

#1513

IN THE MATTER OF ARBITRATION
BETWEEN
THE OHIO DEPARTMENT OF TRANSPORTATION
AND
THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/
AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 2-10-(98-08-18)-0051-01-00 HMW2 (53212)
CASE # 2-10-(98-08-18)-0052-01-00 HMW3 (53213)
CASE # 2-10-(98-08-18)-0053-01-00 HMW4 (53214)

Advocate(s) for the UNION:

Herman S. Whitter, Esq. Dir. of Dispute Resolution
Patty Rich, Classification/Arbitration Coordinator
John Gersper, Staff Representative
Michael Muenchen, Staff Representative
David Simpson, Researcher/Classification Specialist
OCSEA Local 11, AFSCME, AFL-CIO
390 Worthington Rd. Ste. A
Westerville OH 43082-8331

Advocate(s) for the EMPLOYER:

Michael Duco, Esq., Manager Dispute Resolution, OCB
Jim Miller, Esq., Administrator Office of Labor Relations, ODOT
OFFICE OF COLLECTIVE BARGAINING
106 North High Street, 7th Floor
Columbus OH 43215-3009

01 MAR 2011 1:54

INTRODUCTION

A hearing on the above referenced matter was held on October 19, 2000 and October 20, 2000, in Westerville, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted briefs in lieu of making closing arguments. The submission of briefs occurred in late May and early June of 2001. The Union subsequently submitted a post-hearing objection to the Employer's brief and the Employer submitted a response. These matters were cleared up by July 6, 2001 and the hearing closed on that day. The Arbitrator's decision, by mutual agreement of the parties, is to be issued in July of 2001.

ISSUE

The parties stipulated to the following definition of the issue:

Did the Department of Administrative Services properly apply the point factor system to determine the pay range of the Highway Worker 2 (53212) and the Highway Worker 3 (53213) classifications pursuant to Section 36.05(A) of the Collective Bargaining Agreement (CBA)? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 36.05 CLASSIFICATIONS AND PAY RANGE ASSIGNMENTS

BACKGROUND

This is a case that deals with a submission by the Union of a classification review in accordance with Article 36.05 of the Collective Bargaining Agreement. The two positions in contention in this dispute are Highway Maintenance Worker 2 (HMW 2) and Highway Maintenance Worker 3 (HMW 3). The Department of Administrative Services (DAS) determined that the position of HMW 2 was properly classified in pay range 6 and that HMW 3 was properly classified in pay range 7. The Union did not agree with the pay range assignments by the Department of Administrative Services (DAS) and appealed DAS's decision to arbitration.

As part of the stipulated facts the Union does not agree with the point factors assigned to the Highway Maintenance Worker 4 classification; however, OCSEA's application of the point factoring system does not result in enough points to change the pay range pursuant to the DAS point factor manual. Therefore, these decisions only address disputes related to the proper pay range assignment for the classifications of

HMW 2 and HMW 3. In addition to the point factor analysis by DAS and by the Union, the Ohio Department of Transportation (ODOT) did its own point factor analysis of the classifications of HMW 2 and HMW 3.

The point factor system used by the state of Ohio is based upon the Jacob Point Factor System developed in the 1930s. It was introduced in Ohio in 1976 and was most recently modified in 1989. The review procedure that is the contractual basis for this matter (Article 36.05 (A)) was negotiated in the CBA in 1994. The classification system contains several categories upon which an employee's work is evaluated. DAS, the Union, and ODOT agree on the point factors assigned under several categories for the classifications of HMW 2 and HMW 3 (See Stipulated Facts). DAS and the UNION further agree on the points assigned to the categories of Mental Demands, Physical Demands, and Surroundings. ODOT does not agree with DAS and the Union on the point factors assigned by DAS in these areas.

The dispute between the parties on HMW 2 centers on the numerical point factors DAS assigned to the categories of Assets and Personal Contacts. The dispute between the parties regarding HMW 3 centers on the categories of Supervision Exercised, Policy and Methods, and Personal Contacts. The definition of these terms as they appear in Joint Exhibit 13 (Jacobs Company Point Factor Evaluation System) are as follows:

Assets: The determination of the degree is based on the extent of opportunity in the position for achieving economies and preventing losses, the value of items or money involved, and whether the responsibility is limited, or full, and independent.

Personal Contacts: The determination of the degree is based on the extent, frequency, and regularity of establishing and maintaining contacts, the purpose and importance of contacts, and the importance of resulting actions and the level or importance of persons contacted. Contacts with co-workers in the same unit, direct subordinates, and direct supervisors are not included.

Supervision: The determination of the degree is based on the kind of supervision exercised and the size and composition of the group over which supervision is exercised. There are three kinds of supervision acknowledged by this factor-complex direct, direct, and lead work.

