ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 598

OCB GRIEVANCE NUMBER: 11-06-881227-0043-01-09

GRIEVANT NAME: HABERNY, CHRISTINE

UNION: OCSEA/ASFCME

DEPARTMENT: EMPLOYMENT SERVICES

ARBITRATOR: GRAHAM, HARRY

MANAGEMENT ADVOCATE: PRICE, MERIL

2ND CHAIR: WAGNER, TIM

UNION ADVOCATE: FIELY, LINDA

ARBITRATION DATE: APRIL 2, 1991 (BRIEF FILED 5/4/91)

DECISION DATE: MAY 25, 1991

DECISION: GRANTED

CONTRACT SECTIONS AND/OR ISSUES: WAS THE GRIEVANCE PROCESSED TIMELY AT STEP 4? IF SO, DID THE EMPLOYER VIOLATE THE C/B AGREEMENT WHEN IT MOVED AN EMPLOYEE FROM BES BELLEFONTAINE TO BES MIDDLETOWN?

HOLDING: OBES MUST POST THE POSITION PRESENTLY FILLED BY PATTI DEISSLE AT MIDDLETOWN PURSUANT TO ART. 17.04, 17.05 & 17.07. IF PERSON SELECTED IS OTHER THAN MS. DEISSLE AND IS PROMOTED HE/SHE MUST RECEIVE BACK PAY & BENEFITS.

ARB COST: $ 786.93

#598

In the Matter of Arbitration	
Between	Case Number:
OCSEA/AFSCME Local 11	11-06-(88-12-27)-0043-01-09
and	Before: Harry Graham
The State of Ohio, Bureau of Employment Services	

Appearances: For OCSEA/AFSCME Local 11:

Linda Fiely
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For The State of Ohio:

Meril Price
Office of Collective Bargaining
65 East State St., 16th Floor
Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held on April 2, 1991 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 May 4, 1991 and the record was closed on that date.

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

> Was the grievance processed in timely fashion at Step 4 of the grievance procedure? If so, did the Employer violate the Collective Bargaining Agreement when it moved Patti Deissle from the Bellefontaine Ohio Bureau of Employment Service to the Middletown Ohio Bureau of

Employment Services office? If so, what shall the remedy be?

Background: The events that prompted this proceeding are not a matter of dispute between the parties. In the Bellefontaine, OH. office of the Ohio Bureau of Employment Services (OBES) there was employed an Employment Services Interviewer, Patti Deissle. In due course, 1988, Ms. Deissle married. Upon her marriage she moved her residence from Bellefontaine to Kettering, OH. Kettering is near to Dayton, OH. Consequently, Ms. Deissle asked officials of OBES if she could work at a location near to her new residence. Her request could not be met in full. However, agency management determined that it could utilize her services in its Middletown, OH. office. This suited Ms. Deissle and she indicated her willingness to move to the Middletown office. As Ms. Deissle's movement from Bellefontaine to Middletown would result in a diminution of the work force at Bellefontaine the Employer commenced the process of securing approval for a replacement for her in Bellefontaine. In due course this occurred. In December, 1988 Ms. Deissle's Position Control Number was changed to reflect her move from Bellefontaine to Middletown. In fact, she assumed her duties in Middletown on December 13, 1988.

The position Ms. Deissle assumed at Middletown was not posted as a vacancy. Employees of the Middletown office regarded this to be a violation of the Agreement. In order to

protest this perceived violation a grievance was filed. That grievance was processed through the procedure of the parties, though not without incident. In the opinion of the Employer as is more fully set forth below there are procedural defects attendant upon the processing of this grievance that render it not to be arbitral. Hence there are two issues to be decided in this proceeding. The first concerns the question of arbitrability. The second, to be considered only if the first is answered affirmatively concerns the merits of the grievance.

Position of the Union: The Union takes the view that the grievance is properly before the Arbitrator for determination on its merits. When the grievance was appealed to the fourth step of the procedure it arrived at the Office of Collective Bargaining in Columbus. Prior to that point there is agreement that no procedural defects exist. Upon arrival in Columbus the fourth step appeal lacked a copy of the grievance itself. The appeal arrived on March 9, 1989. The grievance was submitted on March 28, 1989. The Office of Collective Bargaining regarded this to be a fatal defect and has consistently held to this view. The opinion of OCB is hotly disputed by the Union.

Notwithstanding the opinion of the Office of Collective Bargaining that the grievance is not arbitrable on its merits, the State has addressed the merits of this dispute.

