**OPINION AND AWARD**

**IN THE MATTER OF THE ARBITRATION BETWEEN**

**Ohio Department of Natural Resources**
**-AND-**
**OCSEA/AFSCME Local 11**

**Appearing for DNR**
John Duffey, Assistant Chief–Reach
Bradley A. Nielsen, Labor Relations Officer 3
Joseph Trejo, Labor Relations Specialist
Abbie Workman, Labor Relations Officer 1

**Appearing for OCSEA**
Treva J. Knasel, ODNR Chapter 2515 President & Chief Steward
Sharon V. Ralph, OCSEA, Staff Representative
Clark Scheerens, Witness, OCSEA Chief Steward Retired
Thomas Tomastik, Witness, Vice President and Steward

**CASE-SPECIFIC DATA**
**Grievance No.**
25-11-20060706-0004-01-13
**Hearings Held**
August 3, 2007

**Case Decided**
January 7, 2008

**Subject**
Timeliness of Grievance (Procedural Arbitrability); Grievance as Prima Facie Case

**Award**
**Grievance Sustained (Grievance is Arbitrable)**

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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## I. The Facts

The parties to this issues dispute are the Ohio Department of Natural Resources, Division of Real Estate and land Management ("Employer" or "Agency") and Ohio Civil Service Employees Association ("OCSEA" or "Union"), representing all bargaining-unit employees of the Employer.

On April 24, 2006, the Agency posted a position for an Environmental Specialist 1 ("ES-1") position. Subsequently, the Agency withdrew that posting and issued letters to potential applicants that the position would not be filled. The potential applicants received the letters on or about May 26, 2006[1]. Then the Agency reissued an AA-2 position.

On July 6, 2006, the Union filed Grievance No. 25-11-20060706-0004-01-13 ("Grievance") challenging the Agency's decision to cancel the ES-1 position, post the AA-2 position instead, and ultimately fill that position on June 26, 2006. The Grievance specifically claimed that the job description in AA-2 was essentially the same as that in ES-1, which was bargaining-unit work. Moreover, according to the Grievance, both the ES-1 and AA-2 positions were in the same division and section and reported to the same supervisor. Consequently, from the Union's perspective, assigning an exempt employee (a non-bargaining-unit member) to that position on June 26, 2006 violated Article 1.05 and 17.05.

## II. The Issue

Whether the Grievance is fatally tardy, and whether the Grievance establishes a prima- facie case under Article 25.03.

## III. Relevant Contractual and Regulatory Provisions

**Article 1.05**

The Employer recognizes the integrity of the bargaining unit and will not take action for the purpose of eroding the bargaining units.

Article 17.035

Posted vacancies shall not be withdrawn to circumvent the Agreement.

**Article 17.05**

[1] Joint Exhibit 2. The Grievance claims potential applicants received the letters on May 30, 2006.

Although the Grievance cites Article 17.05, the Parties' Post-hearing Briefs mention no specific provisions. Therefore, none is listed here.

**Article 25.02**

A grievance involving a . . . non-selection . . . shall be initiated at Step Three (3) of the grievance procedure within fourteen (14) days of notification of such action.

**Article 25.03**

Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration.

## IV. Summaries of the Parties' Arguments

### A. Summary of the Agency's Arguments

1. The Agency did not violate Article 1.05 by eroding bargaining-unit work. Article 1.05 addresses two subjects: supervisors doing bargaining-unit work and erosion of bargaining-unit work. Because the Grievance is silent about supervisors performing bargaining-unit work, it presumptively alleges that the Agency eroded bargaining-unit work. However, the Agency did not, and, indeed, could not have eroded bargaining unit work because bargaining-unit work is nonexistent in ESS. In fact, ESS has never employed bargaining-unit employees. In any event, an erroneous posting of bargaining-unit work, as in the instant case does not somehow create a bargaining-unit position and cannot "erode" bargaining-unit work. An erroneous posting of bargaining-unit work hardly establishes ***intent*** to erode bargaining-unit work, especially where, as here, bargaining-unit work does not exist and has never existed. Under those conditions, the Agency cannot erode bargaining-unit work.
2. The Agency did not violate Article 17.05. First, Article 17.05 is inapplicable to selection of exempt candidates for exempt positions. Instead that Article addresses standards for selecting bargaining-unit members for bargaining-unit work. The Agency never filled the ES-1 position, which precludes any prima facie case of non-selection.
3. The Grievance also fails to satisfy the standards of Article 25.03, which provides in relevant part: Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration."
4. The Grievance fails to state a prima facie violation. Article 25.03 implicitly requires that the Union establish a prima facie case of a contractual violation. An allegation of erosion does not constitute a prima facie case of erosion and, thus, does not allege a contractual violation under Article 25.03. Nor does a non-selection Grievance about an exempt position allege a contractual violation because bargaining-unit members and the Union lack standing to grieve selections involving exempt positions.
5. The Grievance is fatally tardy under Article 25.02. For Grievances involving layoffs, non-selection, or discipline, Article 25.02 requires a Step-3 initiation within fourteen days of notification of the alleged contractual violation. Joint exhibit No. 2 establishes that on May 26, 2006 the Agency notified applicants for the original ES-1 position of the cancellation thereof. Therefore, the Grievance should have been filed no later than June 6, 2006, fourteen days from May 26, 2006. Instead, the Union filed the Grievance on July 6, 2006, well outside of the procedural window of the Contract, thereby rendering the Grievance fatally tardy.