Policy and Methods: The determination of the degree is based on the kind of responsibility (e.g. developing, carrying out, interpreting, enforcing, or participating and assisting in the foregoing), the importance and the level of policy making involved and/or the complexity of the methods involved.

EMPLOYER'S POSITION

The overall position of the Employer is that the DAS analysis is correct and that the Union's analysis is flawed. The Employer argues that the expert witness for the Union did not consider all the relevant facts and conducted his analysis in an arbitrary manner. The Employer points out that in contrast DAS used 3 blind panels of reviewers who considered all of the information they gathered.

The Employer argues that the Union's analysis was defective because it provided to Mr. Hagglund only summaries of employees' responses to isolated questions and not the full text of their responses to all questions. The Employer contends this prevented the Union from gleaning information from the interplay of questions that were responded to by employees. The Employer asserts that the Union's expert originally submitted findings that did not provide a pay increase for the position of HMW 3 and then resubmitted one that did provide a pay range upgrade. The Employer contends that the work of the Union's expert, Mr. Hagglund, was process driven. In other words, the Union was looking for a way to justify reaching a point level that would provide a pay range change for HMW 2s and HMW 3s and structured their findings to fit this scenario, argues the Employer.

The Employer also argued that the Union's analysis failed to consider a number of employees annually who temporarily transfer (1000 hours) to the construction division of ODOT. They take positions such as Project Inspector, which pays a higher hourly rate of pay. The Employer argues that in the case of HMW 2s, its data demonstrates that on average HMW 2s only operate one piece of complex equipment for any significant amount of time. It contends that a dump truck is the most frequently used piece of equipment and it is used by HMW 2s only 17% of time. The Employer also disagrees with the Union that the HMW 2s have very limited responsibilities in the category of Assests, which it argues is accurately accounted for in the DAS analysis.

The Employer disagrees with the Union's contention that HMW 3s have any responsibility to explain policy under the category of Policy and Methods. It also argues that HMW 3s do not supervise employees and that the Union's expert altered the category of Supervision Exercised by incorporating the concept of "available to supervise." The Employer argues the DAS analysis regarding the category of Personal Contacts was correctly assessed.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union's overall position can be summarized as follows:

- 1. The Department of Administrative Services' Office of Classification and Compensation has the sole authority on behalf of the State of Ohio to review and make final conclusions and findings related to classifications and pay range changes to OCSEA pursuant to Article 36.05(A) of the Collective Bargaining Agreement. The Department of Transportation does not have the authority.**

2. **The Department of Administrative Services' Classification and Compensation Office is not infallible.**
3. **DAS erred in its point factoring when it found the pay ranges for the highway maintenance worker 2 and 3 to be proper.**

The Highway Maintenance Worker 2 needs only two (2) additional points to get to Pay Range 7, and OCSEA's analysis shows a three-(3) point gain.

- 1) Assets
- 2) Personal Contacts

The Highway Maintenance Worker 3 needs only three (3) additional points to get to Pay Range 8, and OCSEA's analysis shows a three (3) point gain.

- 1) Personal Contacts
- 2) Supervision Exercised
- 3) Policy and Methods

The Union first argues that during the development and history of Article 36.05 the parties never agreed to language that permits an Agency to challenge the findings of DAS in an arbitration proceeding. The Union contends that the language of 36.05A only permits OCSEA as an entity to challenge DAS findings and that OCSEA's subordinate bodies are not permitted to challenge DAS. The Union argues that its subordinate bodies and Agencies have input into DAS decision-making by providing information; however, they do not have the right to challenge a DAS determination. Therefore, the Union objects to ODOT's position in the instant matter. It argues that *"There has to be integrity to the System"* (See Union Opening Statement). The Union argues that the testimony of Gail Lively, Administrator, Classification and Compensation, DAS, *"reiterates the state's position that DAS is the authority on classification and compensation issues, not ODOT."*

However, the Union argues that the Office of Classification and Compensation is not infallible in making determinations regarding what is *"...equal pay for comparable*

skills, responsibility, effort, and conditions” of employment. The Union pointed out that under cross-examination Ms. Lively admitted her office is not infallible. The main thrust of the Union’s case is that DAS erred in its point factoring in the categories of Assets and Personal Contacts for the HMW 2 classification and in its point factoring in the categories of Supervision Exercised, Policy and Methods, and Personal Contacts for the HMW 3 classification. The Union’s analysis substantially relied upon the testimony of George Hagglund, Professor Emeritus at the University of Wisconsin. In essence, OCSEA argues that the HMW 2 classification was under-valued by 3 points and the HMW 3 classification was undervalued by the same amount of points in the categories listed above.