In his April 17, 1989 response letter denying the grievance Dick Daubenmire of the Office of Collective Bargaining informed the Union of his view that no violation of the Agreement occurred in this situation. He opined that there was neither a creation of a vacancy nor the abolishment of a position as the result of this event. Daubenmire discussed the merits. He did not indicate the grievance was considered not to be arbitrable. The claim of procedural defect is an ex post facto rationalization that should not be permitted to stand according to the Union.

This dispute arose under the terms of the 1986-1989 Agreement. At Section 25.02, Step 4 that Agreement provides that:

> If the grievance is not settled at Step Three, the Union may appeal the grievance in writing to the Director of the Office of Collective Bargaining by written notice to the Employer within ten (10) days after receipt of the Step Three answer, or after such answer was due, whichever is earlier.

There is no requirement that the grievance itself be included with the appeal. The Union appealed in writing in timely fashion. The Employer knew of the basis for the dispute. As there exists no requirement to include the grievance with the written appeal, the Employer cannot assert the grievance is defective due to the lack of the attachment of the grievance to the appeal the Union insists.

At Section 25.01 E the Agreement provides that "Grievances shall be presented on forms mutually agreed upon

by the Employer and Union...." That occurred at earlier stages of the procedure. As is set forth clearly in Section 25.02, Step 4, a fourth step appeal must be made in writing. This occurred. No mention is made of inclusion of the grievance with the fourth step appeal. The language relied upon by the State concerning the presentation of grievances pertains to earlier stages of the procedure according to the Union. It insists it acted correctly by advancing the appeal in writing to the Office of Collective Bargaining in timely fashion.

The Union reminds the Arbitrator of the limitations on arbitral authority contained in the Agreement. At Section 25.03 the is found the customary prohibition against an arbitrator adding to or subtracting from the contents of the Agreement. If it is determined that the grievance must be submitted at the Step 4 appeal the arbitrator will have added to the Agreement a requirement not found in it. This is strictly prohibited.

In support of its view that there is no requirement to submit the grievance at the fourth step the Union stresses that the language is clear and plain. When that is the case, a arbitrator has no option but to give effect to the agreement of the parties. Numerous arbitration decisions to this effect were cited by the Union.

When the parties came to negotiate the current Agreement

they made a change in the grievance procedure. The revised step four contains the proviso that the Union may appeal to the Office of Collective Bargaining by "sending written notice and a legible copy of the grievance form ...." The requirement for inclusion of the grievance form is new. It is a change and an addition to the requirements found in the prior Agreement. Absent the specific requirement to forward the grievance to the Office of Collective Bargaining it must be determined that the Union acted correctly in the processing of this grievance it insists.

The Union stresses that it consistently took the view that the grievance would be moved forward in the grievance procedure. This was communicated to the State without reservation. In a prior decision involving these parties I took the view that the Union had properly notified the State it would advance a grievance when the parties had discussion over the matter. (Case No. 27-25-(89-02-10)-0005-01-03, James Stulley suspension). The State knew of the Step 4 appeal. It was lodged in the Office of Collective Bargaining complete with case number. The number identifies the agency involved, the location, the date of the filing and the bargaining unit involved. Nothing hampered the State from responding to the grievance on its merits at Step 4. Indeed it did so.

It is well known that a forfeiture in arbitration is to be avoided if possible. If it is determined that the

grievance is not arbitrable such a forfeiture will indeed occur. The proper interpretation of the Agreement will avoid such an unhappy result according to the Union.

The purpose of the Grievance procedure is resolve complaints of contract violation. If this grievance is voided due to the alleged procedural defect, a significant grievance will go unaddressed. This should not be permitted to occur according to the Union.

The Union asserts that the transfer of Ms. Deissle to Middletown represents a violation of the Agreement. At Bellefontaine Ms. Deissle carried Position Control No. 25001.1. When she requested transfer John Gore of the Agency indicated that Middletown was understaffed and in need of an additional interviewer, Ms. Deissle's job. The Agency approved that view and transferred Ms. Deissle to Middletown with a new Position Control No., 59013.0. The position at Middletown was not posted.

The movement of Ms. Deissle to Middletown involved a change in offices located 70 miles from each other, in different counties. They had different supervisors and different caseloads. At Section 17.02 the Agreement defines a vacancy as "an opening in a permanent full time or permanent part-time position within a specified bargaining unit covered by this Agreement which the Employer has determined to fill." That is precisely what occurred in this situation according

to the Union. It was a new position, with a new Position Control Number. No such position existed at Middletown prior to Ms. Deissle occupying it. It was full time. It was filled.

