

In the Matter of Arbitration Between the	:	Grievance Number: JFS-2019-02223-09
	:	
<b>OHIO CIVIL SERVICE EMPLOYEES</b>	:	
<b>ASSOCIATION, AMERICAN FEDERATION</b>	:	Grievant: Suzanne L. Gordon
<b>OF STATE, COUNTY AND MUNICIPAL</b>	:	
<b>EMPLOYEES, LOCAL 11, AFL-CIO,</b>	:	
	Union :	Arbitration Hearing Date: March 25, 2021
and the	:	
	:	
<b>STATE OF OHIO, DEPARTMENT OF JOB</b>	:	Howard D. Silver, Esquire
<b>AND FAMILY SERVICES,</b>	:	Arbitrator
	Employer :	

DECISION AND AWARD OF THE ARBITRATOR

APPEAREANCES

For: The Ohio Civil Service Employees Association, American Federation of State,  
County and Municipal Employees, Local 11, AFL-CIO, Union

David Harper  
Staff Representative  
OCSEA/AFSCME, Local 11, AFL-CIO  
390 Worthington Road, Suite A  
Westerville, Ohio 43082-8331  
[धारपर@ocsea.org](mailto:धारपर@ocsea.org)

For: The State of Ohio, Department of Job and Family Services, Employer

Kevin Whaley  
Labor Relations Officer 3  
Employee and Business Services  
Ohio Department of Job and Family Services  
30 East Broad Street, 30<sup>th</sup> Floor  
Columbus, Ohio 43215  
[Kevin.Whaley@jfs.ohio.gov](mailto:Kevin.Whaley@jfs.ohio.gov)

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## PROCEDURAL BACKGROUND

This matter came on for a remote arbitration hearing on March 25, 2021 at 9:00 a. m. via the teleconferencing platform Zoom. During the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded at 11:00 a. m. on March 25, 2021 and the evidentiary portion of the hearing record was closed at that time.

Post-hearing briefs were received by the arbitrator from the parties by April 26, 2021 and exchanged between the parties by the arbitrator on April 27, 2021.

This matter proceeds under a collective bargaining agreement in effect between the parties to this proceeding, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, and the State of Ohio, Department of Job and Family Services. The parties' collective bargaining agreement to be applied in this case was in effect from May 12, 2018 through February 28, 2021, Joint Exhibit 1.

Neither party has contested the arbitrability of the grievance underlying this proceeding. Based on the language of the parties' collective bargaining agreement and in the absence of any objection to the arbitrability of the grievance, the arbitrator finds the grievance underlying this proceeding to be arbitrable and properly before the arbitrator for review and resolution.

## JOINT ISSUE

Did Management violate the OCSEA collective bargaining agreement by denying the Grievant an interview for a posted Account Executive (PN 20042349) position in the Office of Workforce Development (OWD)?

## JOINT DOCUMENTS

1. OCSEA Contract (2018-2021)
2. Documents
  - A. Posting-Account Executive Pg. 9-13
  - B. Application-Suzanne Gordon Pg. 14-18
  - C. Position Description-Account Executive (20042349(09) Pg. 24
  - D. Application/Resume of Selected Candidate-Donald Hawkins Pg. 19-23
  - E. Assessment test Grievant Pg. 25-62 D. Hawkins Pg. 69-103
  - F. Scores to Assessment test Pg. 63-68 D. Hawkins Pg. 104-113
  - G. Assessment sign in Pg. 4
  - H. Security and Confidentiality of Testing and Interviewing Document Agreement Pg. 6
  - I. ODJFS (Ohio Department of Jobs and Family Services) Selection Approval Pg. 7
  - J. Letter-Nancy J. Janco-Kocarek, SHRM-SCP, CCP Pg. 7
3. Grievance Trail
  - A. Grievance-Filed 6/14/2019 Pg. 110
  - B. Step 2 Response-8/19/2019 Pg. 111-113

## JOINT STIPULATIONS

1. The parties agree the issue is properly before the Arbitrator.
2. The parties agree this is a non-selection grievance.
3. The parties agree the disputed posting is for an Account Executive vacancy in Lorain County (PN 20042349) and is a pay range 31.
4. The parties agree the candidates meeting the minimum qualifications according to their applications for the instant posting were Jill Gantt, Yessica Garcia, Donald Hawkins and the Grievant.
5. The parties agree the vacancy was a promotional opportunity for all candidates meeting the minimum qualifications.
6. The parties agree Yessica Garcia did not pass the assessment.
7. The parties agree Donald Hawkins was the selected candidate for the position.
8. The parties agree the Grievant and Mr. Hawkins were discipline-free at the time of the application/selection and remain discipline-free currently.

9. The parties agree the Grievant possesses more seniority than Mr. Hawkins.
10. The parties agree the Grievant and Mr. Hawkins were both employed by Ohio Department of Job and Family Services (ODJFS) at the time of the posting.

#### STATEMENT OF THE CASE

The parties to this arbitration proceeding, the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter referred to as the Union, and the State of Ohio, Department of Job and Family Services, hereinafter referred to as the Employer, are parties to a collective bargaining agreement in effect from May 12, 2018 through February 28, 2021, Joint Exhibit 1.

Within the parties' collective bargaining agreement is Article 25, Grievance Procedure. The first sentence of Article 25, presented in section 25.01(A), provides: "A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement."

In late April/early May 2019 the Employer posted on-line an invitation to bid upon an Account Executive position in the Office of Workforce Development (OWD), position number 20042349(09), a position intended to operate from the OhioMeansJobs Center at 42495 N. Ridge Road, Elyria Ohio 44035, Lorain County. The pay range for the posted Account Executive position was pay range 31. See Joint Stipulation 3 and Posting, Joint Exhibit 2A, paginated 9-10.

On May 3, 2019 the grievant, Suzanne L. Gordon, a bargaining unit member, filed a bid upon the posted Account Executive position.