In regard to the HMW 2 classification the Union argues that DAS underestimated the importance of operating equipment such as 10-ton tandem axle trucks, backhoes, forklifts, graders, plows, and spreaders. The Union does not agree with the DAS assessment under the category of Assets. According to the Union, HMW 2s do much more than handle “...*simple motorized equipment and use of simple motorized hand tools.*” The Union also emphasized the need for care to be exercised on construction and road sites to prevent property damage. The Union pointed to the fact that two-thirds of the respondents that were surveyed indicated that errors or negligence on their part would result in a very large loss of time. Under the category of Personal Contacts (for HMW 2 and 3) the Union claims the Employer minimized contact with the public, other government personnel, law enforcement or the like. The Union pointed out that the job specifications for HMW 3 includes “*occasional*” contacts with the public.

In the category of Supervision Exercised the Union argues that 56% of the workers surveyed affirmatively stated they supervise highway crews (i.e. HMW 1s, 2s, 3s, summer help and prisoner/inmates). Through Professor Hagglund's analysis the Union takes the position that HMW 3s should receive a higher point factor for their lead work. In the category of Policy and Methods the Union argues that HMW 3s are involved in explaining information to various segments of the public and in settling problems with them. The Union contends DAS undervalued this factor in its analysis.

Based upon the above, the Union requests that the grievance be sustained.

DISCUSSION

The parties bring this dispute to Arbitration under the provisions contained in Article 36.05. In pertinent part the Article reads:

"At the request of the Union, ...the Department of Administrative Services shall review up to 10 classifications per year for duties, responsibilities, education, and or experience, certification and/or licensure, and working condition factors to determine appropriate salary range assignment. Such reviews shall be based upon a position description questionnaire survey of a random sample of incumbents in the classification or all incumbents..." [emphasis added]

In this type of dispute the charge of the arbitrator is to judge whether DAS correctly determined the "appropriate salary range" for the classifications in dispute. The two classifications that are the focus of this dispute are HMW 2 and HMW 3. DAS determined they should be assigned to salary range (also referred to as pay range) 6 and 7 respectively. In the case of HMW 2 the DAS point factor level was 36 or 2 points below the total necessary to be placed in salary range 7 (38pts to 45pts). In the case of HMW 3 the DAS point factor level was 43, or 3 points below the total necessary to be placed in salary range 8 (46pts to 55pts). The point factor totals determined by the Union were 39

points for HMW 2 and 46 points for HMW 3.

The evolution of state government and of collective bargaining history between the parties underscores the acceptance of the evaluation system used by the state of Ohio. There is no evidence to suggest that the evaluation system used by the state of Ohio is being challenged in this proceeding. It is a point factoring system that is commonly used in the private and public sectors and is fairly easy to comprehend. However, it is also a system that spawns controversy when small point totals mean the difference between one pay range and the next higher range. As this Arbitrator has previously stated in another case:

*“The rights of the Employer in establishing pay ranges and in analyzing the job duties and responsibilities of classifications are substantial. It must be acknowledged that any classification on the scale of state government is complex and detailed. The Employer is the “chief architect” of the classification system and therefore must be accorded a presumption of expertise in administering this complex system. The perfect system is yet to be devised, and this one has its strengths and weaknesses.”
(1199/State of Ohio, Case # 02-10-961202-0037-02-00, 1999).*

It is also clear that in a system as cumbersome and complex as a classification system, errors can occur and incorrect judgements can be made. Even the most experienced of baseball umpires “blows a call” now and then. In baseball, arguing with the umpire, aside from having a possible cathartic effect, is fruitless in correcting an error. In Article 36.05 of the Collective Bargaining Agreement arguing a “call” by DAS is fair game. The Union correctly pointed out that DAS is not infallible and is capable of making incorrect determinations. The very existence of Article 36.05 is a testament to the parties’ acknowledgement of this reality. It provides for a challenge by the Union of the application of the classification system by DAS and DAS only. I do not find that Article 36.05 makes any provision for an agency to submit a separate point factor

determination. In the instant matter ODOT's position is incorporated in DAS's analysis and is part of the DAS methodology (JX 13). In addition, ODOT communicated its position to DAS frequently as evidenced by JX 9 and the testimony of Gail Lively of DAS. I find the Union's position on this issue to be correct. ODOT's independent point factor analysis is beyond the scope of Article 36.05 and this review.

