

**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**STATE OF OHIO – OHIO DEPARTMENT OF TRANSPORTATION  
CENTRAL OFFICE**

**AND**

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION  
LOCAL 11  
AFSCME AFL-CIO**

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**Arbitration Date: October 29, 2009**

**Grievant Lucille Micatrotto: #31-13(7-28-2008)-0022-01-09  
and #31-13 (03-31-09)-0006-01-09**

**BEFORE: Arbitrator Craig A. Allen**

**Advocate for the Employer:**

**Colleen Ryan  
Ohio Department of Transportation  
Central Office  
1980 W. Broad Street  
Columbus, Ohio 43223**

**Advocate for the Union:**

**Lynn Kemp  
OCSEA, AFSCME Local 11  
390 Werthington Rd., Suite A  
Westerville, OH 43082**

### **I. HEARING**

The hearing was held October 29, 2009 at the Ohio Department of Transportation's Central Office in Columbus, Ohio. The hearing commenced at 9:05 A.M.

The joint issue before the Arbitrator is "Are the grievances of Lucille Micatrotto , numbered 31-13 (07-28-08)-0022-01-09 and 31-13-(03-31-09)-0006-01-09 arbitrable under the 2006 - 2009 Collective Bargaining Agreement?"

Testifying for the Ohio Department of Transportation ("The Employer") were Latisha Hazell, Senior Human Capital Management Analyst; Edward A. Flynn, ODOT Assistant Administrator for Labor Relations; and Joe Trejo, Office of Collective Bargaining Manager of Labor Relations and Dispute Resolution.

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME ("The Union") were Nadine Kempton, Systems Programmer 3; and Lynn Kenp, Union Staff Representative.

### **II. STATEMENT OF THE CASE**

The Grievant, Lucille Micatrotto, was laid off from her position as Training Officer in the Employer's District 12 on March 16, 2008. As a result of an agreement pursuant to Section 18.14 of the Contract, Grievant was placed in the position of Account Clerk 1. Grievant was then placed on a Recall list for re-employment to Cuyahoga, Lake and Geauga Counties.

The Employer posted a vacancy for Training Officer, position number 20064640 on July 3, 2008. The job duties on the posting included "driving equipment operation training, proficiently operates basic, standard and complex equipment for demonstration." This equipment includes: dump trucks, loaders, dozers, graders, and backhoes. The closing date for the posting was 5:00 P.M. on July 13.

Pursuant to Article 18.12 of the Contract, Grievant submitted an application for this position. The application was sent by Grievant on July 8<sup>th</sup> to Latisha Hazell by E-Mail. Ms. Hazell notified the Grievant she had received the application.

On July 10<sup>th</sup> Grievant questioned Ms. Hazell as to her start date. Grievant interpreted Contract Article 18.12 as granting her the position. Grievant stated in her E-Mail "the laid-off employee shall be considered before any other applications and upon meeting minimum qualifications, the laid-off employee shall be awarded the vacancy."

On July 14, Mike Bussa, Administrator for the Employer's Human Resources Division notified Grievant that she would be considered and would be expected to "demonstrate proficiency in the operation of "certain types of equipment and serve a trial period as Training Officer.

The Grievant responded that she would like to be considered for the position and Ms. Hazell scheduled her for an assessment on August 8<sup>th</sup>. On August 4<sup>th</sup> Grievant notified Ms. Hazell that the Contract language in Section 18.12 was clear and she would not attend any assessments or interviews. Ms. Hazell notified Grievant that if she failed to take the assessment she would not be considered.

The Grievant filed her grievance 31-13-(07-28-08)-0022-01-09 hereinafter referred to as (22) directly at Step 3 of the grievance procedure and failed to appear for the assessment. This grievance was filed July 31, 2008.

The Step 3 hearing was conducted on August 21, 2008 by Mr. Edward Flynn. In Mr. Flynn's Step 3 response of September 16, 2008 he found no contractual violation but ordered the job to be reposted because he thought Grievant was ill advised not to appear for the assessment. In the Step 3 response there were no Employer procedural objections and none noted in the response.

On September 30, 2008 Ms. Hazell posted the same Training Officer vacancy, adding that an assessment will be administered to applicants and they will be required to show how they demonstrate proficiency in the operation of basic, standard and complex equipment.

The Grievant applied for the position again. The Grievant did not appear for the assessments claiming she was entitled to the position under Contract Article 18.12.

The Employer filled the vacancy on January 4, 2009. On March 31, 2009 Grievant filed her second grievance 31-13-(03-31-09)-0006-01-09, hereinafter known as (6) directly at Step 3. The Employer denied this grievance on the basis it was untimely, Grievant had withdrawn from the process, and on the merits of the Contractual language.

### **III. THE EMPLOYER'S CASE**

The Employer's first witness was Latisha Hazell. Ms. Hazell is a Senior Human Capital Management Analyst. Ms. Hazell has a Masters' Degree in Business Administration and a

Bachelors' Degree in Human Resource Management. Ms. Hazell currently has the Training Division. She screens applicants for positions. Ms. Hazell was referred to Joint Exhibit 3 and said this is the Training Officer Posting 20064640 Position and that the position is in Ashland County. The position is a Central Office position in Pay Range 31. The position was posted from July 3 - July 13, 2008.

Ms. Hazell reviewed Joint Exhibit 1 and said it was an E-Mail and an application from the Grievant. She said this was received on July 8<sup>th</sup> and there were phone calls and E-Mails after that. Ms. Hazell said Joint Exhibit J was an E-Mail from the Grievant asking for a start date. She then read Joint Exhibit K which is an E-Mail response to Grievant from Mike Bussa, Human Resources Administrator. Mr. Bussa tells Grievant she has to show proficiency in running equipment. She then read Joint Exhibit L which is an E-Mail from Grievant asking to be considered for the position sent July 14, 2008. Mr. Bussa replied the same day and told Grievant she would be contacted once an interview schedule has been determined.

Ms. Hazell then read Joint Exhibit M. This is Grievant's E-Mail to her saying she has contacted the Union Leadership and that the Contract language in Section 18.12 is clear. She should be awarded the position and will not attend any interviews or assessments. Ms. Hazell replied in an E-Mail in Joint Exhibit M that if Grievant failed to take the assessment she would not be considered for the position.

Ms. Hazell said the Training Officer position was not filled but was re-posted. She said the other applicants were sent letters that the position had not been filled. She also said the reporting of the position clarified that applicants had to show proficiency in the operation of equipment and

had to be assessed.

Ms. Hazell was then referred to Joint Exhibit O. This is the reposting of the job. She testified that other people who had applied were asked if they were asked if they were still interested and the Grievant was advised of the reposting. She said the 2<sup>nd</sup> posting time closed and assessments were started. She contacted the Grievant and received more E-Mails.

Ms. Hazell was referred to Joint Exhibit Q. This is her E-Mail to Grievant giving Grievant information on an assessment and asking for confirmation of Grievant's attendance on November 12, 2008. She read Joint Exhibit R which is an E-Mail from Grievant on October 31, 2008 saying Grievant sees no need for an assessment.

