

BENCH DECISION AND AWARD

ARBITRATOR: R. David M. Pincus.

HEARING DATE: 3/25/02

GRIEVANT: Jan Materzi.

GRIEVANCE #: 31-02-(01-31-01)-01-1-06

DEPARTMENT: ODOT.

UNION: OCSA.

MANAGEMENT
ADVOCATE: Dietsch.UNION
ADVOCATE: Gersper

ISSUE

When an employee fails to complete a required probationary period, is the Agency required to post the position as a new vacancy? If so, what shall the remedy be?

AWARD

The grievance is denied. The Employer did not violate Section 17.03 when it failed to post the position as a new vacancy. The parties never specifically negotiated this requirement with respect to failures to complete probationary periods. If anything, the parties practice and custom supports the Employer's interpretation. Finally, since the contract fails to anticipate the above situation, it is properly supplemented by ORC 124.27(C) which, again, complies with the Employer's interpretation.

ISSUED AT:
DATE: 3/25/02ARBITRATOR'S
SIGNATURE: 

RECORD OF MEDIATIONState: Christine Kietzsch

DATE

7-19-01

ADVOCATE:

Union Jim Hansen

GRIEVANT

Jan Materni

MEDIATOR:

Washington

GRIEVANCE #

31-02-2001/01/31-0001-01-06

RECORDER INITIAL:

W**UNION POSITION**

the Union contends Mgmt. failed to post a vacancy. Mgmt posted and filled an Asst. Clerk-2 position in Wood County in the fall of 2000. Rather than repost the position, Mgmt. placed the next senior person (applicant) from the original posting in the position. Art 17 Re-Post

MANAGEMENT POSITION

Mgmt. contends the definition of a vacancy is an opening in a permanent position. the position is not considered to be permanent until the ~~per~~ successful completion of the probationary period. Mgmt was required to select from the original applicants.

MEDIATOR'S COMMENTS/RECOMMENDATIONS

if Mgmt. can prove past practice of that allows a person to not complete their probationary period and allows Mgmt. to go back to the original pool of applicants Mgmt w/ prevail.

ACTION:SETTLED ☐WITHDRAWN ☐NO ACTION ☒CFA



GRIEVANCE FORM

STATE OF OHIO — OCSEA, LOCAL 11 AFSCME, AFL-CIO



ATTACHMENT 5

Date: 01-29-01 Grievance #: ODOT DISTRICT 2 31-02-(01-31-01)-01-01-06

Employee Name: Jan Materni Soc. Sec. #: 277 - 68 - 1138

Home address: 26922 Whiteside Dr Work phone: (419) 353-0866
 City, state, zip: Perrysburg OH 43551 Home phone: (419) 372-2542

Job Classification: Heavy Maint. Worker II Work location: Wood City Garage

Agency: ODOT

Steward name: Jan Materni Work phone: (419) 353-0866
 Home address: 26922 Whiteside Dr
 City, state, zip: Perrysburg OH 43551

Immediate supervisor: Dan Hoops/Violet Courtney Work phone: (419) 353-0866

Contract article(s) allegedly violated:

17.01 and 17.03 ETAL

Witnesses:

Statement of facts (who, what, where, when?):

This past fall (Nov.) an account clerk position was posted at the Wood County Garage. Four people bid on it W. Perryman, N. Rosendale, J. Smith, S. Kinsey. It was given to Perryman. Halfway through his probationary period Mr. Perryman decided he didn't want the job and wanted to return to his old position. ~~Is~~ ~~Is~~ This created a vacancy for the account clerk position at Wood County. Instead of reposting it they put the second choice, N. Rosendale in the job. This is a clear violation of 17.01 & 17.03 and two arbitrations decision that states "it doesn't matter how the vacancy is created, you must post it once it is."

Remedy sought:

The job be posted and the individual who eventually gets it receives back pay beginning 1-29-01, the day Mrs. Rosendale started

Signature: Jan K. Male

(Grievant / Union representatives)

Date: 01-29-01

Suspension / Discharge Grievances:

The Union submits grievances involving suspension / discharge at Step 3 within 14 calendar days of the date of notification. Send the original, completed form to the Agency Head or Designee.



