The Arbitrator concludes that the notice was sufficient for two reasons:

1. § 17.04(C) was plead consistently.
2. The burden is on the Union to show that the Grievant fully met the criteria of either 17.04(A) or 17.04(B).

Therefore, notice to the Union was sufficient.

Thomas E. Dennis, Real Estate Administrator 3, Director of the Bureau of Resource Development (see Chart J-4D) testified. He explained that in 1977 in response to the virtual completion of the federal interstate highway system, the needs of ODOT with regard to real estate acquisition changed dramatically. No need existed any longer for large staffs in local districts. For

efficiency and operational reasons, 4 regions were created and a new Bureau of Resource Development was created. Dennis was charged with creating the new Bureau of Resource Development. He wrote the new position descriptions and coordinated with DAS their issuance. His job was also to see to it that all personnel in District Offices, which were to cease to exist for Real Estate purposes, were notified. Such a notice was the letter of January 19, 1977 to the Grievant (Joint Exhibit 3-A). In that letter, the following statements are pertinent:

. . . the Department's Real Estate Operation should be centralized into four (4) regions from the existing twelve (12) district offices . . .

. . . we have provided opportunities in the new regional organization by posting each position and encouraging all qualified employees to apply.

. . . I am pleased to offer the position of Property Agent 3 (PCN 72590.0) in the Bureau of Resource Development. (Emphasis added.)

. . . you will be assigned to the Bureau of Resource Development for payroll, training and project assignment purposes. (Emphasis added.)

Your new assignment will require that your present area of work be expanded to include the entire state. Assignment away from your home office will be made only when absolutely necessary because of work load requirements and will be on a per diem basis. (Emphasis added.)

. . . should you not desire to accept this position in the new real estate operations, an attempt will be made to place you in a vacant position within your present District. (Emphasis added.)

. . . your present position in the district will be deleted . . . 2-18-87. . . . (Emphasis added.)

Attached to the letter of 1-19-77 was the position description of new job (Joint Exhibit 3.B). Mr. Dennis pointed to the "County of employment" on the Position Description as "Franklin." The Position Description also specified that the Agency as ODOT, the Division as Planning and Design and the Office or Unit as Real Estate. The immediate Supervisor was listed as Property Agt. Supervisor. Mr. Dennis pointed to Joint Exhibit 3C, the Personnel Action which indicated that the position of Grievant had changed in these ways:

Payroll No. 770-111 to 770-213

PCN 31140 to 72590

Work Unit A75 to A40

Check Seq. 340 to 549

Hq. Cty Tuscarawas to Franklin

Mr. Dennis then pointed to Joint Exhibit 3-D wherein the Grievant accepted the new position in writing. Mr. Dennis noted that Joint Exhibit 3E indicated that payroll etc. was "coordinated" by the region but paid out of Central Office. He noted that Joint Exhibit 3-F indicated that the Grievant's personnel records went to Central Office.

Mr. Dennis then turned to Joint Exhibit 3-F, the Control Roster for Northeast Region. He specifically pointed out that the Grievant was not listed therein nor was the vacancy listed there. Moreover, the sub unit number was 642, and the home counties were all Portsmouth. Listed in that Roster was PCN 771.20 Sands - Property Agent Supervisor -- the functional survivor of PCN 72590,

the Grievant's. Also in the Northeast Roster was PCN 77100 Griffith, Real Estate Admin. 3, head of Northeast Region. Dennis then turned to Joint Exhibit 3-G, Position Control Roster for Resource Development. The Sub Unit number is 549. The Grievant's PCN is listed in this section. His county, however, is listed as Tuscaloosa while the majority of other persons in the roster are listed in Franklin County.

Dennis then pointed to Joint Exhibit 3-H, the Position Control Roster of ODOT District Eleven. The Sub Unit number is 340. The PCN of the disputed vacancy is listed in this Roster (31170), and the county is Tuscaloosa. Dennis then pointed to Joint Exhibit 3-I where the Position Update was approved; PCN 72590 (Grievant's) is listed as Payroll 770-000, Sub-Unit 549.

Lastly, Dennis testified about Joint Exhibit 3-J. The Position Description attached to the Position Update. The Position Description lists Agency as ODOT, Division as "Planning and Design - Real Estate" and Unit or office as 649 Bureau of Resource Development. The Immediate Supervisor is listed as 72000, Real Estate Administrator, i.e., the Witness, Mr. Dennis. The description says that the Position is "assigned to Northeast Region and receives assignments from 77120. 77120 is Mr. Sands, Prop Agent Supervisor, who is located in the Northeast Agent (see Joint Exhibit 4(E) (Organization Chart)). On cross examination, Mr. Dennis said he could not explain why the headquarters county for Grievant's position was listed as Tuscaloosa. He said it must be a technical error.

Meril Price, Chief of Administrative Support for OCB was the second witness for the Employer. Ms. Price indicated that she was formally with ODOT Personnel for 7-1/2 years and was familiar with ODOT Classification plan. She explained that a "person is located organization by examining the Payroll Roster, Table of Organization, the Position Description, and Personnel Actions. When a conflict is found, the Department of Administration Services has a statewide policy that the position description "controls," [in this case, Joint Exhibit 3-J]: PCN 72590 which has Franklin as the County of Employment and the payroll unit as 649 - i.e., Bureau of Resource Development.