The approach taken in this matter will be consistent with a prior ruling of this Neutral. The content of record considered by DAS will be reviewed along with the procedural integrity and consistency demonstrated by DAS in making its determinations. This review will be conducted within the context of all the evidence and testimony presented in the hearing. The Union carries the burden of proof, a view that represents a majority of arbitrators' opinions in these types of matters (See 3-M Co., 77-1 ARB 8244 Cohen 1977). The Union's burden in this case is to demonstrate by a preponderance of the evidence that DAS erred in assigning point factors. Specific criteria for determining whether DAS erred in making its determination of an appropriate salary range assignment have been used by this Neutral in the past and shall be applied in this case. It consists of a 3-part test (updated for clarity) that is applied to DAS's determinations. It is as follows:

1. Did the Employer conduct the classification review in an arbitrary or capricious manner?
2. Did the Employer fail to consider all the relevant facts?
3. Did the Employer incorrectly apply its standards?

Each classification will be separately reviewed based upon the specific categories in dispute.

I find no evidence or testimony to suggest that DAS conducted its classification

review of the classifications of HMW 2 and HMW 3 in an arbitrary or capricious manner. Its methodology appeared to follow its own guidelines and was performed in a professional manner. It appears that all the PDQ's were reviewed and the answers were analyzed independently and in relationship to one another where this was required. DAS utilized 3 informed rating panels who were "blind" from one another's findings. The Union did not criticize this utilization of blind panels, and I find it represents a reasonable system of checks and balances in this type of analysis.

HMW 2

The two categories that this discussion shall be confined to are **ASSETS AND PERSONAL CONTACTS**. These are the areas in dispute.

ASSETS

DAS assigned Degree 2, or 2 points to the Assets category; the Union assigned Degree 3, or 4 points.

Assets and the pertinent degrees are defined in JX 13 as follows:

"Assets: The determination of the degree is based on the extent of opportunity in the Position for achieving economies and preventing losses, the value of items or money involved, and whether the responsibility is limited, or full and independent"

Degree 2 *"Requires limited responsibility and provides little opportunity for achieving minor economies and/or preventing minor losses through the handling of or accounting for materials, supplies or small amounts of money, or through the operation of simple equipment, hand tools, or through the safeguarding of supplies, equipment or facilities of moderate value."*

Degree 3 "Requires responsibility and provides opportunity for achieving moderate Economies and/or preventing moderate losses through the management of a small unit, through the handling of materials and supplies, through the handling of accounting for large amounts of money, through the operation of complex equipment or routine maintenance of equipment, through planning, engineering or inspection in connection with construction of the preceding, through the safeguarding of supplies, equipment or facilities of high value, or through legal processes."

In this analysis 926 Position Description Questionnaires (JX 14) were received from employees out of 1307 distributed (JX 4). JX 4 indicates that in most cases employees classified as HMW 2s operated higher level equipment 1 to 10% of the time. The Union contends that DAS understated the importance of the equipment being operated as it applies to this category. It specifically cites the operation of 10-ton tandem axle trucks, backhoes, forklifts, graders, plows and spreaders. The Union also pointed to the degree assigned to the Auto Mechanic 3 classification. It contends that these Mechanics operate the same equipment away from the dangers of the work site (as opposed to HMW 2s who operate it on the highway), yet they have been assigned a higher point factor under the category of Assets.

The Employer argues that HMW 2s seldom handle complex equipment as called for in JX 13 under the category of Assets. It concedes that HMW 2s drive dump trucks but this time only amounts to 17% of the total hours worked by HMW 2s. It contends that HMW 2s involvement with assets is through the handling of materials and supplies for assigned projects as part of a crew. In addition it argues that HMW 2s are involved in the completion of assigned highway maintenance projects, which involves operating a variety of simple motorized equipment and the use of motorized hand tools. According

to the Employer over 50% of an HMW 2's time is spent doing other things besides operating equipment.

The Employer also points out that the Union did not consider the number of HMW 2s who opt for a 1000 hour transfer every year to higher classifications in ODOT'S construction operations. The Employer contends that many of the PDQ responses could have been based upon the experience of HMW 2s who were temporarily transferred to higher classifications which involved the operation of higher level equipment. The Employer contends that the supervisor portion of the PDQ process substantiated this assertion.

The operating record of the equipment in ODOT indicates that a variety of equipment is allocated throughout the state at various locations (JX 4). However, what is not clear from the evidence and testimony is to what extent it is operated by HMW 2s. Professor Hagglund's analysis emphasized that the potential for damage to expensive state equipment is as significant for HMW 2s as it is for HMW 3s and 4s. His point was expertly articulated. However, if an HMW 2 rarely operates complex equipment, HMW 2s cannot be compared to HMW 3s or 4s in terms of responsibility for assets.

When the responses to question 19 are reviewed in detail, it is particularly noteworthy that the operation of heavy equipment, other than trucks, rarely is specifically mentioned. For example, respondent 300 states, *"Run the crane, driving piling. Men handing 20 to 30ft aboveground. If I hit the wrong lever it would drop to the ground possibly causing loss of life."* But respondent 300, along with respondent 589, 623, and 717 appear to be the exceptions and not the rule.

