

Arbitration Decision and Award

Arbitrator: Jack Buettner
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In the Matter of:)
)
The State of Ohio Department)
Of Health)
)
and)
)
SEIU District 1199 WV/KY/OH)

Case No.: DOH-2021-00291-11

Date of Meeting: July 27, 2022

Briefs Received: September 29, 2022

Date Decision Issued: November 1, 2022

Advocate for the Employer:

Debra Payne
Ohio Department of Health
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Advocate for the Union:

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Appearances for the Employer:

Debra Payne	Labor Relations Officer 3
Marisah Ali	Office of Collective Bargaining
Angela Norton	Health Planning Adm 3, ODH
Laura Rooney	Program Manager 3, ODH
Cherene Smith -Watkins	Human Capital Management Manager, ODH
Anna Starr	Health Planning Adm 3, ODH

Appearances for the Union:

Joshua Norris	Executive Vice President SEIU 1199
Molly Kelly	Grievant – ODH Public Health Nurse Specialist

Joint Exhibits:

- #1 Grievance Trail
- #2 Collective Bargaining Agreement between SEIU District 1199 and the State of Ohio, 2018-2021
- #3 Job Posting for Health Services Policy Analyst
- #4 Qualifications Assessment Grid score for Molly Kelly
- #5 Qualifications Assessment Grid score for Sara Haig
- #6 Structured Interview Questions for Molly Kelly: Norton
- #7 Structured Interview Questions for Molly Kelly: Starr
- #8 Structured Interview Questions for Molly Kelly: Rooney
- #9 Structured Interview Questions for Sara Haig: Norton
- #10 Structured Interview Questions for Sara Haig: Starr
- #11 Structured Interview Questions for Sara Haig: Rooney
- #12 Final Selection Results

Employer Exhibits:

- A. Position Description: Public Health Nurse Specialist
- B. Position Description: Health Services Public Analyst
- C. Job Posting: Health Services Policy Analyst
- D. Health Services Policy Analyst Classification Specification
- E. Molly Kelly Job Application
- F. Sara Haig Job Application
- G. Qualifications Assessment Grid for Kelly and Haig
- H. Interview Questions, Interviewers Norton, Starr, and Rooney: Molly Kelly
- I. Interview Questions, Interviewers Norton, Starr, and Rooney: Sara Haig
- J. Enhanced Selection Process for OCSEA & SEIU/1199
- K. Final Selection Results
- L. Arbitration Case
- M. Article 30.02 of the Collective Bargaining Agreement

Union Exhibits:

- #1 Employee Performance Evaluation, ODH, Molly Kelly, 2014-2015
- #2 Manager Evaluation, 3-16-2015
- #3 Manager Evaluation, 3-16-2016
- #4 Manager Evaluation, 11-16-2018
- #5 Manager Evaluation, 3-16-2020
- #6 Molly Kelly Job Application

- #7 Notes used at interview
- #8 Letter of Recommendation
- #9 Ohio Adolescent Health Partnership: invited to attend
- #10 Agenda: Human Trafficking Conference
- #11 Human Trafficking Conference: additional information
- #12 Human Trafficking Conference: Goal
- #13 Ohio Reproductive Health and Wellness Program
- #14 Agenda: RHWP Project Director's Meeting
- #15 Title X Program Review Advanced Information Request
- #16 Case Study: Meeting Clients' Substance Use and Family Planning Needs Simultaneously
- #17 Ohio Journal of Public Health Research Article
- #18 Ohio Collaborative for the Prevention of Infant Mortality: OCPIM Action Group Summary
- #19 OCPIM Action Group 2: Pre & Interconception Care
- #20 Promoting Optimal Women's Health: Before, During and After Pregnancy
- #21 Budget Request for FY20-21, written by Molly Kelly
- #22 ODH RHWP Title X Program Review, Federal Tool
- #23 Email: Preliminary report for RHW campaign
- #24 Email: Notes from 8/23 Bureau Planning Group
- #25 Campaign FY21: Reproductive Health
- #26 Email: Thank you for your help with Fiscal Guidance Document
- #27 This Side Up
- #28 Pre & Interconception Care Change Packag

BACKGROUND:

Molly Kelly, the Grievant, is a Registered Nurse employed by the Ohio Department of Health (hereafter referred to as “ODH” or the “Employer”) as a Public Health Nurse Specialist. Her title is that of Public Health Consultant, and she has been employed by ODH since February 28, 2010. Sara Haig has been employed by ODH since August 26, 2013 and has the title of Adolescent Health/Youth Homelessness Coordinator. Both are members of SEIU District 1199 WV/KY/OH (hereafter referred to as the “Union”). The Parties are operating under a Collective Bargaining Agreement that is in effective from 2018-2021.