OHIO DEPARTMENT OF TRANSPORTATION
CENTRAL OFFICE, P.O. Box 899, COLUMBUS, OHIO 43216-0899

Ms. Jan Materni
Highway Maintenance Worker 2
26922 Whiteside Drive
Perrysburg, Ohio 43551

March 7, 2001

Re: Grievance #31-02(01-31-01)01-01-06

Dear Ms. Materni:

The following represents my decision regarding the Step 3 grievance meeting conducted on February 22, 2001, at ODOT District 2 Office of Labor Relations. At this meeting you were represented by Jim Hauenstein, Staff Representative. Also present:

Union: (Yourself) Jan Materni

Management: Edward A. Flynn, Meeting Officer
Chris Dietsch, Labor Relations Officer
Pam Shanks, Personnel Officer
Violet Courtney, Acting Trans. Adm. :

Union Contention:

The Union contends that Management failed to post a vacancy in violation of Sections 17.01 and 17.03. Specifically, Management posted and filled an Account Clerk 2 position in Wood County in the Fall of 2000. Subsequently, the successful applicant choose to return to his previous position prior to the end of his probationary period. Rather than re-post the position, Management placed the next senior applicant from the original posting in the position.

The Union argues that the above represents a vacancy which requires posting the position.

Management Contention:

Management contends that the definition of a vacancy is an opening in a permanent position. The position is not permanent until the applicant successfully completes his/her probationary period. Therefore, Management was required to select from the original applicants.

Subj: **RE: reposting jobs**
 Date: 01/02/2001 4:00:22 PM Pacific Standard Time
 From: jgersper@ocsea.org (Gersper, John)
 To: Mjdbuckeye@aol.com ('Mjdbuckeye@aol.com')
 CC: jhauenst@ocsea.org (Hauenstein, Jim)

MIKE D.:

THE AGENCY DOES NOT HAVE TO POST AND FILL THE POSITION UNLESS THEY DECIDE TO DO SO. THEY HAVE THE RIGHT TO NOT FILL THE POSITION AT ALL. HOWEVER, SHOULD THEY CHOOSE TO FILL THE POSITION, ARTICLE 17 REQUIRES A POSTING BUT THE UNION CAN WAIVE POSTING TO FACILITATE THE FILLING OF THE POSITION IF THE NEXT PERSON IN LINE WOULD HAVE GOTTEN THE POSITION ANYWAY. IN CENTRAL OFFICE, THE UNION HAS WAIVED A NEW POSTING WHEN A MEMBER ASKED TO BE RETURNED TO HIS FORMER POSITION DURING HIS PROMOTIONAL PROBATIONARY PERIOD AND THE NEXT PERSON IN LINE WAS THE NEXT MOST SENIOR PERSON WHO APPLIED.
 JOHN GERSPER

*Speak
to Sue
regarding
this*

-----Original Message-----

From: Mjdbuckeye@aol.com
 To: jgersper@ocsea.org
 Sent: 1/2/01 4:38 PM
 Subject: reposting jobs

Greetings from Northwestern part of the state, I hope you had a nice holiday.
 John, I have a question. If a person took a job bid as a time keeper in Wood County, he then decided that he does not want the job anymore. Is the state obligated to repost that position? Or does the bid go to the next person down the list? Mike Danko. E-mail me at mjdbuckeye@aol.com

----- Headers -----

Return-Path: <jgersper@ocsea.org>
 Received: from rly-za03.mx.aol.com (rly-za03.mail.aol.com [172.31.36.99]) by air-za04.mail.aol.com (v77.31) with ESMTP; Tue, 02 Jan 2001 19:00:22 -0500
 Received: from groucho.ocsea.org ([205.185.162.8]) by rly-za03.mx.aol.com (v77.27) with ESMTP; Tue, 02 Jan 2001 19:00:00 -0500
 Received: by groucho.ocsea.org with Internet Mail Service (5.5.2650.21) id <ZRBZ3FZY>; Tue, 2 Jan 2001 18:39:53 -0500
 Message-ID: <BBAFDE4CED4CCF11B0C800104BC700E21D7A48@groucho.ocsea.org>
 From: "Gersper, John" <jgersper@ocsea.org>
 To: "Mjdbuckeye@aol.com" <"Mjdbuckeye@aol.com">
 Cc: "Hauenstein, Jim" <jhauenst@ocsea.org>
 Subject: RE: reposting jobs
 Date: Tue, 2 Jan 2001 18:39:52 -0500
 MIME-Version: 1.0
 X-Mailer: Internet Mail Service (5.5.2650.21)
 Content-Type: text/plain;
 charset="iso-8859-1"

2/22/01

Step 3 - Mike Smith
asked for modification - Put Smith in job -
~~given vacancy posting~~ as a remedy.