If many employees were frequently operating backhoes, front-end loaders,

graders, forklifts, or spreaders, it would be reasonable to expect that these pieces of equipment (like trucks or plows) would receive specific mention by many HMW 2s under question 19. What is frequently mentioned are topics like traffic control, flagging, snow and ice removal, plowing, salting, road repairs, guardrail repair/installation, sign erections, and mowing. All of this is important and often hazardous work; however, it does not support the Union's contention that HMW 2s are frequently operating complex and expensive equipment and are responsible for it under the category of Assets.

I understand the potential for employees to be disciplined for improper use of state equipment as outlined in UX 5b and 5c. However, the existence of these memos does not highlight the frequency or variety of equipment that HMW 2s are operating. The one piece of equipment that is most frequently mentioned by HMW 2s in response to question 19 is trucks/plows. The Employer acknowledged that dump trucks are driven by HMW 2s 17% of the time. What is not clear is whether plowing is included in this figure. I concur with Professor Hagglund's findings that dump trucks (\$70,000 + each) are expensive pieces of equipment under the Assets category. However, I also agree with the Employer's position that the amount of time operating equipment is relevant (under the Jacobs Point Factor System) to the degree of responsibility assigned under the category of Assets. The standards are clear in this regard.

The introduction to the degree ratings under the category of Assets on page 9 of JX 13 states in pertinent part:

"The determination of the degree and point rating for assets responsibility is based on the extent of opportunity in the position for achieving economies and preventing losses..."

Ironically, there appears to be a relationship between the two categories in dispute. If one is operating heavy (and noisy) equipment, he/she is unlikely to have the opportunity for frequent conversations with the public under the category of Personal Contact. The evidence demonstrates HMW 2s have frequent routine public contact. The evidence and testimony presented by the Union were unable to refute the Employer's calculation of time (17%) that HMW 2s spend operating heavy equipment nor was it able to provide a more reliable figure to be considered.

I do not find that the analogy between Auto Mechanic III and HMW 2 to hold. Auto Mechanics are evaluated at a degree 4 and receive 8 points for this factor. However, they are capable of rendering a piece of sophisticated equipment inoperable in many more ways than can an operator of said equipment. It is one thing to run a piece of equipment and quite another to take it apart, diagnose the problem accurately, make the correct repairs, service it properly, and put it back together correctly. There are numerous things that could go wrong during each process.

In reviewing PDQ #19, the employees who filled it out frequently referred to losses of time and potential harm to persons. However, when one carefully reviews the responses to question 19, a great deal of emphasis is placed upon the traffic and the potential harm that can arise from doing one's job. Traffic accidents are mentioned numerous, and snow and ice removal are cited on almost every page of JX 5bi (Question 19). Many of the comments include the words safety, injury, and loss of life, hazard, and accident. These appear to be very serious comments, and I do not doubt the importance of what these employees are conveying. However, these issues do not support the Union's argument in the category of Assets. The category of Safety of

Others or Mental demands, which are not in dispute, appear to be more directly supported by a large number of these comments.

A large number of respondents to PDQ #19 mentioned a loss of time, a point strongly emphasized by the Union. However, what is not clear is the amount of individual responsibility an HMW 2 has for this loss of time. The class specifications for HMW 2 refer to the HMW 2 class as a “*developmental level class*” working under general supervision. The Employer persuasively argues that HMW 2s are crewmembers. In Joint Exhibit 5bi, respondent 220 stated, “*The best example I can give is we are like spokes in a wheel, if one of us brakes off its not long and the whole thing flies apart. We have to work as a team or it don’t roll.*” There are several layers to the HMW classification and there are numerous other categories of employees including supervision who are on a work site. I find the Union’s argument that HMW 2s rise above the level of having “*limited responsibility*” is unsupported by the evidence. The weight of the evidence, under the category of Assets, supports DAS’s assignment of degree 2 versus degree 3.

PERSONAL CONTACTS

I do not find that the HMW 2s were incorrectly assigned a Degree 1 rating by DAS under this category. The key word in the standards is the word “*responsible.*” The standard in pertinent part reads:

“Personal Contacts: “The determination of the degree is based on the extent, frequency and regularity of establishing and maintaining contacts, the purpose and importance of the contacts, and the importance of resulting actions and the level or importance of persons contacted.”