### B. Summary of the Union's Arguments

1. By first raising the issue of procedural arbitrability at the arbitral hearing, the Agency constructively waived its right to challenge the timeliness of the Grievance. The Agency knew or should have known of the alleged timeliness violation months before the arbitral hearing. Arbitrator Smith held that issues of procedural Arbitrability should be raised earlier in the grievance procedure to facilitate early resolution and to preserve evidence.
2. The Grievance is not untimely. Article 25.02 requires grievances such as the one in this dispute to be filed within ten days of the causal action. In the instant case, the event that started the procedural "clock" under Article 25.03 and which triggered the Grievance occurred on June 26, 2006 when the Agency awarded the position to an exempt employee and not when the position was originally posted or withdrawn. Thus, the Grievance was filed within the ten-day limit.
3. The Union is grieving the transfer of bargaining-unit duties to an exempt employee and not the posting process itself. The contractual violation occurred at the point that the exempt employee assumed the position in question.
4. The Agency's argument regarding the Union's prima facie case addresses the merits and assumes facts not in evidence, facts which are to be decided during a fully blown arbitral hearing.
5. The argument that by not mentioning supervisory performance of bargaining-unit work, the Grievance fails to assert a contractual violation under Article 1.05 misses the mark for several reasons. First, Article 1.05 contains no such requirement to state a contractual violation. Second, the Grievance does not rest on Article 1.05 alone but alleges a violation of Article 17.05, "and any other relevant articles." So even if the Arbitrator ruled in the Agency's favor on these two Articles, there are other issues of merit to be decided in a fully blown arbitral hearing on the merits. Third, Arbitrator Murphy has broadly held that the Agency's duty under Article 1.05 not to erode the bargaining unit extends beyond simply avoiding supervisory performance of bargaining-unit work. Instead, Arbitrator Murphy read the last sentence of Article 1.05 to prohibit even non-supervisory performance. Finally, the Grievance addresses "what kind of bargaining-unit work is performed at ESS." Furthermore, the Union rejects the contentions that bargaining-unit work is nonexistent at ESS and that ESS has no history of employing a bargaining-unit employee.

## V. Discussion and Analysis

### A. Evidentiary Considerations

Because the Agency alleges that the Grievance contains fatal procedural flaws, the Agency has the burden of proof or persuasion regarding that allegation. To establish those allegations, the Agency must adduce preponderant evidence in the arbitral record as a whole, showing that more likely than not the Grievance is fatally flawed either because of untimeliness or because of failure to comply with a contractual duty to present a prima facie case of the allegations within the Grievance. Also, because the Agency has the burden of persuasion, doubts about the existence of any alleged misconduct shall be resolved against the Agency. If the Agency fails adequately to establish it procedural allegations in the first instance, it cannot prevail, irrespective of the strength or weakness of the Union's defenses. Similarly, the Union has the burden of

persuasion (preponderant evidence) regarding its allegations and affirmative defenses, doubts about which shall be resolved against the Union.

**B. Procedural Arbitrability–Timeliness of the Grievance**

The issue here is whether the Grievance is fatally flawed due to untimeliness. Pursuant to Article 25.02, the Agency contends that the Union should have submitted the Grievance no later than June 26, 2006, fourteen days after the Agency notified applicants that it would withdraw the ES-1 posting. Essentially two rationales drive this argument. First, the Agency suggests that the time limits in Article 25.02 govern the filing of the Grievance. The June 26 notification that the Agency would withdraw the ES-1 posting triggered the procedural "clock" under Article 25.02, giving the Union fourteen days from June 26 to grieve the withdrawal of the ES-1. The Agency does not specifically address the legitimacy of raising procedural Arbitrability for the first time in arbitration.

The Union offers two contentions in response. First, the Agency implicitly or constructively waived its right to raise an issue of procedural Arbitrability by raising that issue for the first time at the arbitral hearing. Second, the Grievance is subject to the ten-day procedural window under Article 25.02. Third, the Grievance was in fact timely because the triggering event was the June 26 filling of the AA-2 position with an exempt employee and not the announced withdrawal of the ES-1 posting.

For the following reasons, the Union prevails on the issue of procedural Arbitrability. First, the Arbitrator agrees with the Union and with Arbitrator Smith that the Agency effectively waived its right to raise the issue of procedural arbitrability by waiting until the arbitral hearing to assert that issue. Furthermore, the Arbitrator agrees with Arbitrator Smith's rationale— that such delay in raising procedural objections obviate possible settlements earlier in the negotiated grievance procedure and risk losing relevant, probative evidence. In addition, disposing of grievances where parties first assert their procedural objections at arbitral hearings ignores the continuity of the special collective-bargaining relationship and need for peace therein. The waiver defense recognizes and respects these characteristics and places a premium on addressing and resolving the

merits of disputes in collective-bargaining relationships if at all possible and without unduly trammeling proponents' rights.[2] Each Party has a standing obligation to scrutinize the substantive and procedural dimensions of a grievance while processing it through the negotiated grievance procedure and to raise relevant procedural and/or substantive objections *before* going to arbitration.[3] For the foregoing reasons, the Arbitrator holds that the Agency in this dispute constructively or implicitly waived its procedural arbitrability objection by waiting until the arbitral hearing to raise it. This is especially true where, as here, nothing in the arbitral record suggests that with due diligence the Agency could not have raised this procedural objection earlier in the negotiated grievance procedure.

