#885

IN THE MATTER OF ARBITRATION

BETWEEN

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME LOCAL 11, AFL-CIO	)	CASE NO. 25-12-(911224)-0011-01-09 GRIEVANT: NANCY CUTWRIGHT
and	)	CASE NO. 31-09-(9212321)-0026-01-09 GRIEVANT: DONNIE SARGENT
OHIO DEPARTMENT OF NATURAL RESOURCES AND OHIO DEPARTMENT OF TRANSPORTATION	)	OPINION AND AWARD

APPEARANCES

On behalf of the Union:

Donald Sargent	Staff Representative
John Porter	Assistant Director of Arbitration
Nancy Cutwright	Grievant
John Cutwright	Witness
Joe Zapata	Witness

On behalf of the Employer:

Ted Durkee	Labor Relations Officer, ODOT
Renee Coyle	Labor Relations Specialist
Donald Skinner	Labor Relations Officer ODOT District 04
Kaye Humble	Personnel Officer
Gerald Davis	Radio Technician Supervisor

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1. STATEMENT OF FACTS

While there is little disagreement over the events which brought this matter to arbitration, the parties are at odds over what triggered those events and what they mean. What they agree on is that the Grievant had been employed by the Ohio Department of Natural Resources (ODNR) as a radio operator from 1962 to 1967 and again from 1984 until her job was abolished in July, 1991. She was called back to work on an interim basis by ODNR to work as a radio operator in Columbus, Ohio from August, 1991 through March, 1992. On November 5, 1991, the Ohio Department of Transportation (ODOT) posted a vacancy for a radio operator in the communications section in its Chillicothe, Ohio District Headquarters. Chillicothe is also a Regional Headquarters for the ODNR and was the Grievant's work location until her job was abolished in July, 1991. The ODOT radio operator vacancy was posted for nine days during which time the Grievant completed and filed an application with the appropriate personnel office. At the time, the Grievant, because of her prior employment with ODNR, was entitled to reemployment rights pursuant to Section 123:1-41-17 of the Ohio Administrative Code which provides in pertinent part:

REEMPLOYMENT RIGHTS

> (A) General. Each laid-off or displaced employee, in addition to the reinstatement rights set forth in this chapter, shall have the right to reemployment with other agencies within the layoff jurisdiction. The right to reemployment is limited to the same classification from which the layoff or displacement initially occurred.

(B) Creation of recall lists for reemployment. The director shall create, by appointment type, a jurisdictional recall list for each classification by combining the recall lists of each appointing authority within a layoff jurisdiction but excluding the names of reduced employees. The name of a laid-off employee shall appear on a jurisdictional recall list for the classification and appointment category from which the employee was initially laid off or displaced.

(C) Administration of recall lists for reemployment. All jurisdictional recall lists shall be administered by the director in the following manner:

(1) Whenever a vacancy exists in any classification within a layoff jurisdiction in which layoffs have occurred, the director shall determine that the appointing authority's recall list for certified employees entitled to reinstatement to the classification has been exhausted before certifying any name from the certified jurisdictional recall list.

(2) Upon the exhaustion of the certified jurisdictional recall list, an appropriate eligible list shall be used to certify names to fill any other vacancies before utilizing either the appointing authority's provisional recall list or the jurisdictional provisional recall list. In filling remaining vacancies, the director shall determine that the appointing authority's recall list for provisional employees entitled to reinstatement to the classification has been exhausted before providing any name from the jurisdictional provisional recall list.