Ms. Hazell was then referred to Joint Exhibit S which is an E-Mail from Lynn Kemp November 3, 2008. Ms. Kemp says that Section 18.12 of the Contract rules and Grievant will not be at the assessment. Ms. Hazell then read Joint Exhibit U which says the Training Office position was filled January 4, 2009. She also testified that non-selection letters were sent but only to those who had an assessment. She said the Grievant was not notified as she considered her "withdrawn". She was asked if all the applicants were bargaining unit members. She said "Yes"

On Cross-Examination Ms. Hazell was asked if she had taken Labor Relations Courses. She replied that she had classes in college. Ms. Hazell was asked "What do you believe contract interpretation means?" Her answer was "The ability to read and interpret the Contract."

Ms. Hazell was then referred to Joint Exhibit J. She said Grievant only asked about a start date. She was then asked "Did the E-Mail also tell you about 18.12 issues?" She answered "We did have an 18.12 discussion." Ms. Hazell was then asked "Did you seek clarification from

Central Office on 18.12." She said "Yes". The response from Mr. Bussa was after he talked with Labor Relations. She was then referred to Joint Exhibit Q which is an E-Mail to Grievant. She was asked "Did you consider assessment a Position Specific Minimum Qualification." She said, "A CDL is a PSMQ." Ms. Hazell was then referred to Joint Exhibit R. This is an E-Mail from Grievant to her. The E-Mail says there is no need for assessment and that 18.12 gives her the position without assessment. Ms. Hazell was then asked "Did the applicant bid as a promotion?" She said "Yes".

Ms. Hazell was then referred to Joint Exhibit N. She said this is a list of people who took the assessment the first time. Ms. Hazell was asked "Were any of those listed laid off as Training Officers?" She said "Just Grievant".

Ms. Hazell was then referred to Joint Exhibit T. This Exhibit is the sign-in sheet for the assessment November 12, 2008. She was asked "if any of the people listed were laid off as Training Officers." She said "Not to my knowledge." She then testified that Joint Exhibits Q, R & S were E-Mails concerning this position.

Ms Hazell was then referred to Joint Exhibit Q and said this was an E-Mail to Grievant but doesn't mention 18.12. She then read Joint Exhibit R. This is an E-Mail where Grievant says she and the Union believe she should have the job because of Article 18.12.

Ms. Hazell then read Joint Exhibit S and was asked "Does the E-Mail say that if Grievant failed to show for the assessment, that she would be no longer considered?" Her answer was "No".

The next witness was Edward A. Flynn. He is the Employer's Assistant Administrator for Labor Relations. Mr. Flynn says he is responsible for all grievances from Step 3 through Arbitration. He is also the Drug Testing Officer. He goes to all 88 counties for Step 3 hearings and presents or goes to all Arbitrations.

Mr. Flynn was referred to Joint Exhibit B. He said this is the first grievance (22) and his Step 3 response. This Exhibit also contains the second grievance and his Step 3 response. It also contains appeal preparation sheets and the Union's request for Arbitration on both grievances. Mr. Flynn said both grievances were filed directly at Step 3.

Mr. Flynn was then referred to Joint Exhibit A, the Collective Bargaining Agreement. He reviewed Article 25.02 and gave his opinion as to what Step a grievance under Article 18 should be filed under. He said Article 25.02 covers Non-Selection. Mr. Flynn said the time lines start when the Grievant becomes aware of an Action. He said Article 25.01 CDS defines days. Step 1 has a 10 day time line (working days) not to exceed 30 days.

Mr. Flynn said the first grievance (22) was filed on July 28. The second grievance (6) was dated March 30 It was also postmarked March 30 so this is the filing date. He said the first assessment date was August 8<sup>th</sup> and the grievance was filed before the selection was completed. Mr. Flynn said Grievant withdrew from consideration so there was no 18.12 issue prior to getting a grievance.

Mr. Flynn said after he received the first grievance (22) he had many talks with Ms. Hazell and Mr. Bussa. He then discussed his Step 3 response and said he did a lengthy discussion of 18.12. Mr. Flynn said he took a lot of time on his Step 3 response.



Mr. Flynn said you have to tie Minimum Qualifications into Job duties. The Trainers have to be proficient in equipment operation as this is a Safety issue. He said Grievant had a different type of job when she was a Training Officer. This job requires ability to operate heavy equipment. Mr. Flynn said he wanted to give the Grievant the benefit of possible miscommunication and so he rebid the job to give her another shot. He said in his Step 3 response he tried to explain to Grievant. He said the Grievant's application did not say she had any experience on heavy equipment. Mr. Flynn said if there is more than one applicant under 18.12 have to bid. There still has to be an assessment. He said the Grievant withdrew from the process.

Mr. Flynn said you have to read Contract Article 17.06. He said you have to meet Minimum Qualifications with job duties. He said he gave Grievant another shot but she withdrew, so he went ahead. Mr. Flynn said he only notified people who completed the selection process.

Mr. Flynn said the Employer received grievances from others. He looked at Exhibit Management 1 and said this is another grievance but it was withdrawn after the job was re-posted. He said after the second posting the job was filled. The second assessment was November 12 and the grievance (6) was filed March 30.

Mr. Flynn was asked "Did you see Ms. Kemp?" He said "Yes, several times." He was shown Exhibit Management 2 which are entries from his calender. The calender shows November 12 he was at District 12 in Step 3s. November 20 he had mediation at Districts 3 and 12. On January 13 he was at District 3, January 16 he was at District 12, January 29 he was at District 3 and February 10 he was at District 3.

Mr. Flynn said Butch Wylie is the OCSEA Staff Rep for District 3. He said he had no inquiry about job being filled until he received the grievance. He also said P A Notices are given electronically. Mr. Flynn said the second grievance (6) refers to Article 17.03 of the Contract. This Article says there are 14 calender days to file a grievance. The job was filled January 4<sup>th</sup>. Fourteen days from the time of notification of the action would mean the time expired on February 4. Mr. Flynn said the Union had notice under Article 3.08.

Mr. Flynn said the first grievance was filed right after the assessment date. He said if you go by this the second grievance should have been filed in October.

Mr. Flynn looked at Section 3.08 of the Contract. He said the letter of agreement with the Union is that electronic transmission satisfies Article 3.08 of the Contract. He said he responds to non-selection grievances all the time.

Mr. Flynn testified that if a job is filled and the probation period runs, the person in the job feels an ownership interest. These matters have to be resolved quickly and that is why the contract has a short time frame. The maximum is thirty days. Mr. Flynn said the time to file the grievance was after the initial selection was made. He said the time line for the second grievance (6) started running January 4. He said if you use the Grievant's argument, should have filed then.

Mr. Flynn looked at the calender and said the last day would have been the 18<sup>th</sup> of January but that was a Sunday. The 19<sup>th</sup> was a holiday so January 20<sup>th</sup> was the last day. If the grievance was filed at Step 1 January 16<sup>th</sup> was the last day. Step 1 has a possible 30 days so the last day was February the 3<sup>rd</sup>. Mr. Flynn said grievances are usually filed after the process is completed and she didn't complete it.

On Cross-Examination, Mr. Flynn said Management 2 is his calender. He said he saw Ms. Kemp and she didn't say anything. Mr. Flynn said he would not have seen Ms. Kemp at any District 3 meetings. He also said Ms. Kemp did not call about the position being filled.

Mr. Flynn looked at Article 25.02 of the Contract. He said Article 18 is the lay-off Article and the Union would pursue it. He was asked "You say the Grievant withdrew by not taking the assessment?" He replied, "Article 18.12 says you consider laid off employees. Article 18.12 says you have to meet the job duties. The Grievant withdrew from consideration."