Based on the application and a questionnaire submitted by the grievant for the posted Account Executive position the Employer determined that the grievant met the minimum qualifications for the

posted position. The Employer determined that four applicants who had submitted bids for the posted Lorain County Account Executive position met the minimum qualifications for the posted position. In the case of each applicant who met the minimum qualifications, selection for the posted position would mean a promotion with an increase in pay. See Joint Stipulations 4 and 5.

The process followed in selecting one of the candidates for the posted Lorain County Account Executive position moved from posting the position, to the receipt of applications, to evaluating applicants' minimum qualifications, to an assessment phase comprised of a written test. The written assessment test required written responses to written questions, making test takers choose among multiple answers in the case of multiple choice questions, exhibit writing skills, and demonstrate the candidate's knowledge of the subject matter of the work, policies, and procedures carried out by the Office of Workforce Development. This phase of the selection process, the written assessment test, was uniformly applied to the candidates for the posted position and graded under a scoring key that attaches to the three test booklets that comprise the written assessment test. The Employer determined that a minimum passing score for the assessment phase of the selection process was seventy percent (70%). This percentage was calculated by comparing the maximum points available under the assessment test, 100 points, to the points awarded based upon the answers and responses provided in the assessment test by each candidate.

When the Employer scored the written assessment tests from the four candidates who had been determined to meet the minimum qualifications for the posted position, the Employer found only one candidate, Donald Hawkins, had attained the seventy percent (70%) score needed to move on in the process, the next step being an interview. The Employer, in scoring the assessment tests, determined that the grievant did not attain a score of seventy percent (70%) and therefore the grievant was not offered an interview. The Employer determined that the grievant scored fifty-four percent (54%) on the

grievant's written assessment test.

Mr. Hawkins was selected to fill the posted position even though both Mr. Hawkins and the grievant, Ms. Gordon, were found to have met the position's minimum qualifications; both Mr. Hawkins and the grievant at the time of their applications were discipline free; and the grievant possessed more State of Ohio seniority than Mr. Hawkins. See Joint Stipulations 7, 8, and 9.

The written assessment test for the posted Lorain County Account Executive position was taken by the candidates on May 29, 2019.

When Ms. Gordon was notified that the Employer had determined that she had not attained a passing score on the assessment test and therefore would not be afforded an interview for the posted position, a grievance was filed with the Employer on June 14, 2019 charging that by denying Ms. Gordon an interview for the posted Account Executive position the Employer had violated the parties' collective bargaining agreement, specifically by violating Article 2, Non-Discrimination; Article 16, Seniority; and Article 17, Promotions, Transfers, Demotions and Relocations.

The grievance filed on behalf of Ms. Gordon resulted in a Step 2 grievance meeting on August 16, 2019 at which the Union noted that the grievant contends she scored higher than fifty-four percent (54%) on her assessment test. The Union contended at this Step 2 grievance meeting that Ms. Gordon should have received thirty-two (32) additional points for which she had not been given credit. The Union questioned the scoring on questions 1, 2, and 3 in Test Booklet #1; questioned the assignment of only partial credit for questions 13 and 14 in Test Booklet #2 despite what the Union claims are full answers to these questions; and the grievant should have received twelve (12) additional points for describing services in Test Booklet #3.

At the Step 2 grievance meeting the Union expressed the grievant's feelings that there existed a bias against her by managers in the Office of Workforce Development, and if Mr. McClure, Mr.

Thompson, or Mr. Weber were to be involved in scoring Ms. Gordon's assessment test, she "... didn't have a shot." The Union expressed at the Step 2 grievance meeting that Ms. Gordon believed the source of the bias against Ms. Gordon was "... because of the grievances I've filed." See Grievance Trail, Joint Exhibit 3(B), paginated 110 – 112.

The grievance was denied by the Employer at Step 2 on August 19, 2019. The unresolved grievance was directed on to final and binding arbitration by the Union pursuant to Article 25, section 25.02.

An arbitration hearing was conducted on March 25, 2021. Post-hearing briefs were received from the parties by April 26, 2021.

#### SUMMARY OF TESTIMONY

##### Marjoyce Watkins

Marjoyce Watkins has been employed by the Ohio Department of Job and Family Services for fifteen (15) years, with the last ten (10) years spent working from within the Office of Workforce Development. Ms. Watkins has served in three different positions at the Department of Job and Family Services, having served in her current position, Customer Service Representative, for the past ten (10) years.

Ms. Watkins recalled in her testimony at the arbitration hearing that she had received an email on April 19, 2019 that referred to the Employer's intention to fill fifteen (15) Account Executive positions. Ms. Watkins submitted an on-line application for an Account Executive position.

Ms. Watkins recalled in her testimony that she had directed a question to the Employer's Department of Human Resources concerning the lack of an interview accorded to Ms. Watkins. Ms. Watkins was notified six days after her inquiry that no interview had been offered to Ms. Watkins



because Ms. Watkins had not attained a minimum score of seventy percent (70%) on the written assessment test.

Ms. Watkins testified that she sat for the assessment test on one occasion, on May 6, 2019 at 4020 E. Fifth Street, Columbus, Ohio, Franklin County.

Ms. Watkins testified that she discovered there were three applicants who were not selected on the basis of not having attained a passing grade on the written assessment test. Ms. Watkins recalled that when she sought to examine her written assessment test she had been unable to find it.

#### John K. McClure

By May 2021 John McClure will have worked for the Ohio Department of Job and Family Services for eleven (11) years. During those eleven (11) years Mr. McClure worked from four different positions.

Mr. McClure knows Ms. Gordon but has never served as Ms. Gordon's direct supervisor.

Mr. McClure testified that completed written assessment tests are randomly assigned to scorers and Mr. McClure stated that it is usually the case that three scorers grade a written assessment test.

Mr. McClure knew that a number of vacant Account Executive positions had been posted to be filled but Mr. McClure did not know how many positions were to be filled.

Mr. McClure identified a Security and Confidentiality of Testing and Interviewing Documents Agreement, paginated 6, which Mr. McClure signed on May 31, 2019, identified on this document as a Program Administrator 3. Item one on this agreement begins with: "Test materials for ODJFS positions will be used only for evaluating employment qualifications." Mr. McClure signed this document as an "Alternate"; no "Primary" signature is presented on this agreement.

