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In the Matter of the Arbitration

between

THE STATE OF OHIO

and

DISTRICT 1199, SEIU, AFL-CIO

GRIEVANT: Richard Benish

DEPARTMENT: Bureau of Workers Compensation

No: 17-00-900117-0004-02-12

BEFORE: Joyce Goldstein, Arbitrator

APPEARANCES:

For the Employer: Sally P. Miller, Labor Relations Specialist, Office of Collective Bargaining; Gretchen Green; Mary Anne Seman; John Finch; Rodney D. Sampson

For the Union: Tom Woodruff, President, District 1199; Maria Margevicius; Bob Clunen; John Shryock; Richard Benish

PLACE OF HEARING: Office of Collective Bargaining, 65 E. State Street, Columbus, Ohio

DATE OF HEARING: September 18, 1990

AWARD: The grievance is sustained. The Grievant is to be promoted to Industrial Reemployment Specialist at the Youngstown Regional Office with back pay for any difference in wages he would have received had he been promoted at the time the position was awarded to Anthony Serluco on January 14, 1990.

DATE OF AWARD: October 15, 1990

Joyce Goldstein

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I. INTRODUCTION.

Richard Benish, the Grievant, is an Industrial Rehabilitation Consultant for the Bureau of Workers Compensation ("Employer"). As such, he is a member of a bargaining unit whose exclusive representative is District 1199, SEIU, AFL-CIO ("Union"). The Grievant was denied a promotion to the position of Industrial Reemployment Specialist in favor of a less senior co-worker (Anthony Serluco).

The issue to be decided by the Arbitrator is:

> Whether the collective bargaining agreement was violated when the employer promoted an employee with less seniority rather than a qualified employee with greater seniority.

The parties agree that the relevant provision of the collective bargaining agreement is Article 30.02, "Awarding the Job (Transfers and Promotions)". Article 30.02 states, in relevant part,

> All timely filed applications shall be reviewed considering the following criteria: qualifications, experience, education, and work record, and affirmative action. 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. (emphasis added)[1]

After the promotion was awarded to the less senior employee, the Union filed a grievance protesting the promotion. The parties stipulated that:

> The grievance is both procedurally and substantively arbitrable. The time limits in the grievance procedure have either been met or waived. The arbitrator has been properly chosen and has jurisdiction to hear the case.

II. STATEMENT OF FACTS

The parties stipulated to the following facts:

1. Anthony Serluco applied for and was awarded the position of Industrial Reemployment Specialist (PCN 6540.2) at the Youngstown Regional Office of the Bureau of Worker's Compensation.

2. Richard Benish applied for the position of Industrial Reemployment Specialist (PCN 6540.2) but was not awarded the job.

3. Anthony Serluco assumed the duties of the Industrial Reemployment Specialist on 1/14/90.

4. At the time of the application, Richard Benish had a state seniority date of 9/12/77; he had been employed at the Industrial Commission as an Industrial Rehabilitation Consultant since 4/7/80.

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1 Article 30.02's language requiring the junior applicant to be "significantly more qualified" in order to be awarded the position represents a strengthening of the seniority language compared to the previous collective bargaining agreement. Article 28.02 of the 1986-1989 contract provided,

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

5. At the time of the application, Anthony Serluco had a state seniority date of 7/17/84 all of which time he had been employed at the Industrial Commission as an Industrial Rehabilitation Consultant.

In addition, the basic facts regarding the relevant qualifications of Mr. Serluco and the Grievant do not appear to be in dispute.

On the subject of experience, Mr. Serluco had ten years of workers' compensation experience while employed by a private trucking company, and five years of experience as a Rehabilitation Consultant with the Employer. The Grievant had ten years of experience as a Rehabilitation Consultant with the Employer. He also is an expert witness/consultant in vocational rehabilitation for the Social Security Administration and is a part-time instructor at Youngstown State University.

On the subject of education, Mr. Serluco has an undergraduate degree in business and is working toward a masters degree in business.[2] The Grievant has an undergraduate degree in psychology and a masters degree in education, specializing in guidance and counseling.

Regarding work record, both Mr. Serluco and the Grievant have unblemished work records with the Employer. Both consistently have received very positive annual evaluations during their respective tenures with the Employer. Mr. Serluco rated marginally, but not substantially, higher in some categories than the Grievant.

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2 The Employer never inquired, so was unable to provide any evidence concerning extent to which Mr. Serluco had completed, or the nature of, his graduate studies.

Both Mr. Serluco and the Grievant are white males, so affirmative action is not a factor. Both of them also satisfy the minimum qualifications identified in the vacancy posting, so this is not a factor.[3]

III. EMPLOYER'S POSITION

The Employer's position is that although both the Grievant and Mr. Serluco are qualified for the position, Mr. Serluco is "significantly more qualified" than the Grievant based on three factors.

First, Mr. Serluco had previous work experience in the private sector while working for a trucking company. Through that position, he gained knowledge of workers' compensation law in Ohio and in other states and of an employer's perspective of the workers' compensation system.[4]

Second, Mr. Serluco had better performance evaluations and was more successful in returning injured workers to work than the Grievant.

Additionally, when asked what it was that Mr. Serluco could do that the Grievant could not do, the supervisor who recommended Mr. Serluco over the Grievant (Ms. Mary Anne Seman) testified that Mr. Serluco could "communicate effectively with people."

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[3] The Union argued, but presented no evidence, that Mr. Serluco failed to meet the minimum qualifications.

[4] On cross examination, however, Ms. Seman (the supervisor who recommended Mr. Serluco) acknowledged that knowledge of workers compensation from other states is not relevant to the Reemployment Specialist position, and that the Ohio law itself has been significantly revised subsequent to Mr. Serluco's departure from his previous employment.