Step 3 - Jan Materni

~~7.04~~

17.07 - B

PG 8 - 6.02

if this goes to ARB
these are the articles
to concentrate on
that Jan will go to

Next →

look at written agreement
at ODOT Central office
on Posting Vacancies when probationary
period is not completed

Step 2 Response
2/07/01
Grievance # 31-02-(01-31-01)-01-01-06
Jan Materni

Prior to the start of the Step 2 Hearing, the Grievant/Union Steward was queried as to whether or not she was going to have another Union Steward present. She stated that she preferred to be her representative at this level. She was advised that it is always best to have a representative other than herself and that extension of time line papers were available in the event she would like to extend the grievance hearing until such time as another Union Steward could be present. She declined and restated she was comfortable representing herself at the Step 2 level.

On February 06, 2001 a Step 2 Hearing was held at the Wood County Garage. Present at the Hearing were: Jan Materni, Grievant and Union Steward; Violet Courtney, Acting Transportation Administrator; Pam Shanks, Personnel Officer; and Christine Dietsch, Labor Relations Officer.

A restatement of the contract Articles allegedly violated was read. Those articles included:

Article 17.01 - Policy

Article 17.03 - Posting

Added was:

Article 19.04 - No pre-positioning

The **Statement of Facts** for the grievance was read: *This past fall (Nov.) An Account Clerk position was posted at the Wood County Garage. Four (4) people bid on it: W. Perryman, N. Rosendale, J. Smith, S. Kinsey. It was given to Perryman. Halfway through his probationary period Mr. Perryman decided he didn't want the job and wanted to return to his old position. This created a vacancy for the Account clerk position at Wood county. Instead of reposting it they put the second choice, N. Rosendale in the job. This a clear violation of 17.01 and 17.03 and two arbitrations decision that state "it doesn't matter how the vacancy is create, you must post it once it is."*

Remedy Sought: *The job to be posted and the individual who eventually gets it receives back pay beginning 01/29/01, the day Mrs. Rosendale started.*

With no procedural objections being noted, the hearing proceeded. The grievance is issue based, therefore, the Union was given the option of presenting their arguments first.

UNION CONTENTION

Ms. Materni stated that the first half of the hiring process was done properly. Mr. Perryman was given the job. It was at the time of his withdrawal from the position and request to return to his former position that Management did not abide by the Contract by not posting the newly created vacancy.

Ms. Materni felt very strong that once Mr. Perryman left the position it was considered to be vacant. Per the Contract, all vacancies must be posted. This was described to be the total basis for the grievance.

MANAGEMENT CONTENTION

Christine Dietsch, LRO, presented for Management. A historical overview of the original application process was detailed: Willie Perryman, along with 3 other candidates (S. Kinsey, N. Rosendale, and J. Smith) applied for a Vacancy posting for an Account Clerk 2 position @ the Wood co. Garage. Applications were received through the close of business on 7/20/00.

Mr. Perryman was the successful candidate and was placed on a 120 day probationary period on 10/08/00. Upon the successful completion of this probationary period, he would be considered to be appointed permanently in this promotion to an Account Clerk 2.

At anytime during this trial period Mr. Perryman could have been placed back into his former position by the Employer, or he could request to terminate the probationary period himself, which he did do. In a letter dated 12/28/00, Mr. Perryman requested to terminate his probationary period and return to his previous classification and position. Out of a 120 day probationary period/trial period, Mr. Perryman served 81 days. He had 39 days remaining.

Article 5 of the Contract - Management Rights, states that *the employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement.*

Article 6 of the Contract - Probationary Employees under section 6.01 - Probationary Periods states that *all newly hired, promoted and laterally transferred employees shall serve a probationary period.* And for the classification in question the period is 120 days.