On November 7, 1991, two days after the Department posted the radio operator vacancy for bid, an employee who performed construction work for ODOT signed a Consent For 1,000 hour Voluntary Assignment form to work as a radio operator in ODOT's Chillicothe Headquarters. ODOT had been using employees idled because of the seasonal nature of their work as 1,000 hour employees and assigning them as radio operators in its Chillicothe District office since the 1984-1985 season. The use

of such personnel is provided for an Article 14, Section 14.01 of the parties' Agreement provides in pertinent part:

ARTICLE 14 - 1000 HOUR ASSIGNMENT

14.01 - ODOT

> When fluctuations in workload or weather conditions necessitate the temporary transfer of employees, the Director of the Ohio Department of Transportation or designee may temporarily assign such personnel to duties other than those specified by their classification. Such transfers such first be done through the solicitation of volunteers in classification series seniority order among available employees. When the workload situation is such that the voluntary list is not adequate, temporary transfers shall be made among available employees on the basis of inverse classification series seniority. For the purposes of this Article for construction personnel, "available" means those employees whose construction assignment has been terminated for the construction season.
>
> When an employee is temporarily transferred, the transfer will be to a classification for which the employee is qualified. An employee(s) shall suffer no loss of pay, benefits or seniority as a result of a temporary transfer. Where such transfers will be to a higher paying classification, . . .
>
> The duties of the temporarily transferred employee(s) shall not unduly alter the regularly scheduled assignments of permanently assigned employees. Any employee who is on a temporary transfer shall not be considered for an overtime assignment until all appropriate permanently assigned employees who have been asked to work the overtime pursuant to this Agreement. . .

The Grievant was unaware of the use of the 1,000 employee at the time she filed her application for the radio operator's position. All she knew is that in spite of having submitted her application before the end of the posting period and in spite of having reemployment rights, Management had not called her to fill

the vacancy. As a result, on December 24, 1991 she completed the standard Grievance Form complaining:

GRIEVANCE FORM

> Nancy Cutwright's position of radio operator class #52431 was abolished in July 1991. A position of Radio Operator was posted for Dist. 9 - ODOT office Chillicothe. The end posting date was Nov. 14, 1991. Nancy was on re-employment list as of her abolishment in July 1991. According to Reemployment language of ORC Nancy should have been recalled to the Radio operator position in Chillicothe.

The reemployment language the Grievant made reference to is also found in Article 18, Section 18.09 of the Contract which provides:

ARTICLE 18 - LAYOFFS

§18.09 - Re-employment

> Re-employment rights in other agencies shall be pursuant to Administrative Rule 123:1-41-17. Such rights shall be for eighteen months.

Management denied the grievance on January 14, 1992 on the basis that because her reemployment rights crossed agency lines, the Office of Collective Bargaining (OCB) had jurisdiction over the matter.

On December 31, 1991 the Union filed its own grievance alleging that Management had violated the Contract because the Grievant had not been appointed to the radio operator's position. In addition to Article 18 which the Grievant had likewise relied upon, the Union also cited Article 17 as authority for its position. That provision provides in pertinent part:

ARTICLE 17 - PROMOTIONS AND TRANSFERS

§17.03 - Vacancy

A vacancy 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.

§17.04 - Posting

All vacancies within the bargaining units that the Agency intends to fill shall be posted in a conspicuous manner throughout the region, district or state as defined in Appendix J. Vacancy notices will list the deadline for application, pay range, class title and shift where applicable, the knowledge, abilities, skills, and duties as specified by the position description. Vacancy notices shall be posted for at least ten (10) days. Posted vacancies shall not be withdrawn to circumvent the Agreement.

§17.06 - Selection

A. The Agency shall first review the bids of the applicants from within the office (or offices if there is more than one office in the county), county or "institution." The job shall be awarded to the qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee.

Management denied that grievance at the third step meeting which was held on January 24, 1992, citing as its reason for doing so:

> The position had been posted but has not yet been filled and there is no contractual timeline requiring a position to be filled by a certain date. Until that time there can be no complaint as to the selection. It is not an usual circumstance at all to have a 1000 hour transferee working in the Radio room. This happens every year and is what is happening this year. Management denied the posting was withdrawn to circumvent the Agreement. When the decision is made to fill the vacancy, it would be properly filled.