### C. Role/Impact of the Prima-facie Standard

Here the issue is whether Article 25.03 imposes an implicit duty on the Union to establish a prima facie case as a *precondition* to arbitrating the merits of a dispute.[4] The Agency cites the following language as the basis for its prima-facie argument: "Only disputes involving the interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration."[5] According to the Agency, the Grievance must contain facts (not mere allegations) sufficient to establish that the Agency somehow eroded bargaining-unit work by mistakenly posting an ES-1 position, withdrawing it, posting an AA-2 position, and filling it. Furthermore, the Agency contends that the Union cannot establish such requisite erosion because there are neither bargaining-unit employees nor bargaining-unit positions in ESS. Finally, the Agency maintains that

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[2] The Arbitrator recognizes that although the affirmative defense of waiver is a widely-held view in the arbitral community, it is hardly universal. Other arbitrators embrace several different responses to the issue of procedural arbitrability. Each of these approaches, like the waiver defense, has functional shortcomings. For example, one view rejects the waiver defense essentially because procedural arbitrability is a *jurisdictional* issue. Therefore, it is argued, a proponent of a procedural arbitrability objection may raise it *anytime* during the grievance procedure, including the arbitral hearing. Subscribers to this school of thought also stress that to embrace the affirmative defense of waiver in the face of explicit contractual time limits is to ignore those time limits and effectively to rewrite those contractual, procedural provisions. This view, however, ignores the concerns of arbitrators who embrace the doctrine of waiver.

Still other arbitrators adhere to defenses of *due diligence* and *harmful error*, both of which *also* tend to *circumvent* the sometimes harsh effects of contractual time limits. The due diligence defense gives the opponent to the procedural arbitrability objection a second "bite of the procedural apple," while the harmful error rule completely shifts the burden of persuasion from the opponent to the proponent of the procedural arbitrability issue.

[3] However, *see* the due-diligence defense discussed in the previous footnote.

[4] Since Article 25.03 makes no mention of a prima facie case, any duty relating thereto must be read into that Article, and, thus, would be implicit rather than explicit.

[5] Joint Exhibit 1, at 91.

Article 17.05 is inapplicable to selections of exempt candidates. In short, the Agency insists that Article 17.05 together with the employee and job demographics of ESS preclude the Union from satisfying the implicit requirement under Article 25.03 of establishing a prima facie case of a contractual violation of erosion under Article 17.05.

Also, the Agency argues that a non-selection grievance regarding an exempt position is not an objection involving an interpretation or application of the Contract because the Union lacks standing to challenge that genre of managerial decisions. This is tantamount to an objection on the basis of substantive arbitrability.[6] The Agency in effect contends that filling exempt vacancies is not a subject that the Parties *agreed to arbitrate*.[7]

The Union counters with several contentions. First, the Union argues that the Agency's prima- facie argument assumes facts not in evidence and that it must be litigated in a fully-blown arbitration. Second, the Union contends that neither Article 1.05 nor 17.05 contains a prima- facie requirement. Third, the Union insists that even if the Arbitrator found such a requirement in either of those provisions, the Grievance contains the "catch all" phrase "and any other relevant articles," which includes other relevant contractual provisions and issues of merit for arbitral attention. Fourth, the Union contends that the last sentence in Article 1.05 covers erosion of bargaining-unit work whether of not the erosive force involves supervisory performance of that work.

The following reasons persuade the Arbitrator that the Union prevails on the Agency's prima- facie objection. First, much of the Agency's prima-facie argument turns on its own *interpretation* of Articles 1.05, 17.05, and 25.03, none of which contains a ***single*** provision that either explicitly adopts or rejects the Agency's readings thereof. For example, Article 1.05 nowhere requires that as a precondition for arbitration

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[6] However, the Arbitrator does not take this objection as one of substantive arbitrability, lest he would lack jurisdiction to entertain it without the Parties' expressed mutual consent and agreement.

[7] Also one may view the Agency's claim as a demurrer or motion to dismiss for failure to state a claim. That is, the Grievance, in this case, allegedly fails to state a claim covered by the Contract. A successful demurrer, like a successful objection of procedural arbitrability, results in the dismissal of the grievance in question.

a grievance filed thereunder must specifically allege supervisory performance of bargaining-unit work. Similarly, Article 17.05 contains no discernible standard that grievances raised under that section must contain specific allegations to qualify for arbitration review. Finally, while Article 25.03 requires a contractual nexus for a grievance to receive arbitral review, that Article has no perceptible requirement that the nexus requirement entails a prima facie case. Ultimately, then, the Agency's arguments regarding the foregoing Articles rest on little more than its interpretation of those Articles, interpretations on which reasonable mind may differ. Consequently, those interpretations simply reinforce the need for arbitral review of the issues in this dispute.

Another problem that plagues the Agency's position is that much, if not all, of the Agency's prima- facie argument rests on several assertions that have hardly been established as facts in this dispute; Assertions that, as the Union contends, are better left to the evidentiary crucible of arbitration. An example of these assertions is, "bargaining-unit work does not exist in the ESS."[8] Perhaps, or perhaps not, but such an assertion is hardly self-evident, and, therefore, cannot constitute a basis for a prima- facie argument against the Grievance in this dispute. Relevant evidence in the arbitral record establishes only that the Agency: Posted an ES-1 position, withdrew that position, replaced it with another position, and later assigned that position to an exempt employee. The Union alleges that the position should have gone to a bargaining-unit employee because the job duties in the ES-1 posting are not substantially different from those in the AA-2 posting.[9] Although these allegations are not "proof," they raise sufficient questions about the propriety of the Agency's decisions to warrant arbitral review, regardless of their prima-facie content.[10] This holding is particularly apt given the special relational and institutional needs in collective-bargaining relationships to address the merits of disputes. Such needs create a heavy presumption in favor of arbitration. Indeed, as the United States

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[8] Agency's Post-hearing Brief, at 3.

[9] Grievance No. 25-11-20060706-0004-01-13.

[10] Generally, a prima facie case contains *sufficient evidence* that, unless rebutted, will at least raise a presumption of the existence of the disputed fact(s).