Mr. Flynn was referred to Joint Exhibit 3 and referred to the last page of his Step 3 response. He said the selected applicant had not actually taken the job. He also said the PSMQ has to be tied to the job duties. You have to show proficiency.

On Re-Direct Mr. Flynn was referred to Management 2. He said District 3 is in Ashland County. The Grievant is in District 12. Mr. Flynn said he was also in District 12 and no one said anything to him in either District.

Mr. Flynn said the Ohio Administrative Code clearly says there can be proficiency exams. Common sense says you have to know how to run equipment. He was referred to Article 17.06 and said assessments are required.

The Employer's next witness was Joe Trejo. Mr. Trejo is the Manager of Labor Relations and Dispute Resolution at the Office of Collective Bargaining. He has been at the Office of Collective Bargaining for six years. Mr. Trejo manages all Labor Relations Specialists and is involved in all Contract Negotiations. He takes calls when the Labor Relations Officers are out.

Mr. Trejo was referred to Article 3.08 of the Contract. He said the State is the Employer through the Department of Administrative Services. He said the Union is notified of all personnel actions. The information is transmitted by an electronic system called Tumbleweed. This was agreed to by the Union in 2007. Mr. Trejo was shown Management 3 and said it was the Letter of Agreement with the Union. This was intended to Clarify Article 3.08, and this is indicated in paragraph 4.

Mr. Trejo said prior to 2007 there was a barrage of paper sent to the Union. Now it is all on the server. He said information on the position being filled was sent to the Union.

Mr. Trejo was shown Exhibit Management 4 and said this shows the Training Officer position was filled on January 4, 2009. He said the Department of Administrative Services sent this information to the Union on January 28, 2009. He looked at the calender on the back page of the Contract and said Article 3.08 requires bi-weekly reports.

On Cross-Examination Mr. Trejo said there was no separate E-Mail to the Union. It was all on the bi-weekly electronic transmission sent January 28, 2009.

#### **IV. THE UNION'S CASE**

The Union's first witness was Nadine Kempton. Ms. Kempton has worked for the Union for twelve years and is now a Systems Programmer 3. She said the Union went electronic in 1997 and that she gets the transmissions. Her job is Data Base Administrator. She gets all the reports including the State's file.

Ms. Kempton said she has been involved with the Ohio Administrative Knowledge System (OAKS). She said she gets the State's files on a bi-weekly basis. The tapes have information of Bargaining Unit Members. This includes job information, dues, and benefits. She said there are close to 676 fields on the file per employee.

Ms. Kempton said there is information concerning about 52,000 employees on the tapes and about 32,000 of these are Union members. She said the Union uses the tapes to check on the Bargaining Unit. When information changes the Union System is updated. All of this is done electronically.

Ms. Kempton said the tapes show personnel action but this information is rarely requested. She said she would have to have the name to find the information. She said there are lots of issues with (OAKS). For example, employees whose names begin with M were not paid. Ms. Kempton said the timeliness and reliability of the Human Resources person impacts on the information. She said there may be several hundred personnel actions in a pay period. She also said she would have to write a program to extract this type of information.

Ms. Kempton looked at Exhibit Management 3 and said this Letter of Agreement came about to stop the transmission of Social Security numbers to the Union. The Union had received electronic information before this. She said this Agreement was in response to a student losing State Tapes.

On Cross-Examination Ms. Kempton looked at Exhibit Management 3. She was asked if the Letter of Agreement complied with Article 3.08 of the Contract. She said "Yes". She was then referred to Exhibit Management 4 and said this was the same format she would use.

Ms. Kempton said the information on the job was on her transmission.

The last witness for the Union was Lynn Kemp. Ms. Kemp is a Staff Representative for the Union and does Contract Administration. She is assigned certain areas for grievances. Ms. Kemp also attends Labor-Management meetings and Health and Safety Meetings. Ms. Kemp is assigned to District 12. She filed grievance (6) in 2009.

Ms. Kemp was referred to Joint Exhibit B. She was asked "Why did you file on this date?" She answered "I became aware of the job being filled. I filed March 30, 2009.

Ms. Kemp was shown Exhibit Union 1 and said she E-Mailed Ed Flynn on December 15, 2008 and asked about the status of filling the position. She also looked at Exhibit Union 2, page 2 and said Mr. Flynn's reply said letters are going out to those who completed the selection process.

Ms. Kemp said the Union Staff Representative in District 3 would not ask about a grievance in another District. She said she filed the grievance at Step 3. She had 14 days to file. Ms. Kemp says Article 25.03 of the Contract says initiate at Step 3.

Ms. Kemp said she was the District 12 Staff Representative and advised Grievant of her Rights under Article 18.12 of the Contract. She said she called Bruce Winegard. Mr. Winegard is the Operations Manager and negotiated Contract Article 18.12. Mr. Winegard agreed that the Grievant had a CDL, met Minimum Qualifications and PSMQ. Mr. Winegard said the Grievant did not need to go to assessment. Ms. Kemp told the Grievant she didn't have to go.

There was no Cross-Examination of Ms. Kemp. The hearing concluded at 1:50 P.M.

### **V. OPINION OF THE ARBITRATOR**

This case has been very well presented by the parties. They have been very aggressive in their presentation and have made their respective positions very clear.

The Employer argues that the applicable Contract Article is Section 25 which requires this type of grievance to be filed at Step 3 within 14 days. The Employer argues that the first grievance (22) was not ripe and the Grievant had no standing. The Employer also argues that the issue was moot as the job was reposted.

The Employer also asserts that the grievance was not ripe as it was speculative under Article 18.12. The Employer said it did consider the Grievant and therefore there was no violation.

As to the second grievance (6) the Employer argues that the grievance should have been filed at the time of the assessment but in fact was filed after the selection was made.

The Employer also contends that Grievant had no standing as the Grievant did not appear for the assessment and did not complete the process. The Employer says the Grievant should have gone for the assessment and then grieved.

The Employer says Ms. Hazell told Grievant in July that if she did not go for the assessment she would not be considered. The Employer also says Grievant was told in July, August, and September if she failed to go to the assessment she would not be considered. The job was filled January 4, 2009 and the Grievance was untimely filed.

The Employer cites Exhibit Union 1 which is Ms. Kemps inquiry as to the status of the position and Mr. Flynn's reply that letters were going out soon. The Employer says the

information was provided to the Union by January 28<sup>th</sup> and the time to file the Grievance ran out February 11.

In reference to Ms. Kemp's testimony concerning the letters; the Union and the State have agreed as to how information is to be provided. The Union has to handle the information. The Employer said it doesn't notify Staff Representatives or those who did not complete the process. The Union knew in December the job would be filled soon.

The Employer submitted a number of Arbitration decisions and Court Cases. The Employer emphasizes Arbitrator Robert Stern's decision stating "the reason for time lines are to act as a Statute of Limitations and there is no flexibility." The cases review standards for filing grievances and whether a grievance is ripe.