Mr. McClure was referred to the score summary sheet for Suzanne Gordon, the grievant,

paginated 25. This score summary sheet presents the names of three scorers – John McClure, Ronnie Marquez-Posey, and Jeremy Conkle, with handwritten signatures from Mr. McClure and Mr. Conkle on this sheet, each dated May 31, 2019. Ronnie Marquez-Posey's name is typewritten on this document but is not dated. This score sheet reports fifty-four (54) points assigned to Ms. Gordon's written assessment test for a score of fifty-four percent (54%).

Mr. McClure identified the score summary sheet for the candidate selected for the posted position, Donald Hawkins, paginated 69. This score summary sheet reports eighty-four (84) points assigned to Mr. Hawkins' written assessment test, for a score of eighty-four percent (84%). The identities of the scorers indicated on the score summary sheet for Mr. Hawkins are Mr. McClure and Mr. Conkle, both signatures dated “5/30/19”; the typewritten name Ronnie Marquez-Posey appears but is not dated.

Mr. McClure identified Union Exhibit 1 as a memorandum dated February 21, 2020 from the Employer to the Union that describes a meeting held on December 13, 2019 to re-score the written test assessments from Suzanne Gordon, Marjoyce Watkins, Ann Kilroy, Donald Hawkins, and Matthew Myers. The re-scorers are identified in this memorandum as Cindy Orr, HCM Administrator; Roxanne Kelley, HCM Administrator 1; Nancy Jancso-Kocarek, HCM Manager; Amber Shedd, HCM Senior Analyst; Jason Hovance, Labor Administrator; Kevin Whaley, LRO 3; John McClure, ODJFS Program Administrator 2; Ronnie Marquez-Posey, ODJFS Field Operations Coordinator; and Jeremy Conkle, Program Administrator 3. This memorandum reports that the re-scoring produced the following point totals:

Matthew Myers 80

Ann Kilroy 73 (former score 71)

Donald Hawkins 71 (former score 84)

Suzanne Gordon 65 (former score 54)

Marjoyce Watkins 49 (former score 66)

Mr. McClure confirmed that because Ms. Gordon had not attained a passing percentage of seventy percent (70%) on her written assessment test, Ms. Gordon was not offered an interview for the posted position.

Under questioning by the Employer's representative, Mr. McClure stated that because Ms. Gordon had not attained the seventy percent (70%) passing grade, Ms. Gordon's point total could not be considered to be within the competitive range of a passing point total.

Mr. McClure explained that the re-scoring described in Union Exhibit 1 was intended to ensure accuracy in scoring. Nine (9) people were called upon to re-grade the assessment tests, and it had been the consensus of the re-scorers that neither Ms. Watkins nor Ms. Gordon had attained the seventy percent (70%) needed to pass the written assessment test.

Suzanne L. Gordon, Grievant

Suzanne Gordon has been employed by the Ohio Department of Job and Family Services for twenty (20) years. Ms. Gordon now works within the Office of Workforce Development in the Trade Development Division. Ms. Gordon has been serving in her present position since November 2019.

Ms. Gordon recalled receiving an email about the posting of an Account Executive position in Lorain County. In response to the notice about the Account Executive position Ms. Gordon submitted an application for the posted position.

Ms. Gordon recalled that she had not received notice that the position had been filled so she contacted the Human Resources Department. She was informed that interviews had started but Ms.

Gordon was not to be offered an interview. Ms. Gordon testified that this denial of an opportunity to be interviewed made her angry and upset.

In June 2019 Ms. Gordon found that Mr. Hawkins had been selected for the posted position.

Ms. Gordon stated in her testimony at the arbitration hearing that she found the scoring of the written assessment test to be open to interpretation, a scoring system that included subjective judgments in awarding points. Ms. Gordon could not understand how she had not passed the written assessment test because she had hit everything that had been asked in the test. Ms. Gordon talked to co-workers who were also upset by being determined not to have achieved a passing score on the written assessment test.

Ms. Gordon was referred to the score summary sheet for her assessment test, paginated 25. This summary scoring sheet reported six (6) points from Test Booklet #1, eighteen (18) points from Test Booklet #2, and thirty (30) points from Booklet #3, for a total of fifty-four (54) points.

Ms. Gordon identified page 2 of Test Booklet #1, paginated 28, as a chart depicting unemployment rates, from January 2009 to January 2012, for the United States, for the State of Ohio, and for the City of Columbus, Ohio. Question 1 in Test Booklet #1 appears immediately below the unemployment rates chart and reads: "Using the chart above, write a narrative that compares and contrasts the unemployment rates for the three areas." This question declares that the narrative called for by question #1 in Test Booklet #1 shall be assigned points in a range of 0 to 7.

Ms. Gordon referred to her response to question #1 in Test Booklet #1, paginated 63, a narrative that reads:

As you can see from the chart above unemployment rates from January of 2009 through January of 2012. This shows that unemployment rates have a higher than normal rate in January of 2010 and then goes down due to the seasonal workers and the shift in closing of big companies that then have a trickledown effect of the smaller companies. Comparing

the U.S. (they are the blue dots), Ohio (is the red line) and Columbus MSA area (is the separated green hyphens) areas, we can see that the areas least affected. Starting with the U.S. we can see that throughout the U.S. unemployment was slightly lower than Ohio but above the Columbus MSA area. The higher than normal unemployment rates seem to show that in January they tend to go high due to the season/weather. While the Columbus MSA area shows some increase in unemployment rates it still is the area in which unemployment rates are still lower than that of the U.S. and Ohio. The jobs seem to be growing in the Columbus MSA area due to the low unemployment rates compared to the U.S. and Ohio.

At page 63 two (2) points are indicated assigned to this answer out of seven, One point appears to have been assigned to the observation that “...throughout the U.S. unemployment was slightly lower than Ohio but above the Columbus MSA area.” Another point was indicated for “... While the Columbus MSA area shows some increase in unemployment rates it still is the area in which unemployment rates are still lower than that of the U.S. and Ohio.”