Supreme Court has declared, "The processing of even ***frivolous*** claims may have therapeutic values. . . ."[11] The Court later declared that doubts under a broadly worded arbitration clause such as that in the Parties' Contract should be clearly resolved in favor of arbitration. A final reason for rejecting the Agency's prima-facie argument is that the prima- facie standard is marginal at best in labor arbitration essentially because of its indelible legal formalistic pedigree.

## VI. The Award

For all of the foregoing reasons, the Arbitrator holds that the grievance is fully arbitral and, barring a contrary mutual agreement by the Parties or a decision by the Union to withdraw the Grievance, it is ripe for arbitral review.

[11] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 568 (1960) (emphasis added).

**OPINION AND AWARD**

**IN THE MATTER OF THE ARBITRATION BETWEEN**

**Ohio Department of Natural Resources**
**-AND-**
**OCSEA/AFSCME Local 11**

**Appearing for DNR**
Steven R. Bates, ODNR/OHR HR Administrator
Brian Mitch, ODNR, REALM
Carrie Spradlin, ODNR, Labor Relations Officer 3
Joseph Trejo, Assistant Manager of Labor Relations

**Appearing for OCSEA**
Treva J. Knasel, ODNR Chief Steward
Sharon V. Ralph, OCSEA, Staff Representative
Patty Rich, OCSEA Witness
Clark Scheerens, Witness, ODNR Retired
Thomas Tomastik, Witness, ODNR 2515 President

**CASE-SPECIFIC DATA**
**Grievance No.**
25-11-20060706-0004-01-13

**Hearing Held**
May 20, 2008

**Case Decided**
April 12, 2009

**Subject**
Management Performing Bargaining-unit Work

**Award**
Grievance Denied

Arbitrator: Robert Brookins, Professor of Law, J.D., Ph.D.

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## I. The Facts

This is a contractual interpretation dispute involving the Ohio Department of Natural Resources (ODNR), Division of Real Estate and Land Management (REALM)–Environmental Services Section (ESS) ("Agency" or "ODNR") and the Ohio Civil Service Employees Association AFSCME Local 11 (" Union").[1]

Among its responsibilities, the Agency must administer a statewide Environmental Review Program, which includes: coordinating environmental projects/programs with external stakeholders on behalf of the Director, conducting research, and establishing the overall ODNR environmental policy.

### A. Historical Sketch of Classification Disputes

This is a job classification dispute ("Classification Dispute") in which the Union challenges the Agency's decision to classify a vacant position as Administrative Assistant-2 ("exempt" "AA2" "Managerial") rather than Environmental Specialist 1 ("Nonexempt" "ES1" "Bargaining-unit). In various forms, classification disputes are a perennial sore point between the Parties. Several causal factors help to foment and aggravate classification disputes. For example, there appears to be no list of well-defined exempt and nonexempt duties, nor is it clear that such a list could be developed.[2] Moreover, the utility of such a list, in classification disputes, would be substantially undermined because supervisors and bargaining-unit employees have historically performed nonexempt and exempt duties respectively. Indeed, Article 1.05 of the Parties' Collective-bargaining Agreement specifically permits supervisors to perform nonexempt duties under certain circumstances. Finally, the longevity of classification disputes and the grief they have caused suggest that they are well neigh inevitable. Otherwise, one reasonably assumes that the Parties would have severely reduced, if not eliminated, them. Against this backdrop, the Arbitrator will resolve the instant dispute and humbly propose a screening device that might prove useful in resolving subsequent classification disputes.

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[1] Hereinafter collectively referred to as the ("Parties").

[2] Certainly the arbitral record contains no such list.

## B. Genesis of the Instant Dispute

On April 24, 2006 through May 3, 2006, the Agency posted a nonexempt position in the Environmental Services Section ("ESS").[3] On May 30, 2006, the Agency subsequently withdrew the nonexempt position and replaced it with a position that the Agency classified as exempt.[4] In a letter dated May 24, 2006,[5] the Agency notified bargaining-unit applicants that the nonexempt position had been withdrawn. The Agency selected Mr. Brian Mitch (a non-bargaining-unit employee) to fill the contested position, and, on June 25, 2006, he commenced his duties therein.[6]

On July 6, 2006, the Union filed Group Grievance No. 25-11-20060706-0004-01-13, challenging the Agency's decision to substitute the nonexempt position for the contested position. Specifically, the Grievance stated in relevant part: "The Exempt position description was essentially the same as the ES1position that was not filled, and both positions were in the same Division and Section reporting to the same supervisor."[7] According to the Union, the Agency violated Articles 1.05, 17.05, and other relevant provisions of the Collective-bargaining Agreement.[8]

The Parties failed to resolve this dispute and ultimately secured the Undersigned to hear the matter. During the ensuing arbitral hearing, the Parties presented their evidence and arguments before the Undersigned. At the outset of the first hearing day, the Agency raised an issue of procedural arbitrability, claiming that the Grievance was tardily filed. Pursuant to the Parties' request, the Undersigned resolved that procedural issue in a separate opinion, ultimately finding the dispute arbitrable.

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[3] Joint Stipulation 1.

[4] Hereinafter referenced as the "Contested Position."

[5] Management Exhibit L, Joint Stipulation no. 2.

[6] Joint Stipulation 4.

[7] Joint Exhibit 2-1.

[8] *Id.*

On May 20, 2008, the Undersigned held a hearing on the merits, during which no further procedural issues were raised. During the arbitral hearing, both Union and Management advocates made opening statements and introduced documentary and testimonial evidence to support their positions in this dispute. All witnesses were duly sworn and subjected to both direct and cross-examination, and all documentary evidence was subject to proper and relevant challenges. At the close of the hearing, the Parties elected to email written closings (Post-hearing Briefs) to the Undersigned on or about June 30, 2008. All closings were timely submitted.