The Union contends that the issue is arbitrable. The Grievant lost her Training Officer job in 2008 and went back to Account Clerk. On July 18, 2008 this Training Officer Job was posted. The Grievant filed her application pursuant to Contract Article 18.12. The Union contends the Grievant met the Minimum Qualifications and the Position Specific Minimum Qualifications. The Union therefore filed a grievance (22) and there was no procedural objection from the Employer. The Union asserts that this is arbitrable under Article 18.12 and that since Grievant was not awarded the job immediately the grievance was filed. The Union also argues that re-posting the job is irrelevant and doesn't change the Contract. The Union also argues that adding an assessment to a Position Specific Minimum Qualification doesn't change anything.

The Union also provided many Arbitration decisions. The Union stresses a decision by Arbitrator Mollie H. Bowers. Ms. Bowers, in interpreting Article 35 said "a Contract applies



unless there are express provisions to the contrary." The Union points out there are no restrictions on the arbitrability of Article 18.12. The Union also has Arbitration Decisions saying rights are presumed to be enforceable unless the Contract expressly precludes it. The Union contends this contract does not forbid the enforce ability of Article 18.12.

As to the second grievance (6) the Union says it is a Step 3 grievance and is to be filed within 14 days of Notice of the Event. The Union argues that it was not aware that the position was filled. The Union says it filed the Grievance (6) within 14 days after it learned the job was filled. The Union also says it was wrong not to notify the Grievant.

The Union also argues that it cannot get this information from electronic transmission as shown by testimony. The Union therefore contends it was unreasonable to assume that the Union knew that the position had been filled and the Employer should have notified the Grievant and the Union. The Union also says Ms. Hazell did not tell the Grievant she would be out of consideration.

The Union says the most senior employee, if qualified, should be awarded the position and the case should be arbitrated on the merits.

The Union cites a decision by Arbitrator Rhonda Rivera. Ms. Rivera, in deciding a case concerning reinstatement after a disability dealt with a timeliness issue. Ms. Rivera found, "that because the Employer did not communicate a final and clear statement to the Grievant of the denial of reinstatement, and because the Union had no formal notice of these events, the evidence leads to an assumption that the Union acted promptly in filing a grievance, when it had reason to know of a probable contract violation."

The Union asserts that it had no Formal Notice of the event and acted promptly when it became aware.

As to the first grievance filed in this case (22) the Employer argues it is premature or not ripe and also moot because the job was reposted. The Union argues Article 18.12 gives the Grievant the job and therefore the Grievance is neither premature or moot.

The Contract Article 18.12 provides in pertinent part as follows: "Notwithstanding the provisions of Article 17 and the other provisions of this Article a laid-off employee may submit an application for any posted vacancy outside of his/her geographic area or for any posted vacancy in the same office, institution or county from which the employee was bumped, in the same, similar or related classification series from which he/she was laid off or displaced. However, this opportunity is limited to lateral transfer and demotion". It further says: "applications from such laid off employees shall be sorted and considered before any other applications pursuant to the provisions of Article 17. Among such employees submitting applications who meet the minimum qualifications as stated in the Position Description and Classification Specification the most senior applicant shall be awarded the vacancy".

There is no dispute in this case that the Grievant was covered under Article 18.12. This Article commences with the words "Notwithstanding the provisions of Article 17." This means that before Article 17 becomes applicable certain events have to occur. The Grievant having applied for the job the first thing that needs to be determined is whether or not the Grievant is the most senior applicant meeting "minimum qualifications as Stated in the Position Description and Classification Specification". The only evidence as to seniority is the Grievant's statement that the

only other Training Officer laid off had less seniority than she did. As this is not an Arbitration on the merits there may or may not be other evidence on this issue.

The other issue concerns the minimum qualifications. The Union contends the Grievant meets these. The Employer attempts to fall back on Article 17. Contract Article 18.12 expressly precludes the use of Article 17. It specifically says applicants under Article 18.12 must be "Sorted and considered" before other Article 17 applications. There is testimony that Mr. Bruce Winegard of the Union was involved in these negotiations and 18.12 means what it says.

The Arbitrator finds that the grievance was timely filed on grievance (22). The Union had a right to "short circuit" any further job proceedings based on the evidence at hand and have an Arbitration on the merits.

The Employer's argument that there is no injury because the job was re-bid is not well taken. The Employer insists that Article 18.12 must be read in conjunction with Article 17 but that is not the case. Whether the Union's case is as iron clad as it asserts remains to be seen in an arbitration on the merits. The issue on seniority may or may not arise as well as evidence on the minimum qualifications. Both of these are factors under Article 18.12. Clearly however, the Grievant's Article 18.12 rights are strong enough at this stage that she could suffer economic injury from a delay in granting her the position so the issue is not moot.

The Employer having decided to repost the job the case continued. The Grievant was contacted by E-Mail and again expressed an interest. Ms. Hazell E-Mailed Grievant and told her she would have to be assessed. Both Grievant and the Union replied that she was entitled to the job under Contract Article 18.12 and she would not appear for the assessment. Ms. Hazell did

inform the Grievant that if she failed to appear for the assessment she would not be considered.

The Grievant failed to appear and the Employer proceeded with assessments and awarded the Training Officer Job to another, filling the position on January 4, 2009.

In the mean time Ms. Kemp sent an E-Mail to Mr. Flynn on December 15, 2008 asking if the position had been filled. Mr. Flynn replied the same day but did not give a direct answer, saying instead, "letters are going out shortly to those who completed the selection process".

The Employer's evidence showed Mr. Flynn travels extensively and said he had seen Ms. Kemp several times but she made no inquiry then as to this situation.

Ms. Kemp ultimately inquired of Staff Representative Butch Wylie as to whether or not the position had been filled. She says she became aware that the position had been filled on March 16 and filed the grievance (6) on March 30 and it is therefore timely.

The Employer argues that Article 3.08 of the Contract covers how notice to the Union is to be sent and the parties have agreed on this procedure. The Employer's evidence of Notice is the Exhibit Management 4 which is an extract from the Tumbleweed Report showing a Training Officer position is filled and giving the position number. The Employer also relies on Exhibit Management 3 which is the Letter of Agreement between the Employer and the Union in August 2007 and says it is dispositive.

The issue here pursuant to Contract in Article 3.08 says in pertinent part that "The Employer will provide to the Union monthly a listing of all approved personnel actions involving bargaining Unit employees. The Employer will provide the Union with a list of employees who have paid Union dues and fair share fees."

The Letter of Agreement between the Union and Employer modifies Article 3.08. This Agreement has several provisions concerning the elimination of the use of employees Social Security Numbers and steps to be taken if there are information breaches. It also refers to personnel action. The Agreement recites that "Whereas, Article 3.08 of the Collective Bargaining Agreement between the State and OCSEA requires the Employer to periodically provide employee information and an account of all personnel actions involving bargaining unit employees to OCSEA."

The Letter of Agreement further indicates the parties are making an agreement. This Agreement says on Page 2 under the State's duties item 3 "Continue to provide position information for all state employees not included in OCSEA represented bargaining units." (Emphasis added)

This Contract was entered into March 1, 2006. The Letter of Agreement was entered into August 20, 2007. The Letter of Agreement therefore modified Article 3.08 in relation to position descriptions so as to only cover non-bargaining unit employees. As this position is a bargaining unit position the Tumbleweed transmission was not Notice to the Union.


The Employer also contents that by refusing to go to the assessment the Grievant had withdrawn from the process and therefore there was no reason to notify Grievant or the Union of the filling of the Training Officer position. The Arbitrator finds the Grievant was notified that failure to go to the assessment would cause the Employer not to consider her.