Ms. Price also testified that she was on the 1986 negotiations team and helped negotiate Article 17 and Appendix J. The Districts in J were set up to coordinate for promotion and layoff purposes with the Ohio Revised Code. She testified that ORC had "counties" as the criteria, but these counties did not mirror ODOT "districts." "J" provided that regional employees must bump within regions, district employees with districts and that regional and district were separate payrolls. The Central Office was also a separate payroll and was listed as District 13 in the Contract, so that Central Office employees could only bump Central Office personnel.

Ms. Price said that no districts exist for Real Estate rather Real Estate Divisions "service" certain districts. She admitted J was badly drafted, and Districts should perhaps be "regions."

The Employer called the Grievant as a "hostile witness." The

Grievant was referred by the Employer's advocate to Joint exhibit 3-D, the letter which the Grievant signed accepting his current position. The Grievant was asked if this letter was the original one he signed. He said, "no" that he had written on the original "right to bid in District Eleven." This letter was returned to him in blank, and he was told "he must either take it or leave it" (the job). He admitted that he was told that the position was a "Central Office" position. He testified that he understood that he had two alternatives to signing:

- 1) "loose his job"
- 2) "go back to District as a truck driver."

The sole Union witness was Ms. Lampkin, Director of Research, AFSME, who provided technical assistance to OCSEA during negotiations. She testified that during negotiations that the Union sought to maximize opportunities as much as possible for Union members by getting first rights for persons in an office or in a geographic area. She said that under Appendix J, Real Estate was separate and that no Real Estate personnel were in District 13. She said that any Real Estate persons in the Central Office would be geographically in District 6 and could bid in District 6. Upon rebuttal, Ms. Price said that real estate personnel exist who are not in any of the 4 regions, and they are in the Central Office in various bureaus. She referred to Joint Exhibit 4(C) which illustrates the organization of the Real Estate Administration where only two sections are "regionalized." All the others (8 in number) are Central Office, including Resource

Development.

Ms. Price said that at the meeting in Washington, little if any discussion focused on Appendix J; Appendix I was the overriding concern. She testified that no detailed discussion of the real estate division or its function took place.

Union's Position (as stated in its closing argument)

The Union asks the Arbitrator to look at the reality of the situation. The Union's argument relies on the following facts -- all of which are undisputed:

1. Prior to 1977, the Grievant was employed as a Property Agent and assigned to ODOT District 11 in Tuscarawas County.
2. In 1977, as a result of a reorganization within ODOT, the Real Estate Division was "regionalized" and the previously existing twelve (12) district offices were abolished. The reorganization resulted in four geographic regions being established, each of which covers three districts as follows:

Northeast Region (Districts 4, 11, 12)
Northwest Region (Districts 1, 2, 3)
Southeast Region (Districts 5, 6, 10)
Southwest Region (Districts 7, 8, 9)
3. As a result of the reorganization, Grievant was assigned to work as a Property Agent in the Northeast Region. (See: Joint Exhibit 3.)
4. The Grievant has been assigned to the Northeast Region at all times since 1977. The Northeast Region is composed of Districts 4, 11 and 12 (which includes Tuscarawas County).
5. The Grievant has been assigned to work in the Northeast Region at all times since 1977. He has never had a regular assignment outside of the Northeast Region.

6. At all times since 1977, the Grievant has received his work assignments and has had his work evaluated by Northeast Region supervisors. Also, his time records, leave records, and other personnel records are maintained at the regional level. (Joint Exhibit 5.)
7. At all times since 1977, the Grievant has received travel and per diem expenses whenever he was required to report to Columbus (or any other region) for a training course or other temporary assignment.
8. The Real Estate Division personnel roster shows the Grievant as having a "headquarters county" of Tuscarawas. (Joint Exhibit 3, pg. G.)
9. Grievant's circumstances are no different from that of any other property agent. That is, there are no property agents who are actually assigned to the "central office". All property agents are assigned to and work in one of the four regional districts (Testimony of R.E. Dennis, Real Estate Administrator, Bureau of Resource Development).
10. The vacancy position for which Grievant applied is located in Tuscarawas County.

The Union also introduced testimony at the hearing concerning the meaning and intent of Article 17 and Appendix J. As explained by Union witness Linda Lampkin, the intent of these contractual provisions was to provide employees working in a geographic area with a preference over those who are located in other parts of the State. (The Employer did not dispute this contention. Although it did continue to cling to its technical "central office" argument.)

Management's Position (as summarized from its closing argument)

1. 17.04 and 17.05 are unambiguous and consequently require no interpretation.
2. To apply 17.04 and 17.05 to the situation of the Grievant, the issue is Appendix J, how it was developed and what relation the Real Estate Division has to the

other Districts in Appendix J.