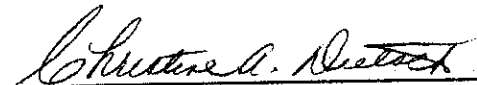
The article gives the employer (during the probationary period) the right to place the employee back in the classification that the employee held previously if the employee fails to perform the job requirements of the new position to the employers' satisfaction.

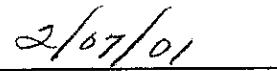
Article 6.02 of the Contract - Promotional/Lateral Transfers Probationary Period states *that employees who are promoted to a different classification shall serve a probationary period pursuant to Section 6.01 mentioned earlier. It further states that during a trial period, the employee may elect to return to his previous position* which is what Mr. Perryman did.

- ➔ If this was a “trial” or “probationary period” as the Contract terms it, it was not a foregone conclusion that the position was permanently filled. Therefore, the original Vacancy still existed and the existing list of qualified candidates was returned to in order to select the next **qualified applicant per Article 17.04 and 17.05.**
- ➔ In defining Vacancy, **Article 17.02** states that a vacancy is *an opening in a permanent full-time position within a specified bargaining unit which the agency determines to fill* Since the probationary period was not completed the position was not filled permanently and was still an opening which the agency determined it needed to fill.
- ➔ **Article 17.03 of the Contract - Posting** is very specific in that it states *that posted vacancies shall not be withdrawn to circumvent the Agreement.* The employer in good faith returned to the existing posted vacancy for the next in line of eligible candidates. If the employer had re-posted the vacancy, it would have given the appearance of not being in favor of the current list of candidates who had applied, and but for seniority calculation, an existing candidate waiting in the wings would not get the nod for the job. The Employer would have been circumventing the Agreement in re-posting to solicit other applicants with more seniority/qualifications than the existing pool who were considered to be “on stand-by” awaiting the possible consideration of the position if the selected candidate did not complete probation.
- ➔ Past practice in D-02 has shown that only when there has been no other eligible list of qualified internal candidates to select from when a probationary period has not been successfully completed, has a vacancy been re-posted and/or advertised externally.
- ➔ Since Probation is defined as a period of testing one’s fitness, that indeed was the case here. The candidate determined himself that he was not fit for the position and requested to return to his former position.
- ➔ This begs the question: In order for him to return to his former position, should that position have been re-posted and he would therefore have been required to re-apply? What if this was the case, then if someone else with more seniority than him, who met the minimum qualifications, applied for and got the job thereby preventing him from returning to his former position, would he be out of a job?
- ➔ If his former position was held open during the trial / probationary period, which it was, then it would stand to reason that the position in question was not yet considered to be filled permanently until such time as the period of a 120 day test was complete.

- There is no where in **Article 17** that mandates a vacancy be posted if a probationary period is not successfully completed. In fact, past and current practice at Central Office is that when a B.U. member has asked to be returned to his former position during his promotion probationary period, the next most senior person in line who applied for the position is put in the position. This is per John Gersper., OCSEA, in an email to the D-02 District Steward.
- Had Mr. Perryman completed his probationary period and then by one day after completion, requested to go back to his former position as a demotion, we would have had to post the vacancy as it would have been considered to have been filled permanently due to having been appointed to the position in question.

Seeing no violations of the Contract, and that procedure was followed correctly, the **grievance is denied.**


Christine A. Dietsch
Labor Relations Officer 3


Date

Mediation
07/19/01
Grievance # 31-02-(01-31-01)-01-01-06
Jan Materni

Contract Articles allegedly violated include:

Article 17.01 - Policy

Article 17.03 - Posting

The **Statement of Facts** from the grievance: *This past fall (Nov.) An Account Clerk position was posted at the Wood County Garage. Four (4) people bid on it: W. Perryman, N. Rosendale, J. Smith, S. Kinsey. It was given to Perryman. Halfway through his probationary period Mr. Perryman decided he didn't want the job and wanted to return to his old position. This created a vacancy for the Account clerk position at Wood county. Instead of re-posting it they put the second choice, N. Rosendale in the job. This a clear violation of 17.01 and 17.03 and two arbitrations decision that state "it doesn't matter how the vacancy is created, you must post it once it is."*

Remedy Sought: *The job to be posted and the individual who eventually gets it receives back pay beginning 01/29/01, the day Mrs. Rosendale started.*

MANAGEMENT POSITION

A historical overview of the original application process is in order: Willie Perryman, along with 3 other candidates (S. Kinsey, N. Rosendale, and J. Smith) applied for a Vacancy posting for an Account Clerk 2 position at the Wood co. Garage. Applications were received through the close of business on 7/20/00.