The problem for the Employer is that in December Ms. Kemp E-Mailed Mr. Flynn with a direct question but did not receive a direct answer. The record resounds with the aggressive

stance of the Union on this issue. The Union had already grieved it once. Even though the Employer regarded the 1<sup>ST</sup> grievance as not ripe and premature, the Union continued its position when the Employer proceeded. Based on the facts of this case the Employer should have notified the Union and the Grievant that the position was filled. Barring that Ms. Kemp should have gotten a direct answer to her question. The Arbitrator finds that Notice to the Union was not until March 16, 2009 and the second grievance (6) was timely filed.

Grievances 31-13-(07-28-08)-0022-01-09 and 31-13-(03-31-09)-0006-01-09 are arbitrable under the 2006-2009 Collective Bargaining Agreement.

Entered at Ironton, Ohio this 17<sup>th</sup> day of November, 2009.

  
\_\_\_\_\_  
Craig A. Allen  
Arbitrator

**IN THE MATTER OF ARBITRATION**

**BETWEEN**

**STATE OF OHIO – OHIO DEPARTMENT OF TRANSPORTATION  
CENTRAL OFFICE**

**AND**

**OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION  
LOCAL 11  
AFSCME. AFL-CIO**

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Arbitration Date: January 29, 2010 & March 3, 2010

Grievant Lucille Micatrotto: #31-13(7-28-2008)-0022-01-09  
and #31-13 (03-31-09)-0006-01-09

BEFORE: Arbitrator Craig A. Allen

Advocate for the Employer:

Colleen Ryan  
Ohio Department of Transportation  
Central Office  
1980 W. Broad Street  
Columbus, Ohio 43223

Advocate for the Union:

Lynn Kemp  
OCSEA, AFSCME Local 11  
390 Worthington Rd., Suite A  
Westerville, OH 43082

**I. HEARING**

The hearing was held at the Ohio Civil Service Employees Association Union hall on January 29, 2010. The hearing commenced at 9:15 A.M. The joint issue before the arbitrator is:

“Based upon the grievant’s application, does the grievant meet the minimum qualifications for the position at issue pursuant to 18.12 of the collective bargaining agreement?”

Testifying for the Ohio Department of Transportation, (“the Employer”) were Latisha Hazell, Senior Analyst Human Capital and Scott Fulks, Training Supervisor.

Testifying for the Ohio Civil Service Employees Association, Local 11 AFSCME (“the Union”) were Patty Rich, Grievance Manager, Lucille M. Micatrotto, the Grievant and Bruce Wyngaard, OCSEA Operations Director.

The hearing was recessed at 1:20 P.M. The recess was due to the absence of a Union witness because of a death in the family. The hearing reconvened March 3, 2010 at 9:00 A.M. As this is an issue case, the Union presented its case first.

## **II. STATEMENT OF THE CASE**

On July 28, 2008 Lucille M. Micatrotto filed a grievance. The Grievant asserts:

“ODOT Management issued a job abolishment notice for her position as an ODOT Training Officer. The abolishment/layoff was effective March, 2008. Grievant was placed on the layoff/recall list with biding rights outside her geographical area. In July, 2008 ODOT management posted a Training Officer position in District 3 - Ashland County.

Grievant submitted an application on July 8, 2008.

The posted Training Officer position ended on July 13, 2008 at 5:00 P.M. As of today’s

date, Grievant has not been awarded the vacant Training Officer position in District 3"



The Grievant sought the following remedy:

“Award Grievant the vacant Training Officer Position in ODOT District 3, Ashland County. Provide Grievant all necessary transitional training required without malice, prejudice, intimidation, harassment and/or discrimination. Make Grievant Whole.”

The matter is properly before the Arbitrator.

### **III THE UNION’S CASE**

The Union’s first witness was Patty Rich. Ms. Rich is the Union Grievance Manager in the Office of the General Counsel. She has held this position for five (5) years. Prior to this Ms. Rich was the Arbitration Coordinator. Ms. Rich testified she has worked with the Department of Administrative Services Labor-Management on Classifications. She has worked on Classifications for seventeen (17) years.

Ms. Rich testified she reviews Articles 17 and 18 of the Collective Bargaining Agreement and reviews all applications to see if candidates meet Minimum Qualifications. She attends Department of Administrative Services (“DAS”) Training and has done joint efforts with the State on testing. Ms. Rich testified that testing is reserved for promotion.

Ms. Rich read Joint Exhibit E which is the Training Officer Posting. The Minimum Qualifications are on page 2 of 3 of this exhibit. Ms Rich testified that the Position Specific Minimum Qualifications (PSMQ) were a Class A CDL with tanker endorsement. She also testified “DAS” has to approve “PSMQs”.

Ms. Rich then turned to Joint Exhibit K and said this was a re-posting of the Training

Officer position. Ms. Rich testified that this posting said that there would be an assessment and

that this is not a PSMQ.

Ms. Rich then read Joint Exhibit I which is Grievant's application with attachment and compared this with Joint Exhibit K. Ms. Rich then testified that the Grievant met the Minimum Qualifications. Ms. Rich testified that the PSMQ says Class A CDL with tanker endorsement and that the Grievant has this license. Ms. Rich further testified that each Minimum Qualification has an option. She said the Grievant meets the position description as she had the job for ten (10) years and this only requires eighteen (18) months. Ms. Rich said the Grievant is qualified and no test is required. Ms. Rich also said a person can't get a CDL without knowing how to run equipment.

On Cross-Examination Ms. Rich referred to Article 18.12 of the Contract. She checked the position description and said the subject matter of training is in Joint Exhibit E which gives job duties. Ms. Rich testified that Grievant's file doesn't show equipment experience, just a CDL and that she has never applied for a CDL. Ms. Rich said she knows from reading, not having one. Ms. Rich testified that the Federal Government lets the States administer the CDL program; and that an applicant must pass a test to get a CDL.

Ms. Rich was then asked if she knew what "KSA" stood for and she said knowledge, skills and abilities. Ms. Rich was referred to Joint Exhibit F the right hand side. She was asked what the asterisk meant under the MAC heading. She said things learned after the start of a job.

Ms. Rich then read Joint Exhibit H which defines standard and complex equipment. The equipment is listed in the Position Description, Joint Exhibit F.

On Re-Direct Ms. Rich was referred to Joint Exhibit E. She said Job Duties are not

Minimum Qualifications. Ms. Rich said the Position Description not signed but it should be. She

then said MACs are not Qualifications. Ms Rich read Joint Exhibits F and K and said Major Worker Characteristics do not say anything about complex equipment. Ms. Rich said concerning lay-off and bumping, if you meet the Minimum Qualifications you get the job.

On Cross-Examination again Ms. Rich said this is not a bumping case but is a case under Article 18.12 of the Contract and you have to meet Minimum Qualifications.

On Re-Direct Examination Ms. Rich testified that the Position Description in Joint Exhibit F has no Minimum Qualifications.

The Union's next witness was Lucille Micatrotto, the Grievant. The Grievant is currently an Account Clerk I and has been so for one and a half years. Prior to this the Grievant was the District 12 Training Officer. She got this position in November 1998 and was laid off from the Training Officer Job March 16, 2008.

The Grievant applied for the Training Officer Job in Joint Exhibit E. Grievant bid on this job because of lay off. She said Contract Article 18.12 lets her do it. The Grievant said she met the Minimum Qualifications.