## II. The Issue

Did ODNR violate Articles 1.05, 17.03, and/or 17.05 of the Collective-bargaining Agreement? If so, what shall the remedy be?

## III. Relevant Contractual and Regulatory Provisions

### Article 1.05–Bargaining-Unit Work

Supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

Supervisors shall only perform bargaining unit work to the extent that they have previously performed such work. During the life of this Agreement, the amount of bargaining unit work done by supervisors shall not increase, and the Employer shall make every reasonable effort to decrease the amount of bargaining unit work done by supervisors.

* * * *

[S]upervisory employees shall only do bargaining unit work under the following circumstances . . . when the classification specification provides that the supervisor does, *as a part of his/her job*, some of the *same duties as bargaining unit employees*.

* * * *

The Employer will not take action for the purpose of eroding the bargaining units. The Employer recognizes the integrity of the bargaining units and will not take action *for the purpose of* eroding the bargaining units.

### Article 17.03–Posting

Posted vacancies shall not be *withdrawn to circumvent* the Agreement.[9]

### Article 17.05–Selection

[9] Although the Grievance mentions Article 17.05, the arbitral record focuses on Articles 1.05 and 17.03. During the arbitral hearing, the Union did not allege the violation of any specific language in Article 17.05.

Generally addresses selection procedures.[10]

**Bargaining-Unit Exemptions**

Fiduciary Employees–Employee appointed pursuant to 124.11 and has a high degree of trust and confidence necessary for his or her job.[11]

## IV. Summaries of the Parties' Arguments

### A. Summary of the Union's Arguments

1. The Employer deliberately and blatantly violated the Collective-bargaining Agreement by improperly transferring long-standing, bargaining-unit work to exempt employees and, thus eroding the bargaining unit.
2. The contested position's description was essentially the same as that of the nonexempt position that went unfilled. Yet, both positions were in the same division and section reporting to the same supervisor. Consequently, on June 25, 2006, the Agency eroded the bargaining unit and trammeled bargaining-unit members' promotional rights by assigning the contested position to Mr. Mitch, a non-bargaining-unit employee.[12]
3. Only a few minor duties separated the exempt and nonexempt position descriptions. Therefore, assuming, arguendo, that Mr. Mitch performed exempt duties in his position, they were too few to convert that position from bargaining-unit to exempt.
5. Furthermore, fiduciary duties do not justify classifying the contested position as exempt. Many professional and technical ODNR bargaining-unit employees (specifically Messrs. Scheerens and Tomastik) regularly perform fiduciary duties such as representing the Agency and Director Sean Logan, and acting as liaisons between their respective divisions and various community, public, and trade groups.
6. Mr. Mitch's duties are largely administrative, and he neither supervises anyone nor performs work that is supervisory, confidential, or fiduciary.
7. That bargaining-unit work has never existed in the Division of Environmental Services Section ("EES") REALM does not exonerate the Agency under Article 1.05 in this case.

### B. Summary of Management's Arguments

**Article 1.05 Arguments**

1. On April 24, 2006, the Agency mistakenly posted an exempt position as a nonexempt position. Upon realizing its error, the Agency withdrew the nonexempt position on May 24, 2006 and replaced it with an exempt position.
2. There has never been a nonexempt position in ESS.
3. The Agency did not "erode" the bargaining unit in violation of Article 1.05, since "erode" means to "wear away gradually."[13] Since there has never been a nonexempt position in ESS, the Agency

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[10] Although the Grievance mentions Article 17.05, nothing in the arbitral record addresses any specific provision of this Article as being in contention in this dispute.

[11] Union Exhibit 1, at 2.

[12] Management Exhibit A, at 1.

[13] Agency's Post-hearing Brief, at 2, citations omitted.

could not have "eroded" the bargaining unit. One cannot erode or "wear away" a nonexistent entity.

4. Article 1.05 also requires intent as evidenced by the phrase, "for the *purpose* of." Nothing in the arbitral record demonstrates that the Agency acted with either the intent or the purpose of eroding the bargaining unit. The nonexempt posting was a mistake. The position that should have been posted was an exempt position. The Agency never intended either to create or to erode a bargaining-unit position; it simply mislabeled the heading of the exempt position.
5. All duties set forth in the exempt job description are themselves exempt. No exempt employees are performing nonexempt duties.
6. An erroneous posting cannot create a nonexempt position.

**Article 17.05 Arguments**

1. Article 17.05 is inapplicable to the selection of candidates for exempt positions.
2. Because the contested position is exempt, bargaining-unit employees are ineligible to fill it.
3. There has been no erosion of the bargaining unit. Specifically, the number of bargaining-unit employees in the Division of REALM increased from twenty-five to twenty-nine in 2006, clearly demonstrating an increase rather than an erosion of the bargaining unit.
4. Standing alone, the fiduciary component of the contested position justifies classifying it as exempt, even though bargaining-unit employees have frequently performed some duties therein.

## V. Analysis and Discussion

### A. Evidentiary Preliminaries

Because this is an issues dispute, the Union has the burden of proof or persuasion regarding the allegation that the Agency violated Articles 1.05 and 17.05. To establish those claims, the Union must adduce ***preponderant*** evidence in the arbitral record as a whole, showing *more likely than not* that the Agency violated the Contract as alleged. Doubts regarding the existence of these allegations shall be resolved against the Union. Unless the Union establishes its allegations, it cannot prevail, *irrespective* of the strength or weakness of the Agency's defenses. Similarly, the Agency has the burden of persuasion (preponderant evidence) as to its allegations and affirmative defenses, doubts about which shall be resolved against the Agency.