Ms. Gordon was referred to page 4 of Test Booklet #1, paginated 30, a page of the written assessment test that presents a table containing Occupational Wage Survey Estimates for Engineering Managers. This table is comprised of five columns, with one column listing each of the areas addressed by this table: Statewide, Akron MSA, Canton-Massillon MSA, Cincinnati MSA – Ohio Part, Cleveland-Elyria-Mentor MSA, Columbus MSA, Dayton MSA, Springfield MSA, Toledo MSA, and Youngstown MSA-Ohio Part. The other four columns that make up the table present figures for employment, entry wage, median wage, and median annual wage. Immediately below the table is question #2 in Test Booklet #1 that reads: “Using the data above, write a narrative that highlights the occupational wage estimates.” This question notes a range of points available from 0 to 7.

The narrative provided by Ms. Gordon in answer to question 2 in Test Booklet #1 is paginated 63 and reads as follows:

While Statewide in Ohio the employment has grown along with the wages this shows that

more employers are willing to pay for qualified Engineering Managers. The entry wages for Engineering Managers at the lowest are \$32.30 in the Springfield MSA area the highest entry wages are \$42.09 in the Cincinnati MSA-Ohio Part area. The most growth in employment areas are Cleveland-Elyria-Mentor MSA with the most at 1,340 and Cincinnati MSA-Ohio Part at 1,130. Even though some of the other areas have a slightly less entry wage employment opportunities are growing and leads to less unemployed. Fueled with this knowledge, using programs such as WIOA, On the Job Training and Apprenticeship and working with employers in the areas in which the Engineering Manager is lower we can help get more people educated, qualified and experience in this field.

Ms. Gordon's answer to question 2 set out above was assigned two (2) points, apparently by assigning one point for referring to entry wages at the lowest level in the Springfield MSA, and a second point for noting the highest entry level wages are in the Cincinnati MSA-Ohio Part area.

Question 3 in Test Booklet #1 is paginated 32 and refers to a table appearing above question 3 titled "Ohio Non-Ag Employment Estimates (in thousands)." This table is comprised of three primary columns, with the first column presenting the categories addressed by the figures in the other columns. Three categories are listed in the first column in this table, with the first category listed as Total. The second category listed is Goods-Producing Industries, subdivided into Manufacturing – Durable Goods and Nondurable Goods. The third category is Service-Providing Industries, subdivided into Trade, Transportation & Utilities; Information; Financial Activities – Finance and Insurance; Educational & Health Services; Leisure and Hospitality; and Government, subdivided into Federal Government, State Government, and Local Government.

The other two columns in the table that prefaces question 3 are titled Employment and Change From. The second column is divided into three parts, presenting figures for December 2012, November 2012, and December 2011. The third column, titled Change From, contains two parts, Change From Last Month and Change From Last Year.

Question 3, appearing below the Ohio Non-Ag Employment Estimates table, reads as follows:

“Using chart above, write a narrative that highlights the significant changes in the Ohio non-ag employment estimates.”

Ms. Gordon's response to question 3 is paginated 63 and reads as follows:

Using the chart we can see that there has been a slight decline from last year in the Goods-Producing Industries and Service-Providing Industries. From December of 2011 through December of 2012 the Goods-Producing Industries (Manufacturing) durable goods has seemed to keep a steady pace and shown an increase, while Service-Producing Industries from December 2011 to December of 2012 has only shown a slight increase. The change puts Service-Producing Industries in the negative in most areas. By comparing the change from last month to last year we need to look at the bigger picture and focus on assisting with the growth in both areas. This can be achieved by obtaining qualified, educated employees to the correct employer.

Ms. Gordon's answer to question 3 was assigned two (2) points, one point for a reference to a slight decline from last year in the Goods-Producing Industries and Service-Producing Industries, and one point for comparing an increase in employment in the production of durable goods to a smaller increase in employment in Service-Providing Services in the time period from December 2011 through December 2012.

Ms. Gordon explained in her testimony that she filed the grievance because she could not understand how she was determined to have failed to pass the written assessment test. Ms. Gordon remains convinced that her written assessment test should have been assigned a passing score. Ms. Gordon does not understand how her written assessment test was scored so low. Ms. Gordon noted that she has worked in the programs covered in the written assessment test and she possesses the information asked for by the test.

Ms. Gordon noted that in indicating her answers to multiple choice questions in the written assessment test she had employed all capital letters in marking her answer and yet when she received

the scores for her assessment, she noticed that one of her multiple choice answers, the answer to the first multiple choice question, was presented in lower case.

Under questioning by the Employer's representative, Ms. Gordon confirmed that she had taken the written assessment test using a Word document, saved the document when she had completed the test, and directed her completed test to two people through email.

Under redirect questioning by the Union's representative, Ms. Gordon noted that her answers to Test Booklet #2, including her answers to multiple choice questions, are paginated 65. Question 1 at page 65 indicates “ b ” as Ms. Gordon's answer. This answer is scored as a correct answer to question 1 and is assigned one point. Ms. Gordon's other answers to the multiple choice questions are all in upper case form. Ms. Gordon was scored as answering eight (8) of twelve (12) multiple choice questions correctly, assigned eight (8) points, one point for each correct answer.

Ms. Gordon noted that she took the written assessment test on May 29, 2019.

#### Amber Shedd

Amber Shedd works within the Employer's Human Resources Department as a Human Capital Management Senior Analyst. Ms. Shedd has been employed in the Human Resources Department for ten (10) years.

In the case of the posted Account Executive positions, Ms. Shedd explained that first a determination was made for each applicant concerning meeting minimum qualifications for the Account Executive position. Those applicants who were found to meet the minimum qualifications for the Account Executive position were invited to sit for a written assessment test. Ms. Shedd explained that those written assessment test takers who achieved a passing grade were afforded an interview. Among those interviewed, scores from the interviews that were within a five percent (5%) range were



considered equivalent, that is, substantially equal, and in such a case State of Ohio seniority is to break the tie.

Ms. Shedd referred to Article 17, sections 17.05 and 17.06 in the parties' collective bargaining agreement, language that Ms. Shedd understands to authorize the use of assessments to determine minimum qualifications and to determine who is to be afforded an interview.