The Grievant was then referred to Joint Exhibit G, page 5 of 11. This Exhibit is the Trainer Classification for all Agencies. Page 5 lists the qualifications and Grievant said she met these too.

The Grievant was referred back to Joint Exhibit K, the Job re-posting. This has a PSMQ. The Grievant testified she has a Class A CDL with tanker endorsement. She said she was told to get one by a Supervisor and she got it in March, 2003. The Grievant testified she was being moved out into the field to train highway technicians.

The Grievant testified that to get a CDL you must watch a video of equipment; learn

safety techniques; do work sheets to self test; read a booklet about the vehicle; and drive the vehicle. There is a written test at the Bureau of Motor Vehicles and a driving test given by the Ohio Highway Patrol. The Grievant said she can drive a high tonnage 18 wheeler. She passed the test the first time.

The Grievant then read Joint Exhibit I. This is her submission for the job. She said she sent an E-Mail to Central Office. The Grievant read page 4 of this Exhibit and said she attached PDs. She testified she thought she should have the job. The Grievant said she had a conversation with Latisha Hazell to be sure she got it.

The Grievant was given Exhibit Union 1 and said it relates her conversation with Latisha. She testified that it was a pleasant conversation and Latisha agreed that the Grievant met Minimum Qualifications. The Grievant asked why her application would be put in with the others as the other applicants were seeking promotions.

The Grievant said Latisha replied "Outside her geographic location". The Grievant said Article 18.12 covers that and Latisha said she would check it with Labor Relations.

The Grievant then read the part of Exhibit Union - 1 which is the Michael Bussa E - Mail. Mr. Bussa said "You will be considered but you have to show proficiency. She turns to page 3 of Exhibit Union - 1 which said she was still interested and she waited to be contacted. Latisha contacted her and said the Grievant had to be tested. The Grievant then contacted Lynn Kemp at the Union, and Lynn checked with the Union leadership.

The Grievant then read page 4 of Union Exhibit 1 which was her E - Mail saying the job was hers. Latisha said no assessment, no job. She then turns to page 4 of Joint Exhibit B. This is

the Step 3 response which says the job will be re-posted.

The Grievant is next given Union Exhibit 2 which are E-Mails on the second posting. The Grievant indicates she is still interested. Latisha calls to schedule testing and the Grievant asked for an E-Mail on information. Latisha sent the E-Mail and the Grievant responds by E-Mail saying she is not coming to the assessment. She says she is on lay-off and Article 18.12 rules.

On Cross-Examination, the Grievant said she is familiar with the duties of the position. She said she has not attended at Regional Training sites. The Grievant testified she is aware there are five (5) equipment training sites. The Highway Technicians went to Ashland for equipment training.

The Grievant was asked about CDL training and she replied, “you start with a large dump truck and a large trailer”. The Grievant read Joint Exhibit F, the Position Description. She said as a Training Officer she gave test; walk around Safety; checked to see that hoses were in proper order; checked fluids, tires and brakes. She also checked to see that all wiring was connected.

The Grievant then read Joint Exhibit H and said she has not operated equipment since she got her CDL. This Exhibit shows equipment to be used and she said she has not used a chipper. The Grievant said she had done concrete and asphalt work.

The Grievant then read Joint Exhibit P which is a list of equipment. She testified she has had a course in load securement. She also said she has done some flagging and had been an Engineering Clerk. The Grievant said District 12 uses the penguin system on snow and ice trucks. The Grievant said she has a little experience with skid steer loaders.

The Grievant said her prior experience included training four hundred eighty (480) employees. She trained in lifting, diversity, sexual harassment, mentor classes, and incident

management. The Grievant said she did On the Job Training (OJT).

The Grievant was given Exhibit Management 1. This is a document from the Training Record System set up by Central Office. The Grievant testified that for the first couple of years the District kept the records. She said not all of her training was in the record. The Grievant then testified that Management Exhibit 1 does show training that she has had; but that her record is not complete. She also testified that her only equipment training was for her CDL.

The Grievant then read Management Exhibit 2. This is an E-Mail concerning the Grievant sent by Bonita G. Teeuwen, P.E., Deputy Director, District 12 to Lynn Kemp. The Grievant said she had met with Bonnie to get a chance to get familiar with the equipment. District 12 said there was no opportunity to do that.

The Grievant was then given Union Exhibit 1. Part of this Exhibit is an E-Mail from Mr. Bussa telling the Grievant she must show proficiency.

The Grievant then read Joint Exhibit B which is her grievance. She said she filed the grievance prior to the Notice from Bonnie. The grievance asks for transitional training. The Grievant said she could start training as soon as she got the new job. The Grievant said ODOT uses the tag team method.

The Grievant observed training at District 12. "Jim" was the other District 12 Training Officer and he got more field training. She said she went out with "Jim" in November, 2002. A new Supervisor put Grievant in the field. The Supervisor told her to get a Class A CDL with a tanker endorsement, and gave her a goal sheet. The Grievant was advised she would train.

On Re-Direct the Grievant said she needs to correct her statement. She never drove a skid steer, she drove a fork lift. The Grievant then read page 2 of Union Exhibit 1. This is where Mr.

Bussa says she is required to serve a trial period. She also read Article 6 (B) of the Contract which says serve a trial period. The Grievant then read Joint Exhibit F and said she had never seen this Position Description until the Arbitration.

The Union's last witness was Bruce Wyngaard. Mr. Wyngaard has been with the OCSEA for twenty-two (22) years. His first job was as Director of Arbitration. He reviewed grievances to decide which ones would go to Arbitration. Mr. Wyngaard also developed strategy and improving problem solving.

Mr. Wyngaard testified that State contract negotiations are done by Senior Staff such as Operations Director and Chief Counsel. He is now Operations Director and is responsible for selected agencies. Mr. Wyngaard testified he administers collective bargaining agreements and also reviews laws and participates in political programs.

Mr. Wyngaard is still Senior Staff and does contract negotiations. His first contract negotiation was in 1989 and he has been involved in every one since 1989.

Mr. Wyngaard said he negotiated Article 18 of the contract in 1992. In 1992 there were major lay-offs. The State had budget problems and institutions were closed. He said members could displace in a wide geographic area. Mr. Wyngaard testified that a paper lay-off procedure was devised and members were advised of their options.

Mr. Wyngaard was then shown Exhibit Union 3. Mr. Wyngaard testified that this is a Union Publication sent to members for ratification of the 1994 contract. The bold print indicates the changes from the previous contract.

Mr. Wyngaard then reviewed Joint Exhibit S on page 10. He testified that the language is the same as in Exhibit Union 3. He further testified that the purpose of this was to let members

return to their original location. The previous contract language did not let employees come back to their original location.

#### **IV. THE EMPLOYER'S CASE**

The Employer's first witness was Latisha Hazell. Ms. Hazell is now with the Department of Commerce but was employed at ODOT as a Senior Analyst Human Capital. She said her past jobs were reviewing applications.

Ms. Hazell said Class specifications are a broad description for a bunch of positions. The Position Description is specific job duties. She then read Joint Exhibit E which is the Job Posting for the Training Officer. It is a Central Office Position. Ms. Hazell said the Minimum Qualifications come from the Class Specs. She then read Joint Exhibit G page 5 and said this has the same Minimum Qualifications.