Unbeknownst to the Union, the day before the third step meeting was held the Communications Supervisor sent an inter-

office communication (IOC) to the Agency's Deputy Administrator regarding the radio operator's position and the agency's personnel needs. In it, the Communications Supervisor stated:

> After re-evaluating our personnel needs in the communications department, in lieu of a new replacement radio operator, we would prefer to hire a Radio Tech 1. In addition to the current Radio Tech 1 specifications, the chosen person would need to be experienced in and qualified to install 2-way radio equipment in our state vehicles.

The District's Personnel Officer was aware of the communication and was present at the third step meeting, but failed to disclose the memo's existence or its contents.

On February 27, 1992, the Deputy Director of the Office of Collective Bargaining (OCB) sent a memo concerning the Grievant's protest to the Labor Relations Chief of the Ohio Department of Transportation. Stamped confidential, the first paragraph of the memorandum laid out the facts of the case as the Deputy Director knew them. After doing so he concluded:

> It is our understanding that you posted the job for 10 days, withdrew it, and transferred a construction worker from your Agency to the position under Article 14.01 of the Contract. By posting the vacancy, then withdrawing it and filling the vacancy with a 1,000 hour transfer, unless you can cite good business reasons to show why you did it, you have left yourself open to the charge that you are attempting to circumvent Article 18.09 - Re-employment. This is in violation of Article 17.04, "Posted vacancies shall not be withdrawn to circumvent the Agreement.
>
> This office recommends that you strongly consider a settlement with the grievant to limit your liability in a case we believe you are almost sure to lose in arbitration.

It is not known if Labor Relations Chief replied to the Deputy Director's memorandum and if he did, what he had to say about it.

Management eventually turned a copy of the memo over to the Union at a mediation session held in an attempt to settle these grievances. When the matter could not be resolved at mediation the Union pursued the case to arbitration.

While all of this was taking place, the Agency's Deputy Administrator sent an inter-office communication on September 10, 1992 to its Human Resource Administrator on the subject of a "Request for New Position - Radio Technician 1" in which he stated:

> The District Communications Supervisor has requested the addition of a Radio Technician 1 (See attached IOC) for his section. This is necessitated by the increase in installation, inspection & repair of communication equipment. The District's Communications Department presently consists of a supervisor, one radio technician 2 and two radio operator positions, (one operator position is vacant). Since the majority of the workload is technical in nature requiring knowledge and experience in electronic technology, the technician classification will enable the District to hire a qualified person to fill this need.

On December 15, 1992 the Agency posted a vacancy for a radio technician 1 for District 9 Headquarters in Chillicothe, Ohio. The position was subsequently filled by hiring someone from off the street.

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

2. POSITION OF THE UNION

The Union asserts that Management, in a premeditated and calculated manner deliberately refused to hire the Grievant to fill the radio operator vacancy in flagrant violation of the Contract. The facts in this matter are simple and

uncontroverted. The Grievant held the position of radio operator for the Ohio Department of Natural Resources (ODNR) in the Chillicothe Region. She was laid off and forced to accept a temporary position a long distance from her house at lesser pay and with no benefits. As a result, when she learned that the radio operator's position at ODOT's Chillicothe Headquarters had become vacant she applied for it. She was not awarded the position because Management began the process which ultimately brought this matter to arbitration. Although the State has repeatedly maintained that it did nothing wrong in this case, and that the Union is simply misreading the Contract, its actions totally belie those assertions.

Management was obligated under both the Ohio Administrative Code and the Contract to request a reemployment list of laid off employees before it took the step of seeking to fill the radio operator's position. It never did that. Then, to compound the fault, Management assigned a 1,000 hour employee to act as the radio operator. It did so at the same time the Grievant's bid, which she really had no obligation to submit because she was on the reemployment list, was in ODOT's offices for consideration. When the Grievant and the Union got tired of waiting for Management to act on the vacancy they filed separate grievances only to have them denied on the basis that there was nothing to grieve since Management hadn't decided which employee to fill the position with. That response is intriguing because if, as Management ultimately claimed at arbitration, there was never any

intention to fill the position then why, it must be asked, was it posted in the first place and why didn't the Employer notify the Union at the second or third steps of the grievance procedure that such was the case? It didn't, because Management had an agenda, which was to keep from employing the Grievant.