Both Parties stipulate to the following:

1. The grievance is properly before the Arbitrator and there are no procedural objections.
2. Molly Kelly has a state seniority date of October 27, 2008.
3. Sara Haig has a state seniority date of August 26, 2013.
4. Molly Kelly is more senior than Sara Haig regarding SEIU District 1199 seniority credits.
5. Both Sara Haig and Molly Kelly meet the minimum qualifications for the position in question, the Health Service Policy Analyst.
6. Candidates Kelly and Haig both scored a 71 on the Qualifications Assessment Grid.
7. Candidates Kelly and Haig were both interviewed by the same 3 individuals: Angela Norton, Laura Rooney, and Anna Starr.
8. Molly Kelly’s final selection result was 77.13% and Sara Haig’s was 96.03% on the Final Selection Results document created by ODH.

ISSUE:

Did the Employer violate the terms of Article 30 of the Collective Bargaining Agreement when they awarded the position of Health Services Policy Analyst to the least senior applicant instead of the most senior qualified applicant and, if so, what shall the remedy be?

EMPLOYER POSITION:

The Employer contends that they did not violate the collective bargaining agreement (CBA) by selecting a less senior candidate for the position of Health Services Policy Analyst. Article 30 states, "Among those that are qualified the job shall be awarded to the applicant with the most state seniority unless a junior employee is significantly more qualified based on the listed criteria." (Employer Exhibit M) ODH argues that Ms. Haig was significantly better qualified than Grievant Kelly.

The candidate's background experience shows that Grievant Kelly's duties in her ODH position are primarily clinical as outlined in the position description for her job. (Employer Exhibit A) Ms. Haig's experience, however, included more data driven work including utilizing quantitative and qualitative data from multiple sources, developing methodologies, preparing statistical and analytical reports, and conducting analytical studies as evidenced in the position description for her job. (Employer Exhibit B)

While the Union argues that the job posting should have included Position Specific Minimum Qualifications (PSMQ's) emphasizing the required data-driven skills, ODH contends that the posting and attached position description delineate the needed skills. (Employer Exhibit C) Further, the Health Services Policy Analyst classification specification (Employer Exhibit D) also references necessary data driven skills.

Based on the Qualifications Assessment Grid, both candidates scored seventy-one (71)

points indicating that they met the initial requirements for the position. The next step in the selection process was the Structured Interview. The interview panel was comprised of three (3) people who asked each candidate twelve questions. They made written notations of their responses, compared them to a list of benchmark responses, and recorded a numerical rating between one (1) and ten (10) for each question. Both candidates were asked the same questions and given an equal opportunity to share details about their education, skills, and experience as it pertains to the position. Grievant Kelly received a Final Selection Score of 77.13%. Ms. Haig received a Final Selection Score of 96.03%, scoring higher on several data-related questions. Thus, the position was awarded to Ms. Haig.

The Employer further contends that the interview and selection process was fair, objective, and consistent. ODH used the Enhanced Selection Process (ESP) (Employer Exhibit J) which the Hiring Managers and interview panelists are required to follow when evaluating and rating candidates for a posted position. It is an objective method that combines the Qualifications Assessment Grid with structured interviews with three (3) panelists that included the Hiring Manager and others familiar with program subject matter. The ESP process has been used since 2001. The Union did file a grievance related to ESP (Employer Exhibit L) in 2008. It was arbitrated by Mr. Dwight Washington and his decision supported the ESP process. Thus, the Employer awarded the job to Ms. Haig since she scored significantly higher on the Final Selection Score for the Structured Interview even though she had less seniority than Grievant Kelly.

UNION POSITION:

The Union contends that seniority should have been the deciding factor when selecting between the two (2) candidates for the position of Health Services Policy Analyst. The CBA allows the Employer to circumvent seniority only when a junior candidate is proven to be significantly more qualified than the senior qualified applicant. The Union argues that ODH did not prove that Ms. Haig was significantly more qualified than Grievant

Kelly.