Ms. Hazell then went back to Joint Exhibit E. This calls for 18 months experience which has to be in major job duties which are Equipment Operator Training. She then read Joint Exhibit E and said Job Duties tells subject matter.

Ms. Hazell then read Joint Exhibit F the Position Description. She said she has done H R and Quality. Ms. Hazell said she has seen other Position Description for Training Officers similar to this.

Ms. Hazell testified she is familiar with "KSAs" and these are minimum acceptable things required. These show in Joint Exhibit F. Ms. Hazell reads the knowledge section in the MACs on the right hand side of the Exhibit. She also reads skills on the same page. Ms. Hazell said the employee has to have these to start the job.

Ms. Hazell then reviewed Joint Exhibit I which is the Grievant's application. She said she



knew the Grievant was laid off. Ms. Hazell read Union Exhibit 1 and said she recalled a telephone call and that it was a general call to get information. The Job was posted July 3. She said Joint Exhibit I was the application sent in by the Grievant. Ms. Hazell testified the E-Mail of July 10 was still in the Posting period. She said she doesn't screen applications as they come in.

Ms. Hazell then read Article 18.12 of the Contract. She reviewed the Grievant's application. Ms. Hazell read Joint Exhibit I, the Grievant's application and said the Grievant was not qualified. The application doesn't mention Equipment Operation, OSHA, or the preparation of instructional materials. Ms. Hazell said she scheduled Grievant for an assessment to show she could handle equipment.

Ms. Hazell read Management Exhibit 3, the Position Description for Training Officer and compared it to Joint Exhibit F and said the descriptions are different. Ms. Hazell said the Grievant failed to show for the assessment. She then read Joint Exhibit K which is the Re-Post for this job. Ms. Hazell testified this was done to let Grievant qualify for this position. This posting said assessment required. Ms. Hazell scheduled an assessment but the Grievant failed to appear.

Ms. Hazell read Joint Exhibit N which shows Steve Lindo promoted to the Job. She also testified that Joint Exhibit M was Steve Lindo's application.

On Cross-Examination Ms. Hazell read Joint Exhibit E which is the first posting of the Job. She said the Job Duties are Minimum Qualifications. Ms. Hazell then read Joint Exhibit F and said this is a State Standard document. She also said she doesn't know if the Union has inp into this document.

Ms. Hazell was then given Union Exhibit 1 and said Grievant mentioned Article 18.12 of

the Contract but said she doesn't make those decisions. Ms. Hazell testified she would talk to Labor Relations. Ms. Hazell then went to Joint Exhibit E and said the Qualifications and Specific Minimum Qualifications make no reference to Equipment Operation. The Grievant did have a CDL.

Ms. Hazell was then referred to page 3 of Union Exhibit 2. She said the assessment was needed to show proficiency in the operating of equipment. Ms. Hazell said the Job was Re-posted to give Grievant a chance. She said also others could apply. Ms. Hazell said the Grievant sent the same application for the 2<sup>nd</sup> posting. She read Union Exhibit 2 where Mr. Bussa said "You do not need to send another application" under Article 18.12 of the Contract. She also said the successful applicant was a promotion.

Ms. Hazell was then asked to compare Joint Exhibit M, Steve Lindo's application with Joint Exhibit E, the Job Posting. She was asked to compare Minimum Qualifications. Ms. Hazell said you have to look at the entire application.

On Re-Direct Ms. Hazell said she separates bargaining Unit applications from the others and then reviews them. She said there was a written exam and a demonstration on the equipment. Mr. Lindo did the entire process and was required to show proficiency in operating equipment. She also testified that Grievant could have revised her application for the second Posting.

The Employer's next witness was Scott Fulks. Mr. Fulks is the ODOT Training Supervisor and has been with ODOT for 28 years. Mr. Fulks has been a highway worker, a Permit Tech, a Transportation Manager 1,2,& 3; an LRO and now Training Supervisor. He oversees Equipment Training Statewide.

Mr. Fulks said the RETs have site responsibility. They are responsible for inventory and

equipment. Mr. Fulks testified that the Training Officers assist the RETs. The Training Officers teach Courses, Course Development and are considered Subject Matter Experts. Mr. Fulks testified that the Training Officers provide training on all types of heavy equipment.

Mr. Fulks read Joint Exhibit P and said these are Equipment Course Offerings. His staff does this training. Mr. Fulks said seven weeks per year training is offered to Cities and Counties.

Mr. Fulks testified that training begins in the class room and then moves to Pre-Trip inspections. All equipment is different. The next step is skills training which consists of 2 students, 1 Instructor and 1 piece of equipment. Mr. Fulks says he is very safety conscious as the students haven't developed skills yet. Students have a CDL Training Center for District 12 in Ashland. Mr. Fulks testified that this is a hard area to train in as there is more traffic, more snow, and a large urban sprawl.

Mr. Fulks then read Joint Exhibit F, the Position Description. He testified you have to be proficient to teach. You have to learn basic skills and still do OJT at the home garage.

Mr. Fulks was then shown Joint Exhibit I, the Grievants application. He testified the Grievant has no equipment experience. He was then shown Joint Exhibit B, the grievance. Mr. Fulks testified that Grievant asked for transitional training and that is not provided. He testified that applicants have to come with that skill.

Mr. Fulks then read Joint Exhibit O which is Steve Lindo's work history. All work the Employee does is tracked. PETG and LTTG training is given. He said Mr. Lindo started January 4 and taught his first class on January 17. Mr. Fulks testified that most of the heavy equipment classes are taught from the Spring to the Fall. He also said a CDL is for trucks over 26,000 pounds and only for trucks.

There was no Cross-Examination of Mr. Fulks.

The Parties then stipulated to Joint Exhibit S, and Joint Exhibit T. The Parties agreed to add Joint Exhibit U by stipulation and the hearing was concluded at 10:18 A.M.

## **V. OPINION AND AWARD**

This case has been well presented by the parties; both on the two hearing days and in their written Closing Arguments.

The Union quotes Article 18.12 of the Collective Bargaining Agreement (“CBA”) in pertinent part, stating “Among such employees submitting application who meet the minimum qualifications as stated in the Position Description and Classification Specification the most senior shall be awarded the Vacancy”.

The Union argues the Classification Specification for the Training Officer (J-G) contains the exact same minimum qualifications as listed on the postings for the Ashland County Training Officer at issue.

The Union says on the Classification Specification there is no Position Specific Minimum Qualification (PSMQ) listed. The only minimum qualification listed on the Position Description is a PSMQ - Class A CDL with tanker endorsement - without airbrake restriction.

The Union argues through the testimony of Ms. Patty Rich that it has no input into Position Descriptions. The Union further argues that MAC’s (minimum acceptable characteristics) are not minimum qualifications. The Union also argues that Article 18.12 of the “CBA” is to cover PSMQs that would be listed on the Classification and Position Description.

The Union relies on Ms. Patty Rich’s testimony that Grievant met the minimum

qualifications and the PSMQs. The Union says it only recognizes the minimum qualifications in the Classification Specification.

The Union asserts that the Grievant was not required to be assessed, pointing out that this question is not part of the joint issue. The Union discusses this issue as there was considerable time spent during the hearings on this question.

The Union points out that assessments / testing appear in Article 17 of the CBA and that Article 18.12 of the CBA says “Notwithstanding the provisions of Article 17...”