Management, of course, asserts that its actions were totally above board and that if there was any misunderstanding it arose innocently because the personnel office automatically posted the radio operator's position when it became vacant instead of consulting with the Communications Supervisor to ascertain if it was actually necessary to fill the position. If that were the case, then Management should be able to explain why it took eight months for ODOT to respond to the request to hire a radio technician. It is after all, the September, 1992 response which ultimately became the basis for the State's claim that it was not necessary to fill the radio operator's position because what the Department needed was not another radio operator, but a radio technician. Again, Management claims that this was not the case and that the question of whether to hire a radio technician or a radio operator had long since been decided in favor of hiring a radio technician. The record, however, is clear that even though that decision had supposedly been made a long time in the past and having been widely known, the fact of the matter is that no one brought that information forth at the third step meeting even though at least one of the participants at the meeting was supposedly privy to it.

Taken together, the events which occurred before and after these grievances were filed demonstrate that the Employer has been playing politics and manipulating the situation to hire someone other than the Grievant to fill the vacant position. This is the same conclusion which the OCB's Deputy Director came to in the memorandum he sent to ODOT's Chief Labor Relations Representative. The State argued long and hard that his memorandum should be excluded from the record. There is absolutely no legal or moral justification for doing so.

Certainly, it is not a settlement offer or evidence of settlement negotiations which would warrant its exclusion under Federal Evidence Rule 408. Instead, it is a straight forward communication between two administrators in which one accesses the other's position regarding the Grievant's protest and states his opinion of what will happen if and when the grievance proceeds to arbitration. This is a far cry from the type of correspondence which would fall within the ambit of Evidence Rule 408.

Further, Management cannot complain that the memorandum is somehow privileged and should, therefore, be excluded on that basis. The rules of evidence are clear that if a document which might otherwise be privileged has been given to a third party by the party who can claim privileged, the privilege is lost. Such is the case here. Whether the State ultimately wanted the memorandum disclosed or not doesn't matter because it was voluntarily disclosed and it was disclosed by a State employee.

Therefore, whatever privileged Management may have been able to assert had the disclosure not been made, was waived.

Procedural considerations not withstanding, it is obvious that Management desperately wants to keep the OCB memo out of the record because it is so damaging. Written by the then Deputy Director of the OCB, it cuts through all of the nonsense that took place and concludes that the State was wrong when it refused to hire the Grievant and that she should have been awarded the radio operator's position. It is the only conclusion which the Arbitrator can reach as well. Since the Grievant was entitled to the position under the Contract, she is also entitled to be made whole which includes more than just back wages, but all lost benefits as well.

3. POSITION OF THE EMPLOYER

Management admits that it made a mistake, but it wasn't the mistake the Union alleges. What Management did was post the radio operator vacancy in error. It should never have been done. The error occurred because the Personnel Officer automatically took the steps necessary to fill the vacancy which was created when the individual who had been working in that classification moved on. Unfortunately, before she posted the vacancy the Personnel Officer did not talk to the Communications Supervisor or his boss. Had she done so she would have learned that the Department did not need another radio operator. What it needed was a radio technician.

In the past, the Agency had employed two radio operators in that District Headquarters. One of those individuals, the one whose position became vacant, gradually spent more and more of his time repairing and installing radios and less and less time serving as a radio operator. He did so because the Agency's needs changed and as they did his duties evolved. All Management did when it withdrew the radio operator's vacancy and instead sought out and hired a radio technician, was to acknowledge the changed circumstances and respond to it. That is Management's responsibility and its right under the Contract. No one, least of all the Union, should expect that circumstances in business will forever remain unchanged. The Ohio Department of Transportation, though a governmental agency, is nonetheless a business. And just like every other business it must respond to changing situations, adopting new techniques and modifying its employment structure if it is to carry out its mission and effectively provide the highest quality of service to the people of the State of Ohio for the least amount of money.