First, the Employer did not have the selected candidate testify at the hearing to provide insight into her qualifications and expertise. The hearing was then based on recollections and notes from the interview process with no opportunity for cross examination. Grievant Kelly, on the other hand, testified as to her knowledge of the position, what she currently does, as well as highlighting her accomplishments during her time at ODH. (Union Exhibits # 9, 10,11,12 13,14,15,16,17,18,19,20, 21, 22,23, 24, 25, 26, 27, and 28) Further, Grievant Kelly has five (5) more years of experience with ODH. The Union cited an arbitrator who posited that experience in and of itself may increase one's skill and ability.

While both candidates scored a seventy-one (71) on the Assessment Grid, what the Union considers an objective measurement, the Union argues that the Structured Interview Process was a subjective tool. It had no answer key and allowed personal opinions and biases to affect the scoring. The only proof of what occurred during the interviews was notes taken by the interviewers which are a record of what they heard, processed, and chose to write down. The Union further argues that the interviewers were unable to fully explain why each score was the number that it was. They relied on their own interpretations and assumptions to support their given scores. Nothing measurable was presented by any of the State's witnesses.

Article 30 of the CBA (Joint Exhibit #2) states, "The Employer may use selection devices, proficiency testing and/or assessments if an applicant meets minimum qualifications and, if applicable, to rate applicants pursuant to this Section." Since interview is not listed, the Union believes that it is not an acceptable means of rating applicants.

Elkouri and Elkouri (8th Ed. Pgs. 296-297) states that, "Arbitrators generally hold that tests used in determining ability must be (1) specifically related to the requirements of the job, (2) fair and reasonable, (3) administered in good faith and without

discrimination, and (4) properly evaluated.” The Union contends that the Structured Interview was not a test and it was not properly evaluated. Thus, the Employer failed to meet their burden of establishing that the candidate was significantly more qualified for the position.

AWARD AND DECISION:

The Union contends that seniority should be the deciding factor in selecting the person for the position of Health Services Policy Analyst since both candidates scored the same on the Assessment Grid, a 71. In their opening statement, the Union went further to say that, “The Employer did not bargain for, nor are they supposed to be seeking the MOST qualified candidate for the position.” This Arbitrator would disagree. Article 30 of the CBA states, “Among those qualified the job shall be awarded to the applicant with the most state seniority unless a junior employee is significantly more qualified based on the listed criteria.” This article allows the Employer to look further into the qualifications of each applicant in order to make a final determination.

A tool was developed, the Enhanced Selection Process (ESP), for the purpose of establishing “a fair and objective selection process by which the Ohio Department of Health can determine the ‘Best Qualified’ bargaining unit candidate for all OCSEA/AFSME (“OCSEA”) positions in Pay Range 28 or above and for SEIU/1199 positions”. (Management Exhibit J) The ESP process is comprised of three (3) parts: the Minimum Qualifications Screening, the Qualifications Assessment, and the Structured Interview. The ESP process has been in place for over twenty (20) years. It contains both quantitative and qualitative measures, an interview panel, and use of corrective measures to address any abnormalities during the process. It was revised in 2006 as a result of an arbitration award to make sure the Structured Interview would be validated

by competent and reasonable evidence, and the Employer has made periodic adjustments in ensuing years. All revisions were shared with the Union, and they did not challenge revisions. Also, as stated earlier, an arbitration by Dwight A. Washington (Exhibit L) upheld this process.

The Union has no issue with the first two (2) parts. They deem it to be an objective measure of the candidates' abilities. The Union contends that the Structured Interview, however, is not a valid instrument to determine if one candidate is more qualified than another since it is more subjective. Further, it is not listed in Article 30. Article 30 states, "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 the Section." While interviews are not listed per se, they are a "selection device" and are often used by employers. Article 30 does not specifically exclude interviews. Another paragraph in Article 30 states the following, "The Employer maintains the right to use a selection device (e.g., structured interview, written test, physical ability, etc.) to measure the listed criteria. Thus, the use of the structured interview is within the Employer's rights to determine a most qualified applicant since both Grievant Kelly and Ms. Haig met the minimum requirements.