Ms. Shedd was referred to Ohio Administrative Code section 123:1-9-02, Subjects, weights, and pass point. This Ohio Administrative Code rule provides that the director or designee shall prescribe the subjects of each examination, and the relative weights to be attached thereto. This administrative rule states that the director or designee shall determine a passing point for each examination. This rule, in its second paragraph, presents the following language: "The director or designee shall require a qualifying grade for any or all parts of an examination providing notice of such requirement is given in the general instructions accompanying examination."

Ms. Shedd referred to page 1 of Part 1 of Written Assessment Test Booklet #1, paginated 27, that presents in bold type: "**Applicant must receive a combined score of at least 70% on Test Booklets #1, #2, and #3 to receive further consideration.**" (Emphasis in original).

Ms. Shedd testified that seventy percent (70%) was set by the Employer as the passing grade for the written assessment test and no one who attained a score on the written assessment test of less than seventy percent (70%) received an interview.

Ms. Shedd recalled attending two meetings, on December 6, 2019 and December 13, 2019, that addressed the non-selection of the grievant for the Account Executive position. Ms. Shedd testified that the meetings were held due to the grievance having been filed and a desire to ensure that the scoring of the written assessment test submitted by Ms. Gordon was handled correctly, scored fairly, in Ms. Shedd's words: "Done right." Ms. Shedd recalled that there had been nine (9) participants at these two

meetings, staff from the Office of Workforce Development, Classification and Compensation, Labor Relations, and Human Resources. Ms. Shedd testified that the nine (9) participants reviewed Ms. Gordon's written assessment test and reached a consensus that a passing grade of seventy percent (70%) had not been attained. Ms. Shedd testified that this conclusion had been reached “without any funny business.”

Under questioning by the Union's representative, Ms. Shedd was referred to the Score Summary sheet produced by the initial scoring of the grievant's written assessment test. This score summary, paginated 25, reports a fifty-four point total for the grievant, producing a score of fifty-four percent (54%).

Ms. Shedd was shown Union Exhibit 1, a memorandum dated February 21, 2020 from the Employer's Labor Relations Department. This memorandum shows that when Ms. Gordon's written assessment had been reexamined by the nine (9) participants listed on this memorandum, Ms. Gordon's score of fifty-four percent (54%) was determined to be more accurately a score of sixty-five percent (65%), an increase of eleven (11) points, twenty percent (20%) higher than the original score reported.

Ms. Shedd was referred to a letter dated August 1, 2019 from Nancy J. Janco-Kocarek, identified in this letter as a Human Capital Management Manager within the Office of Employee and Business Services. This letter is paginated 8. Ms. Janco-Kocarek states in her letter that she reviewed the written assessments completed by Ms. Gordon and Ms. Watkins. For Ms. Gordon's assessment Ms. Janco-Kocarek wrote in the third and fourth paragraphs of her letter as follows:

For the written assessment completed by Suzanne Gordon, I found a discrepancy in the scoring. This is for Question #14 in Test Booklet #2. The correct answers were worth five (5) points each and Ms. Gordon gave two (2) correct answers. The original score awarded was four (4) points total or 2 points for each correct answer. This score should be corrected to be ten (10) points total for Question #14 to reflect each correct answer at 5 points each. The original scoring for Question #14 was likely an inadvertent error

on the part of OWD management as the points awarded for Question #13 on the Answer Key were for 2 points each and the answers for question #13 were displayed directly above Question #14 on the Key.

This would change the score that Ms. Gordon received on the written test from 54% to 60%.

## POSITIONS OF THE PARTIES

### Position of the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO, Union

The Union understands the issue in this case to be whether the Employer violated the parties' collective bargaining agreement by denying the grievant an interview for the posted Account Executive position, PN 20042349, and if so, what the remedy shall be.

The Union notes that Ms. Gordon, the grievant, applied for the Account Executive position on May 3, 2019. When notified in June 2019 that she had not attained a passing grade for the written assessment test, Ms. Gordon filed a formal grievance on June 14, 2019.

The Union recalls Ms. Gordon's testimony at the arbitration hearing about when and where Ms. Gordon accumulated the experience needed to meet the minimum qualifications for the posted Account Executive position. The Union recalls the grievant's testimony about Test Booklet #1, including expressing her belief that she had provided in her narrative responses all that had been requested.

The Union recalls the testimony of Mr. McClure at the arbitration hearing who confirmed that Ms. Gordon's written assessment test had been re-scored on two occasions after its initial scoring by Mr. McClure, and on each re-scoring of Ms. Gordon's written assessment test Ms. Gordon's score had been increased, a fact also confirmed by Ms. Shedd in her testimony at the arbitration hearing.

The Union points to the August 1, 2019 letter from Nancy J. Janco-Kocarek wherein Ms. Janco-Kocarek expresses the opinion that the assessment test scoring had been very lenient. At page two of

the Union's closing argument the Union asserts: "... Again this shows that Grievant and (1) other were singled out because they asserted their contractual rights."

The Union points out that Ms. Janco-Kocarek in her August 1, 2019 letter identified an error in the original scoring of Ms. Gordon's written assessment test, showing that the score should have been increased from fifty-four (54) points to sixty (60) points. The Union notes that later Ms. Janco-Kocarek agreed that Ms. Gordon's written assessment test score should be increased to sixty-five (65) points.

The Union points out that there is nothing within Article 17, section 17.06 that refers to a competitive range of five percent (5%) to seven percent (7%) as claimed by the Employer. The Union also finds nothing in the language of Ohio Administrative Code rule 123:1-9-02, the rule cited by the Employer, that delineates a competitive range.

The Union notes that in Article 2, Non-Discrimination, in section 2.01, Non-Discrimination, the Employer and the Union are prohibited from discriminating in a way inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status.

The Union contends that this case has too many holes. The Union claims the written assessment test was a flawed instrument as reflected by the substantial increases to Ms. Gordon's written assessment test score every time Ms. Gordon's test was re-graded.