That was all that Management did when it withdrew the radio operator's vacancy and instead hired a radio technician. There was no hidden motive behind that decision, nor does it reflect any animosity towards the Grievant. In retrospect, it might have been more polite to have informed the Grievant of the decision not to fill the radio operator's vacancy and instead create another position at the District Headquarters. While that may have been good practice, it was not required by the Contract.

Therefore, the Employer did not violate the Wage Agreement when it failed to notify the Grievant of the change in circumstances.

Nor did Management violate the Contract when it used 1,000 hour employees as radio operators while the Department of Administrative Services slowly took the steps necessary to permit ODOT to hire a radio technician. The Contract clearly calls for the use of such individuals in circumstances such as existed at the District Headquarters. Therefore, the fact that Management availed itself of a portion of the Contract doesn't provide a basis for sustaining the grievance. Likewise, the fact that it took the Ohio Department of Administrative Services, what the Grievant feels was an inordinately long time to act doesn't mean that she was the aggrieved by Management. Everyone would hope the State could operate so efficiently that decisions could be implemented within days of having been made. Unfortunately, things do not happen that way in the real world. Again, the fact that they don't, though, does not give rise to a violation of the Contract.

The simple fact of the matter is that the Union, which has the burden of proof in this case, cannot demonstrate that Management violated the Contract or did anything wrong when it decided that it needed a radio technician instead of a radio operator and, therefore, did not hire the Grievant.

That conclusion isn't changed by the memo from OCB's Deputy Director to ODOT's Chief Labor Relations Representative. The

memorandum should not even be considered as it is a confidential, internal working document. In addition, it must be seen for what it is, a settlement offer which has no business being made part of the record in this case. It is obvious that the reason it was offered was to prejudice the Arbitrator. However, it must be borne in mind that the author of the document was not subpoenaed and, therefore, Management had no opportunity to cross-examine that individual to determine what he may or may not have known about the facts of the case when he wrote the memo. For that reason alone it should be excluded from consideration. Even if it is not, the memorandum only represents one person's opinion. It is not dispositive of the issue and in view of the fact that Management had a right under the Contract to alter the Department's table of organization, it cannot be. Rather, the Arbitrator, relying on the facts and the Contract, should recognize that these grievances are meritless.

4. DISCUSSION

It is impossible to resolve this matter without first addressing the issue raised by the Union's attempt to offer into evidence the February 27, 1992 memorandum from OCB's Deputy Director to ODOT's Chief Legal Representative. Management strenuously objected to the introduction of the document on the basis that it was privileged because it fell into the category of work product, that it evidenced settlement negotiations, and that its introduction prejudiced the Employer since the author of the document was not present to be cross-examined. Of the three

arguments, the first two are the weakest. While the document was obviously an internal communication never intended for the Union's eyes, Management waived whatever claim of "privilege" existed when it voluntarily turned a copy of the memorandum over to the Union during the mediation process. Whether it did so by design or mistake doesn't matter. The important point is that it voluntarily chose to make the document public by providing a copy to the Union. When it did, the Employer lost any basis upon which to claim that the document should be excluded from the record because it is a privileged communication or an inner agency work product. The voluntary disclosure stripped Management of the right to raise those claims.

Likewise, Management's attempt to preclude the introduction of the document on the basis that it represents a settlement proposal or evidences settlement negotiations is also meritless. The problem with the Employer's argument is that the document, on its face, doesn't support that claim. Instead, it has to be seen for what it is, an assessment of ODOT's position by OCB's Deputy Director. There is a vast difference between a document prepared for internal consumption in which an individual assesses his side's chances of success and a settlement offer deliberately conveyed to another party in the hopes of reaching an agreement without the necessity of going to trial. Had ODOT's Chief Legal Representative heeded the advice contained in the Deputy Director's memorandum and made a settlement offer to the Union, that offer could not have been introduced into evidence because

it would constitute a valid settlement offer. Such proposals are excluded by both the Federal and Ohio Rules of Evidence on the grounds that their admission would only foster more litigation because parties would be unwilling to make any attempt to settle out of fear their offer would be used as proof of wrongdoing in a subsequent hearing. Those same considerations do not apply to the document at issue because it is not addressed to the Union and because it does not contain a settlement proposal.