Mr. Perryman was the successful candidate and per the Contract, Articles 6.01 and 6.02, on 10/08/00 he was placed on a 120 day probationary period. Upon the successful completion of this probationary period, he would have been considered to be appointed permanently in this promotion to an Account Clerk 2.

At anytime during this *trial* period, if it was determined that Mr. Perryman failed to perform the job requirements of the new position to the Employer's satisfaction, he could be placed back into

his former position. Or, he could request to terminate the probationary or trial period himself and go back to his former position (which would not have been posted or filled until his probationary period was completed). He chose, by his own request, to go back to his former position. It just wasn't working out for him and he recognized such.

In a letter dated 12/28/00, Mr. Perryman requested to terminate his probationary period and return to his previous classification and position. Out of a 120 day probationary period/trial period, Mr. Perryman served 81 days. He had 39 days remaining.

Article 5 of the Contract - Management Rights, states that *the employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement.*

In Article 6 of the Contract - specifically, Probationary Employees under section 6.01 - Probationary Periods states that *all newly hired, promoted and laterally transferred employees shall serve a probationary period.* And for the classification in question the period is 120 days. There was no contractual violation here.

This article gives the employer (during the probationary period) the right to place the employee back in the classification that the employee held previously if the employee fails to perform the job requirements of the new position to the employers's satisfaction.

Under Article 6.02 of the Contract - specifically, Promotional/Lateral Transfers Probationary Period states that *employees who are promoted to a different classification shall serve a probationary period pursuant to Section 6.01 mentioned earlier.* This was also done and there was no contractual violation here either.

If this was a "trial" or "probationary period" as the Contract terms it, it was not a foregone

conclusion that the position was permanently filled. Therefore, the original vacancy still existed until permanently filled and the existing list or pool of qualified candidates was returned to in order to select the next **qualified applicant per Article 17.04 and 17.05.**

In defining **Vacancy**, **Article 17.02** states that a vacancy *is an opening in a permanent full-time position within a specified bargaining unit which the agency determines to fill* Since the probationary period was not completed the position was not filled permanently and was still an opening which the agency determined it needed to fill.

In reading Article 17.03 of the Contract - Posting, the language is very specific in that it states *that posted vacancies shall not be withdrawn to circumvent the Agreement.* The employer in good faith returned to the existing posted vacancy for the next in line of eligible candidates in the pool. If the employer had re-posted the vacancy, it would have given the appearance of not being in favor of the current list or pool of candidates who had already applied. An existing candidate who had applied for and met the minimum qualifications of the job and but for a calculation of seniority was not the original selection, would now be waiting in the wings and would once again not get the nod for the job. The Employer, in my opinion would have been circumventing the Agreement in re-posting to solicit other applicants with more seniority/qualifications than the existing pool who were considered to be “on stand-by” awaiting the possible consideration of the position if the selected candidate did not complete probation.

In fact, one of the pre-existing candidates from the pool, emailed the Acting Business and Human Resources Administrator to acknowledge that he had heard that Mr. Perryman “turned down the Account Clerk 2 job” and wanted to express that he was still interested in the job. (SEE EXHIBIT EMAIL FROM KINSEY)

In follow up to that email, the Personnel Office responded confirming that Mr. Perryman decided to step down during his probationary period and in looking at the applicants who had applied it was determined that because Mr. Kinsey is a District Wide employee he would be considered in

the grouping of candidates under Article 17.05(A) 3 and 4. Therefore, until those candidates in the prior pool who fell into the grouping under Article 17.05 (A) 1 and 2 were considered, he could not be.

Past practice in D-02 has shown that only when there has been no other eligible list of qualified internal candidates to select from when a probationary period has not been successfully completed, has a vacancy been re-posted and/or advertised externally.

