

OFFICE OF THE ARBITRATOR

February 7, 1990

In the Matter of the Arbitration between:

THE STATE OF OHIO)	
Office of Collective Bargaining)	
)	
and)	Grievance No.
)	28-06-890505-0002-12
OHIO HEALTH CARE EMPLOYEES UNION)		
DISTRICT 1199, WV/KY/OH NATIONAL)		John Deck
UNION OF HOSPITAL AND HEALTH)	RAC / APA
CARE EMPLOYEES, AFL-CIO)	

APPEARANCES

12/19/89

For the State

Lou Kitchen	Advocate, OCB
Rodney Sampson	Advocate, OCB
Rebecca L. Fair	Personnel Coordinator, DR & C
James J. Robincheck	Regional Admin. A.P.A., DR & C
Charles R. Adams	Labor Relations Officer, DR & C
Valerie Butler	Observer

For the Union:

Tim Fogt	Representative
Stephen L. Phillips	Delegate
John Deck	Grievant

Arbitrator

Earl M. Curry, Jr.

BACKGROUND

The instant arbitration arose as the result of a grievance filed on May 1, 1989, by the Ohio Health Care Employees Union District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, AFL-CIO (the "Union") on behalf of four Parole Officers employed by the Toledo District office of the Ohio Department of Rehabilitation and Correction, Adult Parole Authority (the "State") protesting the action of the State in its selection of Mr. Joseph Dubina, a Parole Officer 2, for promotion to a Parole Services Coordinator position, allegedly in violation of the parties Contract. At the Step 3 grievance meeting on this matter the Hearing Officer determined that the previous selection of Mr. Dubina was in error and that Mr. Steven Lohmeyer (one of the four Parole Officers mentioned above) should have been selected for the position. Thereafter, Lohmeyer was promoted to the position. In keeping with its own policy Mr. Dubina was not demoted from the position he was erroneously selected for, and both Dubina and Lohmeyer are to continue in the positions of Parole Services Coordinator until one of them vacates it.

The Union disagreed with the findings of the Step 3 Hearing Officer in that the most senior applicant/Grievant (John Deck) had not been selected and appealed the grievance to Step 4. The position of the State, in its Step 4 response, was that the

grievance had been granted at Step 3 and was, therefore, moot. The grievance was then referred to arbitration.

At the arbitration hearing the parties stipulated the following facts:

1. The position of Parol Service Coordinator was properly posted;
2. The applicant (John Deck) did not have discipline with respect to this dispute.

STATEMENT OF FACTS

The Grievant, John Deck, has been employed by the Adult Parole Authority for six years and has approximately 17 years of service with the State of Ohio. The Grievant, along with the other applicants for the position in question, was interviewed on March 20, 1989, by three members of the management staff at the Toledo District office. At that interview each applicant was asked a series of five questions taken from departmental bulletins and related to the work that Parol and/or Probation Officers perform. The maximum number of possible points assigned to this oral interview was three. With the exception of this oral interview, the source of the information used for the rating of the applicants came from their applications and personnel evaluations of the last five years. Including the three point maximum for the oral interview, the total number of points under this evaluation process is twenty-two.

Due to certain scoring discrepancies among the three original raters a meeting was held in Columbus on April 17, 1988, to attempt to resolve these discrepancies. At that meeting a consensus was reached that only Dubina and Lohmeyer should be considered for the appointment based on their ratings. It was also determined that Dubina had a total of 17 points and Lohmeyer a total of 14. Since Lohmeyer (the more senior applicant of the two) did not score within two points of Dubina it was determined that they were not to be considered relatively equal and seniority did not control and, therefore, Dubina was given the position in question.

After the instant grievance was filed the four applicants'/ Grievants' application were again reviewed by management personnel. At this review Dubina's score was adjusted downwards to 15 points when it was determined he had incorrectly been awarded two points for work performance. Lohmeyer's score, however, was adjusted upwards by two points when it was determined that he had not been credited with any points for work direction giving him a new total of 16 points. The Grievant, John Deck's score was also adjusted upwards by one point for experience for a new total of ten. As a result of this second review the applicants were now scored as follows:

<u>Name</u>	<u>Ed.</u>	<u>Experience</u>	<u>Wk. Perf.</u>	<u>Qual.</u>	<u>Int.</u>	<u>Total</u>
John Deck	4	4	2	0	0	10
Penni Fields-LaConey	0	3	2	4	1	10
Barbara Griswold	5	3	0	2	0	10
Steven Lohmeyer	5	4	2	4	1	16
Joseph Dubina	5	3	0	4	3	15

Since Mr. Dubina and Mr. Lohmeyer were within two points of each other they were, under the procedures followed, now determined to be relatively equal, and seniority now governed pursuant to Section 28.02 of the parties Contract. As stated above, the Step 3 Hearing Officer then determined that Mr. Lohmeyer should have been selected for the position in question and Lohmeyer was promoted to the position retroactive to May 7, 1989, the original selection date. The Union disagreed with the selection of Lohmeyer and, as stated above, this arbitration then ensued.