### B. Violation of Article 1.05

The Agency broadly argues that there has been no erosion of the bargaining unit and offers essentially three arguments in support of this position. First, the Agency stresses that between 2005 and 2006 the number of bargaining-unit positions increased, which, in the Agency's view, is wholly inconsistent with erosion, the common definition of which denotes a gradual wearing away. Second, the Agency observes that

before the nonexempt position was posted, there were no bargaining-unit positions in ESS. According to the Agency, bargaining-unit erosion cannot exist absent a bargaining-unit position in the first instance. Third, the Agency maintains that the presence of fiduciary and other managerial duties in the contested position clearly justify its exempt status.

The Union offers no specific response to these arguments. Instead, the Union avers that classifying the contested position exempt constituted per se bargaining-unit erosion and offers two supporting arguments in this respect. First, the Union contends that bargaining-unit employees have historically performed the duties listed in the contested position. Second, the Union argues that the contested position contains only a very small percentage of exempt duties.

### C. Assessment of the Parties' Arguments

As discussed below, for two reasons, the Parties' arguments miss the mark in this dispute. First, their arguments do not directly address the fundamental issue herein: Whether the contested position is either exempt or nonexempt.[14] Second, the arguments fail to establish the points they do attempt to make.

#### 1. Assessment of the Agency's Arguments

#### a. Direct/Indirect Erosion of Bargaining Unit

Contrary to the Agency's position, an increase in bargaining-unit positions over time does not necessarily establish a lack of bargaining-unit erosion. This myopic argument focuses only on *direct* erosion and ignores *indirect*/*constructive* erosion. Constructive erosion occurs where a new position is erroneously labeled exempt when it should have been labeled nonexempt. In other words, constructive erosion restricts the *future* size of a bargaining unit by impeding its natural growth or accretion; direct erosion reduces the *present* size of a bargaining unit.

Furthermore, there is evidence that Article 1.05 contemplates constructive erosion of bargaining units. First, because Article 1.05 broadly prohibits bargaining-unit erosion, one can reasonably interpret that

[14] The Arbitrator will address this pivotal issue after addressing the Parties' arguments.

prohibition to include both direct and constructive erosion. This is especially true, since both types of erosion are equally detrimental to a bargaining unit. Both the spirit and letter of Article 1.05 seek to prevent erosion of the bargaining unit. Second, as a practical matter, why would one flatly prohibit direct erosion and yet wholly tolerate indirect erosion? It flies in the face of reason. Focusing on direct erosion at the expense of indirect erosion leaves a gaping, malignant loophole in Article 1.05 that the drafter hardly could have intended. Such a loophole portends the evisceration of both the letter and intent of Article 1.05. Finally, the foregoing reasoning applies with equal force to the Agency's argument that there can be no bargaining-unit erosion where a bargaining unit never existed in the first instance.

**b. Fiduciary Duties In Contested Position**

Despite the Agency's contention, the arbitral record does not establish that the contested position involves *fiduciary* duties, at least not as that term is defined in Bargaining Unit Exemptions, which defines "Fiduciary Employee" as one "appointed pursuant to 124.11 and has a high degree of trust and confidence necessary for his or her job."[15] The record is barren regarding the elements of trust and confidence as well as the 124.11 appointment.

**D. Assessment of the Union's Arguments**

Contrary to the Union's position, exempt duties do not become nonexempt merely because bargaining-unit employees actually performed (or had the ability to perform) them; and the same is true where supervisors perform nonexempt duties. A contrary approach will likely smudge, if not erase, meaningful demarcations between exempt and nonexempt duties and the corresponding positions, especially where, as here, positions often involve both nonexempt and exempt duties.

Equally unavailing is the contention that the position in this case is nonexempt because it contains too few exempt duties. In any given position, the ratio of exempt to nonexempt duties is one relevant factor in classifying the position. Standing alone, however, that ratio is hardly dispositive of whether a position

[15] Union Exhibit 1, at 2.

is either exempt or nonexempt.[16]

## E. Violation of Article 1.05

### 1. Intent/Purpose

To establish a violation of Articles 1.05, the Union must show that the Agency acted with the "purpose" (intent) of eroding the bargaining unit. Actors are generally deemed to have intended the consequences of their conduct only if those consequences were *reasonably foreseeable* either to the *actor* or to a *reasonable person* under the same or similar circumstances as the actor *when* the conduct occurred. Preponderant evidence in the arbitral record does not demonstrate that the Agency possessed that state of mind when classified the contested position as exempt. Instead, the arbitral record merely establishes that the Agency re-posted and reclassified that position.

Of course this conclusion does not address the *impact* of the Agency's vacancy-filling decisions. Clearly, the unintentional impact of such decisions would likely be no less erosive than an intentional impact upon the bargaining unit. Nevertheless, Articles 1.05 does not explicitly contemplate unintentional impacts upon the bargaining unit. Nor does the Arbitrator have the authority to extend the scope of Article 1.05 to include unintentional impacts.[17] In the instant case, the drafter presumably considered and rejected the option of extending Article 1.05 to include untended impacts of vacancy-filling decisions. Consequently, the Arbitrator lacks authority to include unintentional acts within that Article's sweep. The Arbitrator, therefore, holds that evidence in the arbitral record does not establish a violation of Article 1.05.

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[16] *See* the criteria set forth in the essence test below.