Section 17.05A of the Agreement requires the State to review bids from within the office, county or institution. That did not occur. No bids were accepted. Section 17.05A continues to require 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." No such showing was made nor can be made as no comparison was conducted. The language in Section 17.05A is mandatory and provides that the job "shall" be awarded to the most senior employee.

Section 17.07 of the Agreement provides that if a vacancy is not filled as the result of a promotion bids for lateral transfer may be considered. Such a transfer is a movement to a position in the same payrange as the posted vacancy. The movement of Ms. Deissle to Middletown constituted a lateral transfer for her. If a transfer is to occur the State is required to consider bids applying the same selection criteria as are used for promotions in Sections 17.04 and 17.05. No transfer bids were considered in this situation.

In two other cases Arbitrators Bittel and Dworkin found the State in violation of the Agreement in circumstances

similar to this. (Case Numbers G87-1287 and G89-0643). The Union urges the same result occur in this situation.

The Ohio Revised Code at Section 4117.10(A) provides that the Agreement takes precedence over conflicting law. It supercedes any conflicting civil service law.

As the Union views this case the Employer accommodated the wishes of a single employee, Ms. Deissle, when it moved her to Middletown. Her movement there was a transfer for her and as such must be governed by the applicable sections of Article 17 of the Agreement. When she left Bellefontaine her departure resulted in a vacancy which the State posted and filled properly under the terms of the Agreement. The internal documents associated with these moves confirm that to be the case. When Ms. Deissle was moved to Middletown the Employer justified it by indicating that Middletown was "understaffed and in need of an Interviewer." When it filled the resulting vacancy at Bellefontaine it indicated that the vacancy had developed as the result of the "transfer" of Deissle to Middletown.

In a dispute involving the State and another Union, Local 1199 (Case No. 29-02-(01-02-89)-0115-02-12) Arbitrator Howard Silver took the view that the Agreement before him guaranteed certain seniority rights to employees. Those rights did not interfere with the authority of the State to determine its table of organization and the tasks it sought

to perform. The dispute before Arbitrator Silver was similar to this dispute. The result should be the same according to the Union. It seeks an award directing the State to post the vacancy at Middletown and to fill it pursuant to the procedures of Article 17. Any back pay and benefits due the successful bidder should be paid the Union insists.

Position of the Employer: The State asserts the grievance is untimely. Consequently it should not be considered on its merits. The grievance was appealed to the Office of Collective Bargaining on March 9, 1989. When that appeal was made the grievance was not included. The physical grievance arrived on March 28, 1989. On March 14, 1989 the State wrote to Gary Burton of the Union and advised him the grievance was late and would be considered to be untimely. The Union Steward, Christine Haberny, acknowledged as much when she forwarded the grievance to Dick Daubenmire of the Office of Collective Bargaining. She indicated "I realize this grievance is not timely...." The State needs the information contained on the grievance form in order to make a proper determination of the merits at Step 4. That information was not provided until after the proper time period had lapsed. The grievance should not be considered on its merits according to the State.

Section 17.02 of the Agreement gives the State discretion to determine if there is a vacancy. There was no

vacancy at Middletown. Hence there was no posting and no bidding.

Under the Management Rights language of the Agreement at Article 5 the State retains broad discretion in the managing of its affairs. I reiterated the authority of the State in a recent decision involving the Department of Transportation. (Case No. G87-1922). In that case I determined that the Agreement must be read in conjunction with the Code at Section 4117.08. The language found there gives the State full managerial authority including the authority to "effectively manage the workforce." That is what occurred in this instance according to the State. There was no violation of the Agreement.

The State may move personnel to manage the workforce. At Section 124.32 the Ohio Revised Code permits it to do so. Furthermore, the movement at issue in this proceeding was not a transfer. In order for a transfer to occur there must be a vacancy. No vacancy existed at Middletown. Nor was there a promotion as Ms. Deissle received no increase in title or pay. Hence, there was no violation of the Agreement according to the State. It urges the grievance be denied.

Discussion: At Section 25.02 of the 1986-89 Agreement the parties indicate their agreement upon the grievance procedure. Step 4 of that procedure, quoted earlier in this decision, provides that the Union may appeal the grievance in

writing to the Director of the Office of Collective Bargaining. That appeal must be in writing. No dispute exists concerning the fact that the Union made its appeal within the appropriate time period and in writing. Conspicuous by its absence from the 1986-89 Agreement is any requirement that the appeal include the written grievance. The Agreement merely states that the appeal must be filed within ten days from receipt of the step 3 answer and be in writing. The Union met those contractually imposed requirements.