ISSUES

1. Was the selection for and promotion to the position of Parol Services Coordinator (PCN #8350.0 Lucas County) in accordance with the criteria set forth in the Contract?

2. Was the above issue mooted and therefore not arbitrable as a result of the State action at Step 3 of the grievance process?

PERTINENT CONTRACT PROVISIONS

ARTICLE 28 - VACANCIES

§ 28.02 Awarding the Job (Transfers and Promotions)

Applications will be considered filed timely if they are received or postmarked no later than the closing date listed on the posting. All timely filed applications shall be reviewed considering the

following criteria: qualifications, experience, education and work record. Where applicants' qualifications are relatively equal according to the above criteria, the job shall be awarded to the applicant with the greatest state seniority.

Job vacancies shall be awarded in the following sequential manner:

A. The job shall first be awarded to an applicant working at the facility where the vacancy exists in accordance with the above criteria;

B. If no selection is made from A above, the job shall be awarded to an applicant working in the agency where the vacancy exists in accordance with the above criteria;

C. If no selection is made from B above, the job shall be awarded to an applicant working in the bargaining unit in accordance with the above criteria;

D. If no selection is made from C above, the job may be awarded by hiring a new employee.

Within non-institutional agencies and within the Adult Parole Authority, step A above shall not apply.

This agreement supercedes Ohio Civil Service Laws and Rules regarding eligibility lists for promotions.

CONTENTIONS OF THE PARTIES

Union's Contentions

The Union contends that the position of Parole Service Coordinator (PCN #8350.0 Lucas County) was not awarded according to the criteria of the contract. In this regard it objects to both the process of selection used in the instant case and to the selection actually made. In regard to the process used in the selection, the Union objects to the use of an interview, on the

basis that the interview is not included in the criteria set forth in Article 28.02. It also objects to the range of points used by management to determine "relatively equal". It is the Union's position that since all of the applicants (Grievants) were satisfactorily performing their jobs, they were all "relatively equal" to each other and, therefore, seniority must determine the selection. It contends, therefore, that Grievant John Deck, being the most senior of all the applicants, is entitled to the position in question pursuant to Section 28.02.

The Union also contends that if the oral test is to be used then, as a Civil Service Agency, the applicants should have been given study guides prior to their testing, or, alternatively, they should have had a "blind test." It argues that the scoring of the interview questions was subjective in nature and further, that the perception of the responses was subjective. It asks, accordingly, that the grievance be sustained and that the State be directed to promote John Deck to the position since he was the most senior of the "relatively equal" applicants.

State's Contentions

The State contends first, that it has responded to the instant grievance, granted the remedy requested on the face of the grievance and consequently considers the grievance moot. It argues that the grievance is not arbitrable because there is no issue unresolved according to the Statement of the Grievance and the resolution requested therein.

While it admits that an error was made in the original selection process, that error, it argues, was corrected at Step 3 of the grievance process. The selectee, Lohmeyer, was one of the affected class of applicants seeking the position and it was awarded to him at the Third Step of the grievance process. It argues that the Union's moving of the grievance to Step 4 and to arbitration is counter to what was requested by it as a remedy. It argues further that the Union's assumption that Mr. Deck, as the most senior applicant, should have been selected is incorrect. It argues that Deck did not fall within the "relatively equal" range as provided for by the process used since 1987.

It also argues that the interview and oral test are a part of the qualifications criteria under Section 28.02, and are essential to determine the knowledge of an applicant regarding their work. It argues that the Union failed to present any evidence whatsoever that management did not have a right to interview applicants for promotion or to use the rating system in use. It argues that this has been the practice since 1987. It argues further that a two point spread for relatively equal is proper, given the low number of total points available. This point spread, it argues, has been used consistently for determining relative equality since 1987, the date of implementation of the rating system. It asks, accordingly, that the grievance be denied.

DISCUSSION

The State has raised as a threshold issue the question of whether this grievance has been made moot and, therefore, not arbitrable by its action at Step 3 of the grievance procedure in granting the remedy requested on the face of the grievance form. In the opinion of the Arbitrator, that action does not necessarily resolve this matter and automatically render the grievance moot as the State has argued. The State would be correct in this assertion only if it has correctly applied Section 28.02 in choosing between the four applicants/Grievants at the Third Step. If, however, it also erred in the selection at the Third Step, as the Union contends herein, then the grievance has not been mooted as it claims. It cannot be determined, however, which side is correct without a review of the merits of the matter. Therefore, the Arbitrator holds that the State's action at Step 3 of the grievance process did not, in and of itself, moot the instant grievance, and that the grievance is arbitrable.