While the union argues that the Structured Interview is a subjective assessment, the creators of the instrument have taken measures to make it as objective as possible. First, the interview panel is comprised of three (3) people with a variety of experience and backgrounds. One interviewer was the hiring manager, another was a Health Planning Administrator, and the last was a subject matter expert. The candidates' applications were not shared with the panelists prior to the interviews, thus creating a level playing field since each candidate would be evaluated solely upon their responses to the interview questions. Each candidate was asked the same twelve (12) questions by each panelist and given the same opportunity to respond. Questions could be repeated but the panelists could not ask clarifying questions or allow candidates to elaborate on their responses beyond their initial statements.

Each interview question was linked to the content of the approved position description with a justifications section where required skills and knowledge and/or abilities supporting each question were identified. Thus, the questions were shown to directly relate to the job position.

The Union argues that there was no answer key for the interview questions.

Benchmarks, however, were set for each question which serve as preset criteria. A benchmark, by definition, acts as a standard by which something or someone can be measured. The panelists were able to look at the benchmarks and decide where the candidate fell in relation to that criterion. They then documented the responses. Many of the questions didn't lend themselves to a right or wrong answer and are based on the experiences and backgrounds of each individual. Thus, an answer key would not be appropriate.

Yet another checkpoint in the ESP process was that after all interviews were completed, interviewers got together and reviewed the individual scores. Any variance of more than two (2) points was to be discussed and the discussion notated. Ms. Cherise Smith-Watkins, ODH's internal ESP Specialist, testified that the interview notes and ratings were consistent and based on the candidates' responses to the interview questions.

Grievant Kelly scored significantly lower on three (3) questions in particular. Question #5 asks, "In this position, you will be responsible for preparing and disseminating information via written reports and oral presentations, as well as respond to questions and inquiries from a variety of stakeholders throughout the state. How do you approach preparing a report or presentation?" Grievant Kelly had a cumulative score on this question thirteen (13) points lower than Ms. Haig. Question #8 asks, "One component of your duties may involve communicating with information technology (IT) staff to correct bugs, make system enhancements, or make system updates or changes. What strategies would you use to ensure the data managed by IT matches what the program needs?" Grievant Kelly had a cumulative score on this question seventeen (17) points lower than Ms. Haig. Question #10 asks, "You will be establishing relationships with

other programs, state agencies, and organizations regarding adolescent health and homeless youth initiatives, including working on data sharing and use. How would you go about establishing these relationships and work with others who are hesitant to share data?” Grievant Kelly had a cumulative score on this question fifteen (15) points lower than Ms. Haig. These questions and many of the others focused on data, data analysis, and technology. Grievant Kelly clearly scored lower in these areas and lacked some of the technical skills and knowledge referenced in the benchmarks.

The Union submitted exhibits for Grievant Kelly dating back to 2014 including performance evaluations and meeting agendas from workgroups on which she served. The Employer, in its closing brief, does not dispute, “that the Grievant is a long-term, well-regarded employee who had performed her Public Health Nurse Specialist duties in an exemplary manner.” Her position, however, is primarily clinical. The Health Services Policy Analyst position, on the other hand, is much more technical, analytical, and data driven. These qualities were enumerated in the job posting description (Employer Exhibit C) and further in the State of Ohio Classification Specification (Employer Exhibit D).

The ESP process does allow for someone with a lower score but more seniority to be awarded a position. A “competitive range” is determined based upon the range of possible scores from the highest Final Selection Score to the calculated score. Any candidate scoring in this range is considered “substantially equal” or “not significantly more qualified.” Thus, a candidate whose score is in the competitive range and has more seniority would be awarded the position even though their score may not be the highest. In Grievant Kelly’s case, Ms. Haig had a Final Assessment score of 96.03%. Grievant Kelly had a Final Assessment score of 77.13%. The Competitive Range was 86.22% and up. Had Grievant Kelly scored in that range, she would have been awarded the position. Since both candidates would have been considered equal, the Grievant, having more seniority, would have been awarded the position.

Based on the entire record including witnesses and their testimony and after considering the exhibits submitted by the Parties, this Arbitrator finds that the Ohio Department of Health did not violate Article 30 of the Collective Bargaining Agreement. The Union's grievance is denied.

CERTIFICATE OF SERVICE

The foregoing report was delivered via email on this the
the 1st day of November, 2022, to

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and

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Jack Buettner

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