[17] Circumstances here differ markedly from those that prompted the earlier holding in this opinion that prohibition of direct erosion implied an intent also to prohibit constructive erosion. In that instance ,the Agency interpreted "eroding" under Article 1.05, which did not explicitly limit "eroding." A contractual provision whose terms lack explicit limits is commonly interpreted more broadly to fully effectuate the Parties' intent under that provision. Other matters equal, explicit limits on terms in a contractual provision betray an intent to so restrict its applicability.

### 2. Agency's Duty to Make Reasonable Effort

In addition to prohibiting purposeful erosion of the bargaining unit, Article 1.05 generally obliges the Agency to guard against bargaining-unit erosion. In this respect, Article 1.05 states in relevant part: "Supervisors shall not *increase*, and the Employer shall make *every reasonable effort* to *decrease* the amount of bargaining unit work done by supervisors. Supervisors shall only perform bargaining unit work to the extent that they have *previously performed such work*."[18]

These passages reflect an intent to limit the number of nonexempt duties performed by supervisors and, over time, to decrease the number of supervisors performing nonexempt duties. The Agency must exert a reasonable effort in both areas. More importantly, the foregoing limits on supervisory performance of bargaining-unit duties reflect the Union's profound and vital interest in preserving bargaining-unit work for bargaining-unit employees. In this case, however, the Arbitrator is not persuaded that the Agency violated any of the foregoing strictures under Article 1.05. For example, short of assigning the contested position to a bargaining-unit employee, which is not justified in this dispute.[19] Nothing in the arbitral record suggests that the Agency exerted less than a reasonable effort to preserve the bargaining unit.

## F. Violation of Article 17.05

The facts in this case do not establish a violation of Article 17.05, which prohibits the Agency from withdrawing a vacancy "to circumvent the Agreement." Although Article 17.05 does not explicitly require "intent," that state of mind is reasonably imputed. The phrase "to circumvent" is reasonably interpreted to mean *in order to* circumvent or for the *purpose or intent* of circumventing the Agreement.

Again, the arbitral record lacks proof of intent under Article 17.05 for the same reason the Undersigned held that element to be absent under Article 1.05. Furthermore, the Agency's claim of mistakenly posting the nonexempt position and later correcting that mistake by posting the contested position

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[18] *Id.* (Emphasis added).

[19] As discussed below, such an assignment is unwarranted, in this case, because the contested position is properly classified as exempt.

is as less credible as the Union's claim of intent under Article 17.05.[20] More important, nothing in the arbitral record either seriously challenges or arguably rebuts the Agency's asserted reason. Finally, the Union has the burden of persuasion on this issue, doubts about which are resolved against the Union.[21]

## G. Reasonable Classification of the Contested Position[22]

### 1. The Circumstantial Backdrop

The gremlin in this dispute is the" hybrid" nature of the contested position, a point about which a prefacatory comment is indicated. "Hybrid," in this context, reflects the presence of exempt and nonexempt duties in one position. Hybrid positions have long been a bane to the Parties and will undoubtedly persist given the inevitability of overlaps between exempt and nonexempt duties.[23] The natural tension of this duality of duties is aggravated because their juxtaposition within a hybrid position threatens central interests of both Parties. The Union often views assignments of hybrid positions as a clear and present danger to bargaining-unit integrity and stability–the institutional, economic, and political, heart of unionism. From the Agency's perspective, inappropriate assignments of hybrid positions undermines the core of the managerial imperative that only exempt employees conduct, oversee, and preserve central functions of the Agency. The perceived magnitude of this threat together with the centrality of the competing interests cause the Parties to view assignments of hybrid positions as zero-sum games, a perspective that effectively suffocates objectivity and compromise.

### 2. The Parties' Arguments

Having addressed the Parties' other major arguments and evidence in this dispute, the Arbitrator turns now to their arguments that directly address the outcome-determinative issue: Whether the contested position

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[20] This point is equally applicable to the analysis of Article 1.05.

[21] This is equally applicable to Article 1.05.

[22] Where hybrid disputes are concerned, a "reasonable" classification is about all one can seek.

[23] One cannot reasonably expect perfect demarcations between the duties in exempt and nonexempt positions.

is either exempt or nonexempt.[24] The Union alleges that the contested position is really nonexempt and that the Agency eroded the bargaining unit by posting that position as exempt. Furthermore, the Union contends that awarding the contested position to Mr. Mitch, a non-bargaining-unit employee, constituted "non-selection of a bargaining-unit position." In the Union's view, the Agency's attempt to recast the contested position as exempt based on fiduciary duties therein is unpersuasive for essentially two reasons. First, the Union argues that no duties in the contested position qualify as fiduciary under the "Bargaining Unit Exemptions."[25] Alternatively, the Union contends that any fiduciary duties in the contested position are so minuscule as to be irrelevant in classifying that position. In contrast, the Agency insists that it inadvertently posted the contested position as nonexempt, caught its mistake, re-posted the position as exempt, notified bargaining-unit applicants of that modification, and ultimately hired Mr. Mitch to fill the contested position.

A functional (albeit imperfect) referential *screen or test* can prove useful in resolving disputes about hybrid positions. One can use such a screen to *assist* in classifying hybrid positions as either exempt or nonexempt and, hence, reduce the confusion, discord, disputes, and grievances associated with filling hybrid positions. Accordingly, resolution of this dispute involves the application of a *screen* that hopefully sheds light on and dissipates heat in classification disputes. It is to that task that the Arbitrator now sets his hand.