Turning now to the merits of the grievance, Section 28.02 contains a modified seniority clause that is generally referred to as a "relative ability" clause since here comparisons between qualifications of employees applying for the job are necessary and proper and contemplated by the language of Section 28.02. Arbitrators have frequently held that "relatively equal" ability

does not mean exactly equal ability. The phrase "relatively equal" allows for minor variances and a minor difference in ability is insufficient to justify ignoring greater length of service. Generally, for the junior employee to be awarded the job his greater ability should be clearly discernible to outweigh the factor of seniority. That is, the junior employee should not be awarded the job unless there is a definite, distinct, substantial and significant difference as to ability in his favor.

The Employer, of course, may develop a procedure to make this determination, as it has done here through the implementation of Selection Form Rev. 2/4/87. Arbitrators have frequently held that management has the right to develop a process to make the selection and to make the initial determination of qualifications of applicants for promotion, subject to challenge by the Union on the ground that either the procedure used to make the selection or management's decision under it was either unreasonable under the facts, arbitrary, capricious or discriminatory. In the instant case the Union has challenged the process used to make the selection as well as the actual selection made at the Third Step.

In regard to the process used in making the selection, the Union has objected to the use of the interview on the basis that it is not included in the stated criteria set forth in Article 28.02 and, that the range of points used by management to

determine "relative equal" is too narrow. In the Arbitrator's opinion the Union's objection to the use of the interview is without merit, since an interview to determine the knowledge an applicant has regarding the work they perform is clearly reasonable, if not essential. The fact that the interview is not specifically mentioned in the criteria set forth in Section 28.02 does not mean the State cannot use an interview as part of the process to determine the applicant's qualifications and it may be a part of that criteria.

The Arbitrator does find merit, however, in the Union's second objection regarding the range of points. Under the process used applicants must score within two points of each other on their total score to be considered relatively equal and for seniority to then determine the selection. In the Arbitrator's opinion this narrow spread of points will not show that there is a definite, distinct, substantial and significant difference as to ability of the applicants. Two points is less than ten percent of the maximum number of points (22) available under the procedure used in this case. This is simply not a sufficient point spread to show that the junior employee, if he/she is to be awarded the promotion, has ability that is clearly discernable to the extent that it should outweigh seniority. In the Arbitrator's opinion, the percentage difference should be considerably greater and in this regard the Arbitrator finds the process used herein to be arbitrary.

With the exception of the above noted objection of the Union regarding the range of points, the Union has failed to show that the procedure used by the State herein was either unreasonable under the facts, arbitrary, capricious or discriminatory. The Union's claim that no rating system is required is simply without merit. Section 28.02 itself impliedly requires some sort of rating system by stating that "[a]ll timely filed applications shall be reviewed considering the following criteria: ..." The State has developed a methodology to rate applicants using the criteria set forth in Section 28.02. It did so by the promulgation of Selection Form Rev. 2/4/87. Absent a showing by the Union that this procedure fails to meet the above discussed standards the Arbitrator has no authority to substitute his judgment for that of management.

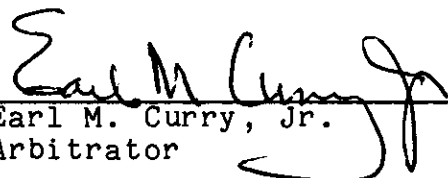
As to the selection itself, however, in the instant case, Mr. Lohmeyer had a total of 16 points out of 22 while Mr. Deck had a total of 10 points out of 22. This difference, in the Arbitrator's opinion, is sufficient to show the "significance difference" discussed above and required when awarding a junior employee a promotion over a more senior employee. In other words, Mr. Lohmeyer received a score of approximately 72% while Mr. Deck's score was approximately 45%. Therefore, the Arbitrator believes that, in the instant case, the State was justified in promoting the junior applicant, Mr. Lohmeyer, over the more senior employee, Mr. Deck, on the basis of the criteria

set forth in Section 28.02. The State has determined that Mr. Deck was not "relatively equal" to Mr. Lohmeyer according to the criteria in Section 28.02, and therefore, the job need not be awarded to him (Deck) on the basis of his greater seniority.

In regard to the Union's claim that as a Civil Service Agency the applicant should have been given study guides prior to their testing or, alternatively, should have been given a "blind test" the Arbitrator believes that this issue should be taken to the Civil Service Commission for resolution, or the parties next negotiation rather than to arbitration. An Arbitrator has no authority under this Contract to grant the relief requested by the Union regarding this issue.

AWARD

The grievance is denied for the reasons set forth just above.



Earl M. Curry, Jr.
Arbitrator

Shaker Heights, Ohio
February 7, 1990