When the parties came to bargain the present Agreement a change was made in Step 4 of the grievance procedure. In addition to the written appeal within the ten day period there was added the requirement that included with the appeal be "a legible copy of the grievance form...." That requirement is absent from the prior Agreement. To hold the Union responsible for submitting a grievance form with the step 4 appeal when none was required is beyond the province of this or any arbitrator. Section 25.03 of the 1986-89 Agreement places the customary restrictions upon the authority of an arbitrator. The arbitrator may not add to nor subtract from the terms of the Agreement. Nor may the arbitrator impose upon a party an obligation to which it has not assented. To hold that a grievance form must be submitted at a step 4 appeal under the 1986-89 Agreement would obviously place upon the Union an obligation to which it has

not assented. It would also add a requirement to the Agreement which is plainly not within its terms. Neither this nor any other arbitrator would undertake such action. The grievance was plainly processed within the time limits established by the Agreement. It must be decided on its merits.

At Section 17.02 of the 1986-89 Agreement the parties agreed upon the definition of a vacancy. It is:

> An opening in a permanent full-time or permanent part-time position within a specified bargaining unit covered by this Agreement which the Agency determines to fill.

On November 4, 1988 Ms. Deissle requested a transfer to the Middletown office of OBES as an Employment Service interviewer. (Jt. Ex. 7). On November 11, 1988 the Director of Operations, John Gore, requested that Ms. Deissle and her position be transferred from Bellefontaine to Middletown. He indicated that Middletown was "understaffed and in need of an Interviewer." (Jt. Ex. 6). Ms. Deissle was subsequently transferred to Middletown. Her transfer was accompanied by a new Position Control Number. She reported to a different office, worked with different colleagues and was supervised by different supervisory staff. At Section 123:1-47-01(A)(61) the Ohio Administrative Code indicates that a changed Position Control Number is associated with "movement of an employee from one specific employment position to another." The movement of Ms. Deissle from Bellefontaine to Middletown

carries with it all the characteristics of a new position. When such positions are created the Agreement provides the manner in which they must be filled.

Section 17.07 of the Agreement governs transfers. It specifies that if a vacancy "is not filled as a promotion pursuant to 17.04 and 17.05 then submitted bids for a lateral transfer may be considered. (Emphasis added).

The word "then" governs the sequence of events that is to occur. A vacancy must first be posted. In this case, Ms. Deissle moved to a position which the Employer decided to fill. Middletown was understaffed. To improve the situation a position was added to the complement at Middletown. It was a permanent full-time position. When filling such positions the Agreement clearly, unmistakably, and unreservedly requires that they be posted. That did not occur in this case. Upon posting, employees are permitted to bid. That did not occur in this case either. Employees did not bid because they did not know of the vacancy. It was not posted. Employees could not exercise their bidding rights under Section 17.04 of the Agreement. Similarly, the "qualified employee with the most State seniority" was deprived of the opportunity for being awarded the position under Section 17.05 of the Agreement. Employees must be provided the opportunity to exercise their rights to bid on a vacancy before a transfer may be effected.

The Management Rights language in the Agreement, Article

5, does not support the position of the Employer in this dispute. It indicates that "Except to the extent expressly abridged only by the specific articles and sections of this Agreement" the Employer retains its managerial rights. The Agreement in this situation addresses the question of transfers. Article 17 circumscribes the authority of the Employer to transfer and prescribes the manner in which they may be effected. It must be given precedence over Article 5 by the clear language of the Agreement.

In State ex. rel Rollins v. Cleveland Heights-University Heights Board of Education (1988) 40 Ohio St. 3d 123 the Supreme Court addressed the question of conflict between the provisions of a collective bargaining agreement and State law. It took the view that the Agreement should supersede conflicting law. This case is unlike the situation I was confronted with in Case No. G87-1922. In that case, there was not specific language prescribing the manner in which equipment might be deployed. The Union argued that use of equipment by the State on the second shift was designed to avoid its responsibility to pay overtime. I disagreed with that view and strongly affirmed the right of the State to utilize its resources effectively. This situation differs from that as there is specific language governing transfer in the Agreement at Article 17. As the language exists, it must be given effect.

Award: The grievance is SUSTAINED. The Ohio Bureau of Employment Services must post the position presently filled by Patti Deissle at its Middletown office pursuant to the terms of Article 17 of the Agreement. The position must be filled pursuant to the bidding, (Section 17.04), selection (Section 17.05), and transfer (Section 17.07), sections of the Agreement. If the person selected for the position is other than Ms. Deissle and is promoted he or she must receive any applicable back pay and benefits.

Signed and dated this 25th day of May, 1991 at South Russell, OH.

Harry Graham
Arbitrator