### 3. A Tool for Screening Hybrid Positions

The most functional method of screening hybrid positions is to focus primarily on the *essential duties* therein ("Essence Test") and secondarily on other factors. The basic inquiry under the Essence Test is whether either exempt or nonexempt duties are *required* in (*essential* to) daily job performance in a given hybrid position. Other matters equal, a hybrid position is exempt if daily job performance entails exempt

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[24] Nevertheless, the Parties offered several arguments regarding other aspects of this dispute that are subsumed in a determination of whether the position at issue is either exempt or nonexempt. Consequently, the resolution of that issue in this section effectively addresses those arguments.

[25] Union Exhibit 1.

duties. Conversely, a hybrid position is nonexempt if daily job performance necessitates nonexempt duties.[26]

Further inquiry is indicated, however, if daily performance requires either equal or equivalent application of exempt and nonexempt duties. If, for example, bargaining-unit employees have performed exempt duties in a position on another occasion, then one may reasonably classify that *position* as nonexempt without fear of eroding exempt *positions*, even though the *duties* therein remain exempt for purposes of classifying other positions in the future.[27]

Finally, irrespective of the foregoing circumstances, a position is exempt if daily job performance involves exempt duties that: (1) lie at the heart of (central to) managerial decision-making authority, or (2) are fiduciary in nature as that term is defined in "Bargaining-unit Exemptions."[28] Similarly, a position is nonexempt if the daily job performance entails duties that the Parties have explicitly classified as nonexempt.

**H. Classification of the Contested Position**

Application of the Essence Test indicates that the contested position is exempt. First, the position clearly encompasses a number of exempt duties such as representing administrators and directors in meetings and conferences and assuming responsibility and authority of absent administrators.[29] Because many of the italicized duties lie at the heart of managerial decision-making authority, the contested position is reasonably classified as exempt under the foregoing screening device. Absent clear proof otherwise, one strains to argue that these are duties that nonexempt employees either can or should perform. Reason suggests that exempt employees are better situated and arguably entitled to represent the Agency's interests by standing in for directors and administrators (and performing other central, italicized duties in Appendix A), just as Union

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[26] This approach guards against *undue* erosion of both the bargaining unit and exempt positions.

[27] Observe, however, that the Parties' explicit (as distinguished from implicit) agreement, exempt duties do not lose that status because bargaining-unit employees perform them, and the same can be said for nonexempt duties performed by supervisors. Otherwise, both duties will eventually lose their functional identities and aggravate the confusion surrounding hybrid positions.

[28] Union Exhibit 1. Numbers (1) and (2) guard against erosion of exempt positions.

[29] *See*, e.g., Italicized passages in Appendix A below.

officers are better situated to represent the Union's organizational or institutional interests. The emphasis here is not on the ability to perform (or having performed) an exempt duty. The emphasis is on *interests*, which constitute one of the major distinctions between exempt and nonexempt duties and, ultimately, positions.

Second, the Arbitrator finds unpersuasive the Union's contention that the contested position is nonexempt essentially because Messrs Scheerens and Tomastik have performed some exempt duties therein. Exempt duties do not somehow become nonexempt merely because bargaining-unit employee have performed them.[30] Nor do nonexempt employees otherwise become *entitled* to perform exempt duties (or to hold positions involving those duties) simply by performing the duties.[31] Absent unambiguous mutual agreements between the Parties and in the interest of labor/management peace, exempt and nonexempt duties retain their respective statuses. The Union's approach in this instance virtually assures smudging (if not erasing) demarcations between exempt and nonexempt duties, virtually ensuring the proliferation of ever knottier classification disputes.

Finally, one notes that the Parties explicitly allow supervisors to perform nonexempt duties under certain circumstances. Specifically, Article 1.05 permits a supervisor to perform "some of the *same duties as bargaining-unit employees*" (nonexempt duties) pursuant to the "classification specification" of the provision in question.[32] Observe, however, that Article 1.05 is not a license for exempt employees to erode the bargaining unit by performing nonexempt duties. Those duties remain nonexempt. These considerations persuade the Arbitrator that the contested position in this dispute is exempt.

## VI. The Award

For all the foregoing reasons, the Grievance is hereby **DENIED**.

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[30] And despite the strictures of Article 1.05, this truism is equally applicable to situations where exempt employees perform nonexempt duties.

[31] This principle is equally applicable to exempt employees performing nonexempt duties. Observe, also, that application of the doctrine of past practice to classify exempt and nonexempt duties is a recipe for confusion, discord, and grievances.

[32] Joint Exhibit 1, at 2.

## Appendix A

| Nonexempt Position | Contested Position |
|---|---|
| Prepares and reviews data & maintains records or reports related to assigned projects (e.g., update Microsoft Access database of projects circulated for review); consults and coordinates with staff of other divisions, state and federal agencies; provides technical assistance and consultation to government officials and private firms or individuals regarding environmental laws, policies and programs & environmental issues. Attends training sessions & seminars; assists in conducting special studies or programs/projects, attends conferences and meetings (e.g. project site reviews, interagency meetings).\1 | Serves as *liaison* with public officials, private agencies & general public (e.g., explains policies & programs; responds to telephone & written inquiries & complaints); *represents administrator and Director* in meetings & conferences & *assumes responsibility & authority in administrators absence* (e.g., attends meetings, prepares documents & correspondence regarding program & responds to inquiries from public & ODNR); *relieves supervisor of non-routine administrative duties* (e.g., directors letters regarding the department's environmental policies/programs. *Researches & analyzes programs, procedures & policies related to environmental review . . . . Develops proposals & provides reports* on project status and provides technical advice to administrators; *maintains files* for active, inactive and closed projects and work requests.\2 |

\1. Management Exhibit C, at 1
\2. Management Exhibit E, at 1.

Respectfully,

Robert Brookins

Robert Brookins, Professor of Law, Labor Arbitrator, J.D., Ph.D.