When **Probation** is considered to be a period of testing one's fitness to perform the job requirements, that is perhaps the clearest definition of the case here. The candidate on probation determined himself that he was not fit for the position and requested to return to his former position. In other words the probationary period was never completed, and the "trial" period was successful in that it truly tested the candidates fitness to perform the job requirements. Ergo, that while in "trial" the position was not considered to be closed or permanently filled or put another way, while in the "test" stage the question or conclusion of permanency could not be drawn.

This begs the question: In order for Mr. Perryman to return to his former position, should that position have been re-posted since it was "vacant" while this "test" of his fitness to perform the new job requirements was on going and had not yet concluded? If so, would he, therefore, have been required to re-apply? What if this was the case, and if someone else with more seniority than him, who met the minimum qualifications, applied for and got the job, he would be prevented from returning to his former position. Would he be out of a job?

If his former position was held open during the trial / probationary period, which it was, then it would stand to reason that the position in question was not yet considered to be filled permanently until such time as the period of the 120 day test was complete.

No where in **Article 17** is **there language** that mandates a vacancy be posted if a probationary period is not successfully completed. If there is, please point it out.

Had Mr. Perryman completed his 120 day probationary period, on day 121 the position would have been considered to have been permanently filled. At that point, had Mr. Perryman requested to go back to his former position as a demotion, we would have had to post the vacancy for the position as it would have been considered to have been filled permanently and this grievance would then have had merit.

This not being the case, there is no violation of the contract to be found.

Kelli Burkhardt

02/02/2001 12:48 PM

To: Gary Weinandy/Highway/D02/ODOT@ODOT, Pam
Shanks/Personnel/D02/ODOT@ODOT, Chris
Dietsch/Administration/D02/ODOT@ODOT

cc:
Subject: ACCOUNT CLERK JOB

FYI

----- Forwarded by Kelli Burkhardt/Accounting/D02/ODOT on 02/02/2001 12:47 PM -----

Stephen Kinsey

02/02/2001 10:55 AM

To: Kelli Burkhardt/Accounting/D02/ODOT@ODOT
cc:
Subject: ACCOUNT CLERK JOB

KELLI,

I HEARD THAT WILLIE PERRYMAN TURNED DOWN THE ACCOUNT CLERK 2 JOB AT WOOD COUNTY. JUST WANT TO LET YOU KNOW THAT I WOULD STILL BE INTERESTED IN THE JOB. THANK YOU AND HAVE A GOOD WEEKEND.

STEPHEN K. KINSEY



Pam Shanks

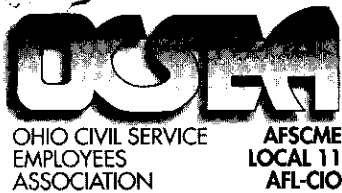
02/07/2001 09:59 AM

To: Gary Weinandy/Highway/D02/ODOT@ODOT
cc: Kelli Burkhardt/Accounting/D02/ODOT@ODOT, Chris
Dietsch/Administration/D02/ODOT@ODOT
Subject: Re: ACCOUNT CLERK JOB

I just got off the phone with Mr. Kinsey. I told him that when Willie Perryman decided to step down during his probationary period for the account clerk 2 position, we looked at the applicants who had applied. We determined that Steve was a districtwide employee based on his position. As a districtwide employee, per the memorandum of understanding, the county employees are considered first (when I say county I am including garage and those working in offices located in Wood County).

Mr. Kinsey thanked me for calling him and not leaving him wondering what happened.

thanks!
Pam



RONALD C. ALEXANDER
PRESIDENT
DAVID L. SLONE
VICE PRESIDENT
VANESSA TOLLIVER
SECRETARY-TREASURER
IRWIN M. SCHARFELD
EXECUTIVE DIRECTOR

March 27, 2001

Mr. Stephen Gulyassy, Deputy Director
Office of Collective Bargaining
106 North High Street, 7th Floor
Columbus, Ohio 43215

Re: JAN K MATERNI
31-02-(01-01-31)-0001-01-06
TRANSPORTATION - CENTRAL OFC

Dear Mr. Gulyassy:

This letter is to inform you that OCSEA/AFSCME Local 11 requests that the above-referenced grievance be taken to arbitration pursuant to Section 25.02 of the contract with the State of Ohio.

Thank you.

Sincerely yours,

Herman S. Whitter/ag

Herman S. Whitter, Attorney
Director, Dispute Resolution

Cc: James Hauenstein

01 APR 2001 3:11