Management's third argument, that it would be prejudiced by the admission of the document because it could not cross-examine its author is its strongest but is no more persuasive than its first two. Essentially, the Employer is claiming that the document should be excluded because it is hearsay, offered to prove the truth of the statements contained in it. Because it is and because the declarant was not present at the time of hearing and therefore, not subject to the test of cross-examination, the document fits the classic definition of hearsay and would normally be excluded. As the parties are well aware, though, the rules of evidence are not strictly adhered to in arbitration, nor, in the absence of any contractual provision demanding that a particular set of evidentiary rules apply, need they be. As a result, the Arbitrator has far more discretion than a trial judge with regard to what can and cannot be admitted into the record.

Beyond that general principle, there are a number of reasons for admitting the document. The first is that it essentially constitutes an admission against interest and on that basis falls

into a well recognized exception to the general hearsay rule which would call for the document's exclusion. Second, because Management handed the document to the Union in the course of mediation session, the Employer cannot claim that it was surprised when the Union subsequently produced the memorandum during the arbitration hearing. Even the most inexperienced labor relations practitioner could have easily foreseen that the Union would attempt to introduce the document into evidence for the very reason that Management now claims it should be excluded, its potential to prejudice the Arbitrator. Because Management knew the Union had the document and could easily foresee the use to which it would be put, Management had the obligation to call the memorandum's author to question him about his motivation for writing the document and his knowledge of the case when he wrote it. For whatever reason, the Employer chose not to take that step. Having failed to do so, it cannot now complain that it was prejudiced because it did not have an opportunity to cross-examine the Deputy Director.

Although the document is admissible, its admission into the record does not, as the Union hopes, end this inquiry. The memo certainly cannot be ignored because of who authored it and his analysis of the situation presented by the first grievance. However, as Management notes, it is the Arbitrator's responsibility to decide the outcome of this matter. At best, the memorandum is just one more piece of information the Arbitrator can consider albeit a powerful one. Its existence,

though, cannot and should not prevent the Arbitrator from reviewing all the evidence presented in the course of the hearing and reaching his own decision based on that evidence.

Looking at that evidence and the time sequence involved, it is easy to understand how the Union can conclude that Management was playing fast and loose with the Contract by manipulating the situation in order to keep from hiring the Grievant. The record discloses that the vacancy notice was posted for the radio operator's position from November 5, through November 14, 1991. The Grievant submitted her application on the last day of the posting period. Because she had reemployment rights and because she had filled the same position for the Ohio Department of Natural Resources, the Union reasons that the Grievant should have been offered the job. Everything which took place after that point, the Union believes, was simply part of a plan designed by the Employer to keep from hiring the Grievant.

What the Union finds especially upsetting is Management's silence concerning the alleged decision to abolish the radio operator's position and fill the void with a radio technician. It is difficult to understand how the Union could have been kept in the dark for so long over that decision, especially since Management had an opportunity to notify the Union about it as early as January 24, 1992 when the parties met at the third step to discuss the Union's grievance. The District's Personnel Officer was present at that meeting and was aware of the IOC from the Communications Supervisor to the District Director dated the

previous day, yet made no mention of it to the Union. Nor apparently, was the Union ever notified after that day that such a change was being contemplated or was in the works. Coupled with the eight month delay it took the Department to respond to the January, 1992 IOC, the Union concludes that the entire process was, at best, a ruse designed to cover the earlier decision not to hire the Grievant. Although the events are clearly suspicious, the undersigned cannot agree with that conclusion.

Management was able to establish that there was a need for an additional radio technician at ODOT's Chillicothe Headquarters. However, that determination does not resolve this dispute. It would if there were no contract. Then the Employer would have the right, subject only to any applicable laws, to hire whomever it wanted, created whatever positions it felt were needed to carry out its operations and abolish any such positions whenever it felt that they had outlived their usefulness. To the extent that the Contract speaks to those issues, Management's right to act is limited by the terms of the Agreement. Such is the case with filling vacancies.