The degree assignments in dispute read:

- Degree 1 *"Requires limited responsibility for making routine contacts on non-specialized matters with employees, general public and outside agencies in performing duties of the position."*
- Degree 2 *"Requires some responsibility for making occasional responsible contacts with the general public, other departments or divisions, or with persons at all levels outside of the organization unit for the purpose of furnishing or obtaining information on non-specialized matter; or for making regular routine contacts with the general public."*

In the Union's analysis Professor Hagglund concluded that in response to PDQ # 18 (JX bii), there are numerous examples of HMW 2s contacting other state workers, federal and local employees, the general public, and other population groups. The Union argues that the significance of contacts with the public was minimized and DAS did not mention other contacts with government, organization, or law enforcement personnel. The Union points out that the nature and significance of the contacts made by HMW 2s and HMW 3s are widely expressed in the responses to PDQ #18. The Union also argues that p. 2-51 of UX 2, OHIO COMMERCIAL DRIVER'S HANDBOOK, contains the requirement for drivers involved in accidents to notify authorities.

The Employer argues that in the case of HMW 2s and HMW 3s, personal contact *"...is generally initiated by the public who happens to be in their work zone, and that contact generally occurs while flagging, which is primarily done by a Highway Maintenance Worker 1, or if none are available, by a Highway Maintenance Worker 2."*

The Employer argues that HMW 3s are usually operating heavy equipment making it generally impractical for them to communicate with the public on a regular basis. The Employer also points out that if an HMW 2 is flagging, he or she has limited ability to communicate with the public while working. Through its witness, Gail Lively, the Employer made the point that Degree 2 under the category of Personal Assets requires

the conveying of more than “...*straightforward information...*” Ms. Lively stated it requires an employee to be responsible for “*interpretation of rules or procedures.*” This is beyond the scope of responsibility of an HMW 2 or HMW 3, argues the Employer.

The Union’s burden in this case is to demonstrate that HMW 2s are having more than limited responsibility for contacts with the public and others. Degree 1 addresses limited contacts of a routine nature. As stated previously, HMW 2s are normally part of a crew in which there are several employees and supervision. The work is often performed on busy roads, and employees must contend with everything that goes with such conditions. It is difficult to imagine that an HMW 2 so situated would frequently have the burden of making “*responsible contacts with the general public, other departments or divisions, or with persons at all levels outside of the organization for the purpose of furnishing or obtaining information on non-specialized matters,*” as called for in Degree 2 of the category of Personal Contacts. Given the evidence, it is far more plausible that an HMW 2 would have limited responsibility for making routine contacts as called for under Degree 1. The introduction to the degree rating on page 11 of JX 13 states in pertinent part:

“The determination of the degree and point rating for personal contacts responsibility is based on the extent, frequency and regularity of establishing and maintaining contacts...”

Upon reviewing JX 5bii, which contains 817 responses to PDQ # 18, I find that the vast majority of the contacts described can be more accurately characterized as limited and routine contacts with the general public. There are numerous examples of giving directions, explaining what the project is and when it will be completed. A sampling of responses supports this contention. For example, out of the first 100

responses, giving directions and or explaining to the public what is being done is mentioned no less than 53 times. A reasonable person would interpret most of these comments as routine examples of ordinary contacts by people who are in a hurry, curious, in need of help with directions, or are irritated at being inconvenienced. It is likely that given the nature and location of the work of HMW 2s and 3s, most of the interactions with the public are brief. Reviews of the remainder of the responses to question 18 appear to represent a similar pattern. Summaries contained in Joint Exhibit 5bii reveal that giving out or explaining information is concentrated in the areas of General public or Disagreeable angry public. This data is weighted in favor of the DAS interpretation that HMW 2 contacts are largely confined to the dispensing of basic information to motorists about directions or what work is being performed, as opposed to the interpretation of information. The information contained in UX 3, p. 7A-1 Preface also supports and underscores the necessity of providing such information to motorists.

This is not to say that HMW 2s do not have contact with law enforcement or other entities. The data demonstrates this occurs on occasion. However, the types of contact that appears to be most frequent and regular (as described in the requirements of the category) is that which deals with routine non-specialized information being imparted to the motoring public. This conclusion also considers the responses and opinions expressed by supervision in JX 12.

I do not find that DAS improperly assigned a Degree 1 rating in this category.

HMW 3

PERSONAL CONTACTS

The arguments by the parties concerning this category are cited above under HMW 2. The responses contained in JX 5ii for HMW 3 are similar to those of HMW 2 and reflect a concentration of activity in the areas of responding to uncomplicated routine inquiries from a sometimes irritated and unpleasant public or providing travel directions to motorists. The Union made the point that the position specification for HMW 3 states they have “occasional” contacts with the public. The job description for HMW 3 states in more detail under Job Duties, “...responds to general inquiries from public (e.g. gives directions; explains why delay in commute; explains work underway.” Given the fact that HMW 3s spend more time on operating heavy equipment than do HMW 2s, it is likely their time to respond to public inquiries is less than that of an HMW 2 who is more accessible by the public.