The Union points out that the hearing record shows that the Security and Confidentiality and Interviewing Documents Agreement was never signed by a Primary signer, the signer who would have been officially responsible for receiving the test materials and insuring that the terms of the agreement are carried out.

It is the position of the Union that the grievant answered all of Test Booklet #1 Labor and Market Trend Analysis fully and should have been awarded the maximum twenty-one (21) points

allowed. Adding these twenty-one (21) points to Ms. Gordon's score would raise her score from sixty-five (65) points to eighty-six (86) points. This higher score, argues the Union, should have been awarded and would clearly have identified the grievant as the highest scorer and the most senior among those with a passing grade on the written assessment test. As noted by the Union, these circumstances would have entitled Ms. Gordon to an interview, the next step in the selection process.

The Union charges that the Employer did not score Ms. Gordon's written assessment test properly and this caused the grievant to be disadvantaged which prompted the filing of the grievance.

The Union asks that the arbitrator sustain the grievance and order a remedy that would make the grievant whole, a remedy that would include an interview, selection for the posted position, and full back pay.

Position of the State of Ohio, Department of Job and Family Services, Employer

The Employer refers to the joint issue statement stipulated by the parties as presenting the issue in this case, namely: “Did Management violate the OCSEA Collective Bargaining Agreement by denying the Grievant an interview for a posted Account Executive (PN 20042349) position in the Office of Workforce Development (OWD)?”

The Employer notes that this is an issue case and therefore the Union must carry the burden of proof if the grievance is to be sustained. The Employer points out that the evidentiary burden in this case requires the Union to prove that the Employer violated the parties' collective bargaining agreement by denying an interview to the grievant.

The Employer notes that Ms. Gordon filed an application for the posted Lorain County Account Executive position on May 3, 2019. Ms. Gordon's application was screened and determined to present an applicant who met the minimum initial qualifications for the position, entitling Ms. Gordon to move

to the next step in the selection process – sitting for a written assessment test. This test set a passing score at seventy percent (70%). Ms. Gordon sat for the written assessment test on May 29, 2019 and was assigned a score of fifty-four percent (54%). The failure to attain a passing score of seventy percent (70%) was determined by the Employer to reflect that Ms. Gordon had not met the minimum qualifications for the posted position and was declared the reason the Employer was not offering an interview to the grievant.

On June 14, 2019 Ms. Gordon filed a grievance with the Employer alleging a violation of the parties' collective bargaining agreement by the Employer through the denial of an interview, citing Article 2, 16, and 17 as having been violated.

The Employer contends that neither the Union nor Ms. Gordon has presented any evidence indicating a violation of Article 2, Non-Discrimination.

The Employer argues that neither the Union nor Ms. Gordon has presented any evidence to the hearing record indicating manipulation in the scoring of the grievant's written assessment test. The Employer points out that in questioning the accuracy of the scoring of Ms. Gordon's written assessment test, only three questions were identified as questionable, questions 1, 2, and 3 in Test Booklet #1.

As to question 1 in Test Booklet #1, the question refers to a chart that presents unemployment rates for the U. S., the State of Ohio, and for Columbus, Ohio. This question asks the test taker to construct a narrative that compares and contrasts the unemployment rates for the three areas. An answer that included a response presented in the answer key was awarded one point. A maximum of seven (7) points was available from this question. Responses from the test taker not mentioned in the answer key were to be awarded, in the aggregate, a maximum of one point.

The Employer examines in detail the narrative provided by Ms. Gordon in response to question

1 in Test Booklet #1 and finds that Ms. Gordon provided one correct response and should have received a score of one point for her answer. The rest of her narrative was found by the Employer to not be comprised of complete sentences or the responses were not accurate. <sup>1</sup>

As to question 2 in Test Booklet #1, the Employer found that Ms. Gordon's response had been correctly awarded two (2) points, one point for each of two correct answers within Ms. Gordon's response to this question.

As to question 3 in Test Booklet #1, a chart is presented reflecting Ohio Non-Agricultural Employment Estimates. The Employer, in examining each sentence in Ms. Gordon's response to question 3 in Test Booklet #1, concludes that the two correct answers provided in Ms. Gordon's narrative for this question were correctly awarded a total of two (2) points.

The Employer points out that Ms. Gordon's written assessment test was scored on three separate occasions and on each occasion the score determined was less than seventy percent (70%).

The Employer contends that the initial application is screened for an initial determination of whether minimum qualifications are met by an applicant. The Employer points out that those applicants making it through the initial determination of minimum qualifications are then invited to sit for the written assessment test, a device used by the Employer to further determine whether minimum qualifications for the posted position are met. The authority for this practice cited by the Employer is Article 17, section 17.05, language that empowers the Employer to "... use selection devices, proficiency testing and/or assessments to determine if an applicant meets minimum qualifications and, if applicable, to rate applicants pursuant to Section 17.05." Article 17, section 17.05 also includes language that specifies: "Selection devices (e. g. structured interview, written test, physical ability, etc.) may be used at the discretion of the Agency."

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<sup>1</sup> The original score for this question had been two points.

The Employer argues that the written assessment test was a screening tool to determine minimum qualifications. Without attaining a passing grade of seventy percent (70%), the grievant is unable to show an entitlement to move ahead in the selection process to an oral interview. The Employer contends that the facts of this case do not raise the issue of whether Ms. Gordon's score is substantially equal to the score of the applicant selected. The applicant selected attained a passing score on the written assessment test reflecting meeting minimum qualifications; the grievant did not attain a passing score on her written assessment test, reflecting not meeting minimum qualifications; the score of Ms. Gordon's written assessment test cannot be viewed as substantially equal to a passing grade on the written assessment test.

The Employer contends that neither the Union nor Ms. Gordon has presented evidence proving that the Employer violated any part of the parties' collective bargaining agreement in denying the grievant an interview. The lack of a passing grade from Ms. Gordon for her written assessment test was the reason Ms. Gordon was determined not to meet minimum qualifications for the Account Executive position and was the reason an interview was not offered to the grievant.

The Employer contends that no violation of the parties' collective bargaining agreement has been shown and therefore urges the arbitrator to dismiss the grievance in its entirety.