The Union offers authority for its position citing “Black’s Law Dictionary” and “Labor and Employment Arbitration”.

The Union contends that the Employer conceded the question of qualifications by Mr. Bussa’s E - Mail telling Grievant she would be considered, ODOT simply wanted to test her. The Union also points out that Grievant sent an E - Mail to Ms. Hazel “as acknowledged by your office, I meet both minimum and specific minimum qualifications for the posted position”. The Union says the Employer never contradicted this statement. The Union also argues that the Step 3 response gave no indication Grievant did not meet the minimum qualifications.

The Union then says it reviewed the application of the successful candidate and fail to see how he is qualified.

The testimony from Bruce Wyngaard showed the purpose of Article 18.12 of the “CBA” was to expand rights of laid - off employees to return to their original positions and pay ranges. The Negotiations notes show extensive discussion about testing and assessments relating to Article 17 of the “CBA” but as to Article 18 the question was never addressed by the Union.

The Union discounts the testimony of Steve Fulks as to the Grievant meeting minimum

qualifications.

The Union's final argument is that Article 6.01B allows for a trial period in this situation. The Union cites Arbitrator Harry Graham's decision in Mychovsky where Arbitrator Graham says "of necessity there occurs some learning period, even if not formally set forth in the agreement".

The Employer in its argument says the Grievant meets several of the requirements of Article 18.12 of the "CBA" but fails to show that she is qualified.

The Employer argues that positions within a classification have varying duties and successful applicants must demonstrate they meet the minimum qualifications for the particular position for which they are applying. The Employer argues other provisions of the "CBA" support its argument. Section 6.011 (B) of the "CBA" Lateral Transfer within the Same Classification reads, "Where a single classification involves work which varies substantially among different positions with the classification, the Employer may require employees who are laterally transferred to serve a trial period equal to one-half of the regular probationary period". Section 18.11 Recall an employee who is laid off "shall be recalled to a position provided the affected employee is qualified to preform the duties". Section 18.13 Re-employment "provided the employee is qualified to perform the duties".

The Employer then cites the Mychkovsky case as authority for its position. The Employer quotes Arbitrator Graham as saying there is "of necessity" "some learning period". The Employer acknowledges this but argues Scott Fulks says there is not enough time to teach Grievant how to proficiently operate the equipment. The Employer cites Arbitrator Graham's ruling that "in determining whether or not a person is qualified , attention must be devoted to

whether or not the

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senior employee possesses a background of education, experience and adaptability as to give a neutral reviewer reasonable confidence that the senior bidder will be able to competently perform the requisite duties within a reasonable period of time”. Scott Fulks testified Grievant would not be able to efficiently or proficiently operate a piece of equipment to teach others.

The Employer argues that Grievant had no equipment training other than operating a fork lift once and drove a truck to get her CDL. The Employer then argues Article 17.04 of the “CBA” which requires transferring employees to “specify on the application how they possess the minimum qualifications for the position”. The Employer cites Ms. Hazell’s testimony that a Training Officer and a Training Officer in Computer Applications have different duties.

The Employer says the testimony of Bruce Wyngaard said the purpose of Article 18.12 of the “CBA” was to expand recall and re-employment rights and allow institutional employees ... to return to their home institution or closer to home.

The Employer then argues that the Grievant must be qualified and the only tool available is the application. The front page of the posting CJE&KS has job duties taken from the Position Description. The essential job duty is the proficient operation of basic, standard and complex equipment. The Employer says the testimony of Ms. Hazell is convincing that Grievant was not qualified. Ms. Hazell’s testimony, in summary, is that Grievant did not indicate which courses she had taken at Cleveland State. There is also no mention of other required skills such as public speaking. The Grievant’s application did not indicate she met the minimum qualifications. The Grievant in her testimony focused on her CDL and not other qualifications.

The Employer says the Union’s argument that holding a position in the Classification

means you are qualified fails because Article 18.12 of the “CBA” also refers to “the Position

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Description”. The minimum qualifications are in the Position Description. A Position Description contains job duties and it contains minimum acceptable characteristics “MACs”.

The Employer says the contract doesn’t say employees must meet “PSMQs” it states the applicant must meet minimum qualifications “as stated in the position description”.

The Employer also points out that the qualifications in the position description at issue are different from the qualifications of Grievant’s previously held Training Officer positions. The qualifications for the position itself are in the MACs. The Employer cites a decision by Arbitrator Anna DuVal Smith in the DeJesus decision. “An inescapable conclusion is that the operative document is the Position Description”. Arbitrator Smith went on to rule “She (DeJesus) must also possess the minimum acceptable characteristics on the “Position Description”.

The Employer then argues that the Grievant’s Position Description from her former Training Officer position are not similar to those required for the job at issue here.

The Employer also points out that neither the Grievant’s application nor her testimony mention any knowledge of Safety regarding OSHA’s standards or any ability to operate basic, standard and complex equipment.

The Employer then points out the successful applicant had considerable qualifications including the Air Force’s Heavy Equipment Academy.

The Employer then makes a historical survey of the evolution of Article 17 of the “CBA” concerning qualifications.

Because this is a case of first impression on Article 18.12 of the “CBA” the Arbitrator



has set forth here not only the facts presented but also the arguments of the parties.

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The stipulated issue is “whether the Grievant’s application demonstrated that she met the minimum qualifications for the position of Training Officer in the Equipment Training Program pursuant to Article 18.12 of the “CBA””.

The Arbitrator finds that the Grievant did not meet the minimum qualifications and the grievance is denied.

The Union has made a maximum effort on behalf of the Grievant. The Union however has not shown sufficient evidence to meet its burden.

The Union argues that it has input into the Classification Specifications but not any input into the Position Description. Therefore the Union argues that the Classification Specification is decisive. However, Article 18.12 of the “CBA” includes the Position Description as part of the criteria.

The Union contends that the Grievant met the Minimum Qualifications because she had a CDL. Unfortunately for the Grievant this was not the only requirement.

The Employer points out that the Grievant’s application and her attached Position Descriptions did not show she was qualified. The Arbitrator agrees with this.

The Union argues that a Training Officer is a Training Officer. This is not necessarily correct. The Employer’s evidence proves this point.

The Union contends the Grievant was mis-lead by the Employer telling her she would be considered when it should have told her to re-do her application. The fact is that ODOT went to considerable effort to assist Grievant. The Union is absolutely correct that Article 18.12 of the

“CBA” does not require assessment / testing.

On the other hand ODOT posted this job twice to see if Grievant could operate heavy

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equipment.

The Union also argues against the use of “MAC’s” as Minimum Qualifications. The Arbitrator agrees with Arbitrator Smith that they are a requirement. The other problem is that the Position Description indicates that 75% of the job is related to the operation of heavy equipment.

The parties to this Arbitration, and their advocates are experienced and very capable. As part of this proceeding there has been evidence and argument about matters they felt were important.

The Employer argued the import of Article 17 of the “CBA”. The Union is correct that Article 18.12 of the “CBA” precludes the use of Article 17. The Union is also correct, as indicated above, that Article 18.12 does not require assessment / testing.

The Union also questioned the qualifications of the successful applicant. The Arbitrator has reviewed his application and finds he is qualified.

Grievance Denied.

Entered at Ironton, Ohio this 9th day of April 2010.

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Craig A. Allen, Arbitrator