I find there is insufficient evidence to justify overturning DAS’s assignment of Degree 1 under this category.

SUPERVISION EXERCISED

The definition of Supervision is as follows:

“Supervision: The determination of the degree is based on the kind of supervision exercised and the size and composition of the group over which supervision is exercised. There are three kinds of supervision acknowledged by this factor: complex direct, direct, and lead work.”

Lead work is defined as follows:

“Lead Work: Daily responsibility for providing work direction and training on work processes and guidance on the adequacy of work products or tasks associated with accomplishing specific work assignments to inmate workers or other civil service employees assigned to the same organizational work unit.”

The Union points out that 100 out of 179 HMW 3s, or 56%, answered affirmatively to either PDQ #6 and # 25 about supervising crews, HMW 1, 2, 3s, summer help and inmates. Professor Hagglund concluded in his findings that based upon these responses, HMW 3s should be assigned to Degree 1 under the category of Supervision Exercised. He stated during hearing that HMW 3s should receive some credit for lead work because “...an HMW 3 must be prepared to take over lead work.” (also see JX 5A).

The Employer argues that the main characteristic that separates an HMW 4 from an HMW 3 is the phrase, “Serves as a lead worker.” That is the reason the HMW 4 is assigned Degree 1 under this category, contends the Employer.

The job description for HMW 3 contained in JX 4 states in pertinent part under Job Duties, “...acts as a lead worker (i.e., provides work direction & training) to work crews in absence of highway maintenance worker 4.” It is clear that HMW 3s are expected to “step up” to the role of HMW 4 when required. JX 5biii lists responses to PDQ # 6. In it 66 out of 179 of the responding HMW 3s state they have some lead work/supervisory responsibilities. One respondent indicated he supervises 90% of the time, while some indicated they supervise employees 20 to 25% of the time. Others characterized the percentage of supervision in the 10 to 15% range, and the remainder of the 66 respondents were under 10%. 66 out of 179 represents approximately 37% of the HMW 3s.

When the responses to question 25 are added to these totals, the number increases to 100 out of 179 (or 56%), as cited by the Union. Question 25 did not ask for a percentage of time so it is difficult to assess its weight in comparison to question 6.

Nevertheless, the number of HMW 3s who are supervising employees, college students, or inmates is significant. For all intents and purposes this appears to be the work of HMW 4s. The Agreement under Article 19 deals with working out of class for those employees who perform said work 20% or more of the time. The responses to questions 6 and 25 would indicate some people might fall into this category.

However, in terms of the immediate matter, I find that the structure of ODOT's HMW class series designates HMW 4s as lead workers and not HMW 3s, except in the absence of the HMW 4. Although a sizeable number of HMW 3s appear to engage in supervision at times, there is not a requirement of the job. The parties have provided relief to employees who work at a higher level. Article 13.17, Temporary Working Level, of the Agreement provides an employee with higher pay when transferred to a higher position. In his testimony, Professor Hagglund testified he was not aware of this provision in the Agreement. Whether this would affect his conclusions is unknown.

It is unclear whether all the respondents to question 25 who are actually performing lead work are receiving additional compensation for their supervisory duties. However, this is a fairly black and white issue. Either one is performing lead work or he is not, and according to the Employer that is the main function that separates HMW 3s from HMW 4s. Information in MX 1 reveals that in many cases the Employer rebutted the contentions of HMW 3s regarding their lead work activity. In some cases HMW 3s were working TWL or were recommended for reclassification to HMW 4s. It is also not clear how "*self-directed work team*" fit into this scenario. However, if a large number of HMW 3s are frequently performing lead work over other employees, inmates, etc., the parties may have another matter to resolve outside of the scope of this dispute.

Within the confines of this dispute the definition of lead work under the Jacob Company Point Factor System specifically requires *“Daily responsibility for providing work direction and training...”* Although a large percentage of HMW 3s indicate they have performed lead work, the preponderance of the evidence does not substantiate that HMW 3s, with the exception of a few, are performing lead work daily. HMW 4s presumably perform lead work daily. Therefore, the assignment by DAS of Degree O to HMW 3s appears to be consistent with the definitions contained in the evaluation system.

I do not agree that being available to take over lead work on a daily basis is equivalent to performing lead work every day. Such an interpretation runs contrary to the standard. The Supervised Exercised standard is unequivocal in its intent. It states in the first sentence, *“Refers to the requirement for exercising supervision over others.”* This means the daily exercise of lead work. The standard does not contain a provision for being available for daily lead work. There are many qualified employees who could supervise other employees if given a chance. The key is they must have the opportunity to lead.