In Article 17 the parties laid out a fairly detailed plan Management is obligated to follow whenever a vacancy occurs. What Article 17 doesn't include is a time limit within which Management must act. It is the absence of any specified period of limitation which led Management in mid-January to deny the Grievant's protest, asserting that it was untimely because no

final decision had been made on who to hire to fill the vacancy. While the Contract doesn't specify a time within which Management must make its decision, it obviously must act within a reasonable time if the parties' words and the intent expressed in those words is to have any meaning at all. If that were not the case, then Management could circumvent not only the intent but the language of Article 17 by simply refusing to act and instead filling the vacancy with whomever it chose. That, however, is exactly what the Grievant and the Union are alleging ODOT did in this case.

In defense of its actions the Employer maintains that it initially took the steps to fill the radio operator's vacancy by mistake, automatically completing the necessary paperwork instead of discussing the Department's personnel needs with the appropriate Supervisors. While the posting may have been a knee jerk reaction to a vacancy, Management's explanation for why it started the hiring process doesn't explain what happened between November 14, 1992 and January 23, 1993 when the Communications Supervisor sent the memo in which he asked the Department to hire a radio technician in place of a radio operator. In the intervening 70 days, Management should have requested a reemployment list if it seriously intended to fill the radio operator's vacancy. The fact that it did not do so does not mean, however, that the failure is evidence of Management's decision to change the organizational structure of the communications section of its Chillicothe division. It is not,

because Management's witnesses indicated that the decision to seek a radio technician in lieu of a radio operator was not made until late January. Additionally, Management made no mention of not filling the radio operator's vacancy or seeking a radio technician in place of a radio operator when it responded to the Grievant's protest. Instead, it simply maintained that the grievance was untimely as Management had not yet decided which of the applicants for the radio operator's position it would hire.

Again, while the time sequence and Management's silence may be suspicious, it is just as likely that those circumstances were the product of nothing more than bureaucratic inertia brought on by the placement of a 1,000 hour employee in the communication section. Because that individual was transferred into the communication section about the time that the radio operator's vacancy was posted, and because that individual was directed to fill the radio operator's vacancy for up to 6 months, Management really did not have any pressing need to complete the hiring process until the 1993-1994 winter season.

Whatever Management's motives, whether by design or mistake, the question is the same, did it violate the Contract when it failed to hire the Grievant as a radio operator in ODOT's Chillicothe Headquarters? The answer to the question lies in the relationship between Article 14 which permits the Employer to utilize seasonal employees in 1,000 assignments and Articles 17 and 18 which speak to filling vacancies and recall rights respectively. What is not at issue is the Employer's right to

change the Chillicothe division's table of organization in order to more efficiently carry out its responsibilities. But like so many of its other rights, the right to alter its organizational structure by abandoning positions or creating new classifications and filling those classifications is limited to some extent by the terms of the Collective Bargaining Agreement, as well as by the Ohio Administrative Code.

It is unclear if Management actually abandoned the radio operator's classification as that term is used in the Administrative Code, and if it did, whether it complied with the requirements of the Administrative Code before it did so or if it simply decided that it would no longer fill the position. What is clear is that even though the Communications Supervisor decided in January 1992 that what his section really needed was a radio technician as opposed to a radio operator, Management did not have the right to hire the radio technician until the Communications Supervisor's decision had been ratified by ODOT's senior management in September of that year. In between those two dates, regardless of the Communications Supervisor's analysis of his manpower needs, the situation was in status quo, he could have a radio operator but not a radio technician. The State asserts that it did not fill the radio operator's position, but the claim is disingenuous as the work was performed by the 1,000 hour employee from early November 1991. Thus, the outcome of this dispute turns on whether or not the State could utilize the

1,000 hour employee in lieu of filling what was then, a permanent vacancy in the communications section.