## DISCUSSION

The grievance underlying this proceeding was not prompted by disciplinary action and is a grievance initiated by the Union. This circumstance requires the Union to carry the burden of proof in this case if the Union is to prevail.

The grievance underlying this proceeding was filed on June 14, 2019, charging the Employer with a breach of the parties' collective bargaining agreement through violating Article 2, Non-



Discrimination; Article 16, Seniority; and Article 17, Promotions, Transfers, Demotions and Relocations.

Article 2, Non-Discrimination, in section 2.01, Non-Discrimination, prohibits the Employer and the Union from discriminating in a way that is inconsistent with the laws of the United States or the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, disability, sexual orientation, or veteran status.

Article 2.02, Agreement Rights, provides that no employee shall be discriminated against, intimidated, restrained, harassed, or coerced in the exercise of rights granted by the parties' collective bargaining agreement, nor shall the employee be reassigned for these purposes.

The discrimination prohibited by Article 2 arises from the non-uniform application of policies and procedures to employees based upon one or more of the categories enumerated in Article 2, section 2.01.

The arbitrator does not find a preponderance of evidence in the hearing record proving that the grievant suffered discrimination in the application of procedures, processes, and policies that related to posting, bidding on, and selecting a candidate to fill the posted position. There is not a preponderance of evidence in the hearing record showing the grievant to have been intimidated, restrained, harassed, or coerced in the exercise of her rights under the parties' collective bargaining agreement.

The hearing record does indicate that Ms. Gordon's written assessment test was graded by two scorers rather than three. It appears however that the selected candidate, Mr. Hawkins, also had his assessment test scored by two scorers rather than three, the same two scorers who had scored Ms. Gordon's assessment test. The use of two scorers rather than three scorers may be at variance with customary practice but it does not persuade the arbitrator that it indicates a form of discrimination prohibited by Article 2. The arbitrator finds no evidence indicating that this differences arose from an

intention by the Employer to discriminate against the grievant so as to disadvantage her, or was grounded in an improper motive related to race, sex, creed, color, age, national origin, or any of the other protected classes enumerated in Article 2, section 2.01.

The arbitrator was nonetheless surprised at the wide variance in scoring the assessment tests of Ms. Gordon, Ms. Watkins, and Mr. Hawkins, when comparing the original scoring done by the two scorers in May 2019 to the re-scoring performed by nine (9) re-scorers in December 2019. The re-scoring that occurred in December 2019 among nine (9) re-scorers, some of whom had served as original scorers of the assessment tests being re-scored, produced a consensus that Ms. Watkins' score be reduced from sixty-six (66) points to forty-nine (49) points, a drop of twenty-six percent (26%) in comparison to the original score assigned to Ms. Watkins. Mr. Hawkins' original score of eighty-four (84) points was recommended by a consensus of the nine (9) re-scorers to be changed to seventy-one (71) points, a fifteen percent (15%) drop in points compared to the original score assigned to Mr. Hawkins' written assessment test.

Ms. Gordon's original score of fifty-four (54) points was recommended by a consensus of the nine (9) re-scorers to be increased to sixty-five (65) points, an increase of twenty percent (20%) in comparison to the original score assigned to the grievant's written assessment test.

In re-scoring Ms. Gordon's written assessment test an error was discovered in applying the answer key in the original scoring of Ms. Gordon's assessment test. As noted in Ms. Jancso-Kocarek's August 1, 2019 letter, question 14 in Ms. Gordon's test was originally scored as offering two (2) points for each correct answer for a maximum of fifteen points instead of applying five (5) points for each correct answer for a maximum of fifteen points as is called for by the test booklet and the answer key. Ms. Jancso-Kocarek points out in her letter of August 1, 2019 that Ms. Gordon had provided two (2) correct answers to question 14 and should have been assigned five (5) points for each correct answer

for a total of ten (10) points as the score for question 14, rather than the four (4) points assigned in the initial scoring. The correction in the scoring of question 14 would net an additional six (6) points for Ms. Gordon's score, raising it to sixty (60) points. The arbitrator presumes that part of the change recommended to Ms. Gordon's original assessment test score was intended to correct the scoring error. The hearing record does not reveal the reason for the additional five (5) points recommended by the re-scorers to be added to Ms. Gordon's score nor does the hearing record disclose the reasons Ms. Watkins' and Mr. Hawkins' original scores were subsequently determined to have been so inflated.

The wide range in scoring indicated by comparing the original scores to the re-scoring that occurred six months later, with substantial drops in the scores of Ms. Watkins and Mr. Hawkins and a substantial increase in the score of Ms. Gordon, tends to support the grievant's claim that parts of the assessment test are open to subjective judgments in determining how points are to be awarded in scoring the test. If the test were to be determined totally objective, how does one explain the wide differences in scoring?

The arbitrator remains persuaded that identical questions were presented in each of the written assessment tests completed by the candidates; the answer key for the written assessment test was applied uniformly in scoring the written assessment tests; a manipulation or alteration of the scoring of the written assessment tests has not been substantiated by a preponderance of the evidence in the hearing record.

The grievance herein balances on the agreed language presented in Article 17 of the parties' collective bargaining agreement, Promotions, Transfers, Demotions and Relocations. Article 17, section 17.01 reserves to the Employer the right to determine which vacancies are to be filled and whether the vacancies are to be filled through a permanent transfer under Article 17, section 17.07 or a promotion, transfer, or demotion.

Article 17, section 17.02(B) defines “promotion” as the movement of an employee to a posted vacancy in a classification with a higher pay range within the same agency. Article 17, section 17.02 (E) defines “vacancy” as an opening in a permanent full-time position or a permanent part-time position within a specified bargaining unit covered by the parties' Agreement which the Employer determines to fill. “Vacancy” does not include positions identified through mutual agreement between the Union and the Employer as positions to be excluded from the bargaining unit.

Article 17, section 17.03, Posting, provides that all vacancies within the bargaining unit which the Employer intends to fill are to be posted, with each position posting presenting the position's classification title, the deadline for submitting a bid on the position, the position's pay range, and whether the posted position is to be filled through a promotion.