POLICY AND METHODS

The definition of Policy and Methods is as follows:

“The determination of the degree and the point rating for policy and methods responsibility is based on the kind of responsibility (e.g. developing, carrying out, interpreting, enforcing, originating, or approving or executing any existing or new policies or methods; or participating and assisting in the foregoing), the importance and the level of policy making involved and/or the complexity of the methods involved.”

The degree definitions in dispute are as follows:

Degree 1: "Requires normal responsibility in carrying out established policy following the methods and procedures relating to the duties of the position."

Degree 2: "Requires some responsibility for carrying out and explaining existing policy, methods and/or procedures relating to the duties of the position or of subordinate or lateral positions."

The Union argues that three PDQs impact upon this evaluation: PDQ #11, #12, and #18. Question 11 states "...list the procedures, rules, laws, standards, codes or other guidelines you use in your job." Question 12 asks, "How much freedom do you have to not follow the items listed in question 11, or to use something in place of them?" Question 18, utilized under the category of Personal Contacts, has applicability to this category, argues the Union. The Union points out that sub-parts of question 18 indicate whether HMW 3s "Give out information," "explain information," or "settle problems with no clear solutions." The Union contends that question 18 is "...the most germane to evaluating..." the HMW 3 classification in the category of Policy and Methods.

The Employer argues that the primary responsibility of HMW 3s is to "...operate heavier equipment. The Employer contends that the County Manager or his assistant managers are responsible for explaining policies, methods, or procedures to the public and to other ODOT line employees. The Employer does concede that as a lead worker, an HMW 4 may be required to explain methods to co-workers. However, it argues an HMW 3 only has responsibility for carrying out and following procedures and does not have responsibility for explaining policies, methods, or procedures.

The evidence demonstrates that at times HMW 3s perform the work of HMW 4s and presumably they may be required to explain policies and or procedures to other

workers. However, while performing work as HMW 3s, I find there is insufficient evidence to prove that they are responsible for explaining policy on any consistent basis.

From the responses to question 18 what appears more common are repetitive conversations with the public that generally center around explaining what work is done, giving directions, or aiding motorists in other ways. This ground was covered previously under the category of Personal Contacts. This is important work because it impacts the image of ODOT; however, it seems more aligned with carrying out and following established policy and procedures rather than the more complex requirements of having to explain existing policy. As stated earlier, given the core duties of the position of HMW 3s (operating heavy equipment), it is unlikely that these employees would regularly be able to engage the public or even other employees in anything but brief conversations.

The danger associated with highway work is considerable. The proximity to traffic while trying to perform physically demanding work speaks for itself. Therefore, the importance of carefully adhering to rules, policies, and procedures can literally make the difference between a safe operation and one that ends up in serious injury or even death. In response to question 12, respondent # 177 poignantly summed up the situation. He stated, *"Due to the laws, or harm to the fellow employees you can't have much freedom not to follow the rules."* From the evidence, it is clear that when faced with certain situations, there are times when there is a need to deviate from established procedures, but this has more to do with experienced judgment rather than explaining policy. The responses to question 12 that stated "Great deal" substantiate this conclusion. 50% of the respondents to PDQ 12 stated they have little or no freedom to deviate from

policy. The figure rises to 88% when the response of some freedom is added to this total. I do not agree with the Union's contention that question 18 is the most germane question in this category. Article 36.05A requires that reviews shall be based upon the PDQ survey, and I find no intent in the language to emphasis (or de-emphasize) the responses to some questions over others that address the same category.

There is little question that HMW 3s must be responsible for carrying out and following policies and procedures. And there is substantial evidence to indicate that there are circumstantial exceptions that must be made to rules or procedures when conditions or circumstances support a deviation. However, the evidence indicates that nature of the work of an HMW 3 is in the context of teams or crews. Judgement calls are likely to be within the context of the "managerial milieu" established by HMW 4s and supervision in general.

I find that DAS correctly assigned a Degree 1 factor to this category for HMW 3s.

In summary, it must be stated that the Union presented an exhaustive and expertly crafted argument. Professor Hagglund has impressive credentials, and he provided well-reasoned testimony in an articulate manner. However, in this type of case the data and a reasoned interpretation of the data determine the outcome. It is a highly factual process that requires a measure of subjectivity. The key is whether the subjectivity is defensible.

I do not find that there was a preponderance of evidence in this case to establish that DAS was arbitrary or capricious in its approach to evaluating the positions of HMW 2s or 3s. It approached its tasks in a disciplined and objective manner. The testimony of Gail Lively added further credibility to DAS's methodology and to the apparent control she exercised over the process. I further find that when all things are considered, DAS

reasonably considered all the relevant facts it was supplied and properly applied its standards of measurement to these facts.