Article 14, Section 14.01 which permits the Ohio Department of Transportation to make 1,000 hour assignments does not explicitly preclude the Employer from using such appointments to avoid filling a permanent vacancy. At best, Section 14.01 only limits how such employees can be used by providing that their duties ". . . shall not unduly alter the regularly scheduled assignment of permanent assigned employees". This is a far cry from the language of Article 7 which expressly prohibits the Employer from using temporary or intermittent positions to avoid filling permanent full time positions. In Section 7.03 the parties defined intermittent positions as those in which the work is of an irregular or unpredictable nature, and with the exception of certain departments where it can last up to 1,000 hours per employee per 12 month period, is not to exceed 720 hours per employee per 12 month period. The difference between the language of Article 7 and Article 14 may be no more than mere happenstance or the product of careless draftsmanship. Or, the difference may recognize a fundamental distinction in the nature of the employment relationship between the State and intermittent and temporary employees on one hand and 1,000 employees covered by Article 14 on the other. The former are not full-time permanent employees, but instead have been hired to fill a particular void. The 1,000 hour employees covered by Article 14 are permanent full-time employees who temporarily cannot perform

their normal duties because of the seasonal nature of their work. As a result, the parties agreed that the Ohio Department of Transportation could use these people wherever there were openings rather than lay them off.

In spite of the fundamental difference between temporary and intermittent employees on the one hand and 1,000 hour employees on the other and in spite of the fact that Article 14 does not specifically address Management's use of 1,000 hour employees to avoid filling permanent full-time vacancies, that limitation has to be read into the language of that section. If it were not so, then in many instances the procedures outlined in Articles 17 and 18 would become worthless, as they did in this case. In such circumstances Management could, as it did here, avoid filling the vacancy and defeat an employee's reemployment rights by effectively declaring that the vacancy doesn't exist because the work is being performed by a 1,000 hour employee. Likewise, the thrust of both the Contract and Administrative Rule 123:1-41-17 would be neutralized if the Employer were permitted to use 1,000 hour employees in lieu of filling permanent vacancies. The practical effect of permitting the State to do so would effectively be to pit one employee against another, which was never the intention of either the Contract or the Administrative Rule. Rather, the parties' intention as evidenced by Section 7.04, which bars the State from using temporary or intermittent employees to avoid filling permanent vacancies, and Section 17.04, which prohibits the State from withdrawing a posted

vacancy to achieve the same result, is to fill vacancies with permanent full time employees. That intent is not altered by Article 14 which permits the State to use the ODOT employees idled by weather conditions to fill in where needed.

Management did not have to have two full-time radio operators in ODOT's Chillicothe headquarters. It could easily have had one and made a 1,000 hour assignment or hire an intermittent employee to deal with the seasonal increase in the work load. What it could not do is effectively use an intermittent employee to avoid filling a permanent vacancy. That thought, is what it did. It also could not post a vacancy then effectively withdraw it by refusing to fill the position. This is the same conclusion which OCB's Deputy Director reached in February, 1992.

The radio operator's position ceased to exist in late 1992 when the Employer finally decided that it was time to change the table of organization in the communications section of its Chillicothe District Headquarters by abandoning the radio operator's position and creating the new position of radio technician. Until that time, Management was obligated to follow Articles 17 and 18 of the Contract to fill the radio operator's position. Since the Grievant submitted a timely application for the position which she had held for the ODNR in the same geographic area and because she had reemployment rights under Administrative Rule 123:1-41-17, she should have been awarded the position. But she was only entitled to hold it up until the

point Management took the appropriate steps to change the organization structure of the communications section in Chillicothe, Ohio by posting the Radio Technician's vacancy in December, 1992.

5. DECISION

For the foregoing reasons the Grievance is sustained in part. The Grievant is entitled to back pay, less sums earned from other sources, and all benefits associated with the radio operator's position from the date she filed her grievance through the date the Department posted the vacancy for the radio technician' position. She is also entitled to all rights under the Contract which would have accrued when the radio operator's position was abandoned.

Date June 23, 1993

Lawrence R. Loeb, Arbitrator