There has been no issue raised concerning the posting of the Account Executive position. The posting occurred in April 2019; the grievant submitted a timely and appropriate bid in response to the posted position; neither party has raised any issue as to the posting carried out in this case; there is no evidence in the hearing record substantiating any violation of Article 17, section 17.03, Posting.

Article 17, section 17.04, Applications, empowers employees to file timely applications to posted positions to be filled through promotions, with applicants to specify in their applications how they possess the minimum qualifications for the position sought.

Article 17, section 17.05, Selection, provides that if the posted position to be filled is in a classification assigned to pay range twenty-eight (28) or higher, the position is to be awarded to an eligible bargaining unit employee on the basis of qualifications, experience, education, and active disciplinary record. When these factors are substantially equal, Article 17, section 17.05 provides that State seniority shall be the determining factor.

The facts of this case reveal a posting in compliance with Article 17, section 17.03 and an

application submitted by Ms. Gordon in compliance with Article 17, section 17.04. The position sought by the grievant would, if the grievant were to be selected for the position, constitute a promotion as this term is defined by Article 17, section 17.02(B). It is also the case that the candidate selected, Mr. Hawkins, and the grievant, Ms. Gordon, had no active disciplinary record, both were determined to have met the minimum acceptable characteristics required by the position description for Account Executive, and the grievant, Ms. Gordon, possessed greater State of Ohio seniority than that possessed by Mr. Hawkins, the selected candidate. See Joint Stipulations 7, 8, and 9.

Article 17, section 17.05 also includes the following: “Selection devices (e. g. structured interview, written test, physical ability, etc.) may be used at the discretion of the Agency.”

Article 17, section 17.06, Selection devices/proficiency instruments/assessments, begins with the following:

The Employer may use selection devices, proficiency testing and/or assessments to determine if an applicant meets minimum qualifications and, if applicable, to rate applicants pursuant to Section 17.05.

The agreed provisions of Article 17, sections 17.05 and 17.06 make clear, through express language, that in adjudging candidates within a selection process initiated by a posted position that comprises a promotion, the Employer may require that candidates sit for selection devices that may include a written test, in this case what is called a written assessment, consisting of three test booklets. This selection device, the written assessment test, includes multiple choice questions for which test takers are to determine the best answer for each question, and poses other forms of questions that are intended to gauge writing skills, reading and comprehension, knowledge of subject matter, and knowledge of grammar and punctuation.

Each of the candidates competing for an Account Executive position in Cuyahoga County

received the same written assessment test and there is nothing in the hearing record that indicates the grievant's assessment test, after having the original scoring of question 14 corrected, was scored differently in comparison to the written assessment test's answer key or in comparison to how other candidates were scored. A test taker may take issue with the fairness or clarity of questions in the written assessment test but if the grievance herein is to be sustained, the arbitrator must be presented with a preponderance of evidence in the hearing record proving that the grievant was treated in a disparate manner for a wrongful purpose, and that this discriminatory treatment is the reason the grievant, the candidate with the most State of Ohio seniority, was not selected for the position.

The arbitrator, as stated above, does not find evidence of discrimination or mistreatment of the grievant. The arbitrator does find that the scoring applied to the grievant's written assessment was in conformity with how scoring was to occur on all candidates' written assessment tests by applying the answer key that presented correct answers and the points to be awarded for correct answers. The arbitrator finds the scoring of the multiple choice questions to have been correct, as was the scoring for the correct answers provided in questions 1, 2, 3, and 14. The arbitrator finds the points and percentage produced by the corrected scoring of the grievant's written assessment test did not attain the minimum score required to move on in the selection process, the next step in the selection process being an interview.

In the absence of evidence proving discrimination, in the absence of evidence proving non-uniformity in testing or scoring, and in the absence of evidence indicating a manipulation of the scoring of the grievant's written assessment test, the arbitrator does not find sufficient evidence in the hearing record to uphold the grievance. The arbitrator finds the grievance has not been proven and therefore the arbitrator orders the grievance dismissed.

## AWARD

1. The grievance underlying this proceeding is arbitrable under the language of the parties' collective bargaining agreement.
2. Management did not violate the OCSEA collective bargaining agreement by denying the Grievant an interview for a posted Account Executive (PN 20042349) position in the Office of Workforce Development (OWD).
3. The grievance is denied.

Howard D. Silver

Howard D. Silver, Esquire  
Arbitrator

P. O. Box 14092

Columbus, Ohio 43214

[hsilver@columbus.rr.com](mailto:hsilver@columbus.rr.com)

Columbus, Ohio  
May 13, 2021

CERTIFICATE OF SERVICE

I hereby certify that duplicate, signed originals of the foregoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO and the State of Ohio, Department of Job and Family Services, grievance number: JFS-2019-02223-09, Grievant: Suzanne L. Gordon, were directed electronically to the following this 13<sup>th</sup> day of May, 2021:

David Harper  
Staff Representative  
OCSEA/AFSCME, Local 11, AFL-CIO  
390 Worthington Road, Suite A  
Westerville, Ohio 43082-8331  
[dharper@ocsea.org](mailto:dharper@ocsea.org)

Kevin Whaley  
Labor Relations Officer 3  
Employee and Business Services  
Ohio Department of Job and Family Services  
30 East Broad Street, 30<sup>th</sup> Floor  
Columbus, Ohio 43215  
[Kevin.Whaley@jfs.ohio.gov](mailto:Kevin.Whaley@jfs.ohio.gov)

and

Eric Eilerman  
Policy Analyst  
Office of Collective Bargaining  
Ohio Department of Administrative Services  
1602 West Broad Street  
Columbus, Ohio 43223  
[eric.eilerman@das.ohio.gov](mailto:eric.eilerman@das.ohio.gov)

Howard D. Silver

Howard D. Silver, Esquire  
Arbitrator  
P. O. Box 14092  
Columbus, Ohio 43214  
[hsilver@columbus.rr.com](mailto:hsilver@columbus.rr.com)

Columbus, Ohio  
May 13, 2021