3. Prior to the implementation of the Contract, no negotiations or discussions shed light on Appendix J.
4. To give full meaning to Articles 17.04 and 17.05, each ODOT District must be a separate entity for bidding purposes. In addition, the four regions of the Real Estate are separate bidding entities.
5. The Grievant is a Central Office employee, District #13, for bidding purposes, and the evidence clearly shows he had full notice and knowledge of his status.
6. Under Article 5, the Employer has the right to structure its organization as it deems efficient and effective.
7. The Arbitrator must read all Contract sections consistent with the whole Contract. The reading urged by the Union of Appendix J would create an inconsistency with 17.04 and 17.05.
8. The creation of District 13 in Appendix J was to prevent overlapping districts, the purpose of both parties.
9. The entities in Appendix J were structured to mirror then current ODOT structure.

Discussion

The Employer maintains the Article 17.04 is clear and unambiguous. In its pristine state, perhaps it is. However, when an attempt to apply 17.04 to PCN 72590 as held by the Grievant when he seeks PCN 31170.0, the words are not clear and unambiguous to this Arbitrator, especially when they are read in conjunction with Appendix J as specifically referenced in 17.04(B). For example, 17.04A allows employees "within the office, institution or county where the vacancy is located" to apply. Without

reference to extrinsic evidence, the Grievant could argue that since he currently works in Tuscarawas county he is within the county of the vacancy. However, on the other hand, the Position Description of the Grievant's current job lists Franklin County as his location. The Position Control Roster lists the Grievant as a Central Office employee, but the same roster says his county is Tuscarawas. The Arbitrator could list a number of other confusions and/or errors. The main point is that at least two plausible interpretations exist when the words of 17.04 are examined solely on their "face" value.

The intent evidence offered at the Hearing was hardly decisive. Both parties agreed that Appendix J was virtually undiscussed and that no detailed discussion was held which explained ODOT and its Real Estate Division. The Union witness attributed the designation of the ODOT Central Office as District 13 to Gene Brundige, OCB negotiator and former ODOT employee. Moreover, the Union witness also attributed the Real Estate "Regions" to Mr. Brundige. One reasonable inference was that Mr. Brundige was trying to fit then current ODOT structure into Appendix J without contradicting the Ohio Revised Code (as suggested by Ms. Price). Certainly, the Union introduced no evidence to even suggest that the ODOT lists in Appendix J were designed to change ODOT structure. The majority of exhibits, position control rosters, position descriptions, personnel actions, etc. support the Employer's contention that the Grievant was a Central Office employee. However, some evidence contradicts

that contention, i.e., the naming of Tuscarawas in the position control rosters. However, also clear is that the Grievant was while a Central Office employee (District #13), the Grievant was assigned to the Northeast region. Did this assignment allow the employee to bid in the Northeast region? Since District 11 is listed as within the Northeast Region, can he, therefore, bid in District 11? What does 17.04 mean when it describes an employee as "within" . . . some area or organization. Is the Grievant "within" the Central Office (District #13), "within" Franklin County and hence District #6, "within" the Northeast region and can bid in that region or "within" the Northeast so he can bid in any one of 4 districts.

Because no evidence was shown to convince the Arbitrator that a significant change was to result from 17.04 read in conjunction with Appendix J, past practice is important. A review of the evidence convinces this Arbitrator that the Grievant was placed by ODOT in the Central Office and hence, District #13 for bidding purposes. Past practice makes untenable the concept that persons stationed in Central Office are given bidding rights in District 6. The Arbitrator finds the paper evidence convincing that the Grievant was only "assigned" to the Northeast Region and could be reassigned elsewhere in the State. Therefore, the Grievant was not "within" either Tuscarawas County, District #11, or the Northeast region permanently.

Stronger than all this evidence of past practice and of various forms is the evidence of the extent of notice given to the

Grievant and upon which information the Grievant was entitled to rely and form his reliance.

At the time of the reorganization of the Real Estate Division, the Grievant was clearly told that his position was no longer a District #11 position. He clearly understood the consequences. He stated that on the original acceptance form, he wrote in his own hand "with bidding rights in District 11." This document was rejected by his superiors. He said he was given three alternatives -- sign under the conditions stated, stay in District 11 in a different job, or be terminated. The Grievant chose to sign; he clearly knew he had no bidding rights in District 11. Since that date, he has been given no reason to believe his situation has changed. His position description was updated in 1986. No changes were made. No evidence was adduced that after the Contract went into effect that his payroll, PCN, or any other official paper changed to indicate that bargaining had changed the bidding positions of any of the Central Office employees of the Real Estate Division. Nothing existed to allow the Grievant to rationally conclude his position had changed nor could he reasonably rely on such an alleged change.

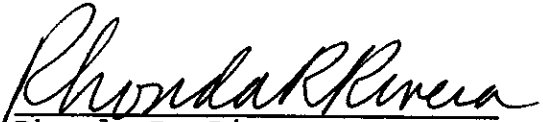
The position of the Employer that organization structure is a management prerogative is in general well-taken. No evidence was shown that the Employer bargained any change in the structure of the Real Estate Division. No doubt Appendix J could have been

drawn more felicitously had more time and attention been paid to it. However, mere inept construction does not lead to the Union's position.

Award

Grievance denied.

September 5, 1990
Date


Rhonda R. Rivera
Arbitrator