When she was asked which of the five factors listed in the collective bargaining agreement that she had given the most weight, Ms. Seman answered, "empathy, creativity, ingenuity and powers of persuasion."

Ms. Seman explained the standard to be used when a junior employee is promoted over a senior employee: "When you could prove without a doubt that the person selected is eminently more qualified."[5] She maintained that this standard was satisfied when Mr. Serluco was promoted rather than the Grievant.

IV. THE UNION'S POSITION.

The Union's position is that Mr. Serluco is, at best, equal in qualifications to the Grievant. Because he is not "significantly more qualified based on the [criteria set forth in the collective bargaining agreement]", he should not have been awarded the job.

In evaluating the five factors, the Union maintains that the qualifications are only those which are listed in the job posting. The Grievant satisfies them; but there was no evidence that Mr. Serluco satisfies them since he does not have a graduate degree.[6]

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[5] In the Employer advocate's closing argument, she stated that "Under Section 30.02, if employees are relatively equal, seniority shall, and indeed should, be the determining factor..." This was the standard under the previous, not current, collective bargaining agreement, and is at odds with the express contractual language as well as the testimony of the Employer's own witnesses.

[6] The vacancy notice, however, does not require a graduate degree. It allows the graduate education requirement to be satisfied if there is equivalent experience.

Concerning experience, the Grievant has twice as much experience on the job as Mr. Serluco. The Union asserts that not only does the Grievant have double the experience, but that the Grievant's experience is more relevant to the Reemployment Specialist's position. The Grievant had substantially more experience working with "harder to place" clients; while Mr. Serluco worked primarily with clients employed by one large company for whom it was relatively easy to return injured clients to work. Because the Reemployment Specialist acts as a consultant/supervisor to the Rehabilitation Consultants who are need of extra assistance for hard to place clients, the Union maintains that the Grievant's experience is far more pertinent than Mr. Serluco's.

Responding to the Employer's argument about Mr. Serluco's private sector experience, the Union argues that the relevance of Mr. Serluco's experience with the trucking company is limited due to the change in the Ohio workers' compensation law, and that his experience was limited to only an employer's perspective (not a worker or union perspective) from only one industry and only one company. At best, the Union argues, the experience levels of the Grievant and Mr. Serluco is equivalent.

Regarding education, the Union argues, there is no question that the Grievant's education surpasses that of Mr. Serluco. The Grievant has an undergraduate and graduate degree in the relevant field, while Mr. Serluco has an undergraduate degree in an "unrelated" field and no graduate degree at all.

On the subject of work record, the Union maintains that there is no significant difference between the performance evaluations of the two applicants.

Ultimately, the Union's position is that the Reemployment Specialist position represents the only promotion available to Rehabilitation Consultants, and there is only one such position in each office around the state. Accordingly, it is only fair, and consistent with the contract, to have a uniform, objective system so that employees interested in being promoted know what is expected of them in order to be eligible for a promotion. Subjective factors, such as "empathy, creativity, ingenuity and powers of persuasion", are not consistent with the collective bargaining agreement and are too nebulous as standards for promotion.[7]

V. DISCUSSION.

The bottom line in this case is that all things being equal, the Employer wanted to give the job to Mr. Serluco because the Employer genuinely believed, for whatever reasons, that Mr. Serluco would be better in the position. But, all other things are not equal, and it is the arbitrator's job to interpret the collective bargaining agreement in light of the facts, not to second guess who was the "best" candidate for the job in a vacuum. The determination of whether the collective bargaining

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7 The Union presented evidence of grievances filed over the promotion of a junior employee to the position of Reemployment Specialist in another part of the state. There, the Employer used entirely different criteria to justify its avoidance of seniority.

agreement was violated turns on whether the required factors were given proper consideration. This determination can only be made on the objective factors set forth in the agreement and the evidence presented at the arbitration hearing.

First and foremost, the mandatory contract requires that a qualified senior employee "shall" be given the promotion, unless a junior employee is "significantly" more qualified based on the five factors. The evidence fails to show that Mr. Serluco was "significantly" more qualified than the Grievant.

Both candidates possess the minimum qualifications for the job. The Grievant possesses more experience as a Rehabilitation Consultant; Mr. Serluco has more experience in the private sector. The Grievant has substantially greater education. The work records of both are comparable.[8] Affirmative action is not a factor.

Throughout the testimony of the Employer's witnesses, it was clear that if they considered seniority at all, it was only one factor, but no greater than any other. That is not what the

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[8] Much attention was given to the number of people who were returned to work by Mr. Serluco and the Grievant. The parties agree that Mr. Serluco was responsible for returning to work more people than the Grievant, and that this is an important goal of the Employer. However, there was persuasive testimony that Mr. Serluco had a substantially easier case load. Almost all of Mr. Serluco's clients worked for one large employer who had an obligation under its own collective bargaining agreement to guarantee employment for its workers who were injured on the job. On the other hand, the Grievant had a diverse case load, including many clients who were injured while working for small employers who had no collective bargaining obligation to make accommodations for returning their workers to their original employment. Given the undisputed difficulty of the Grievant's case load, the difference in "return to works" is given little weight.

contract requires. The Employer's disregard of seniority was evident on several occasions.

According to Gretchen Green, Manager of Labor Relations, in the four competitively bid promotions throughout the state for Reemployment Specialist since January 1989, in every instance, the junior employee got the job. Not only was there relatively little consideration given to seniority, there appears to have been little consideration given to the consistent application of the objective standards.[9]

Similarly, when Ms. Seman testified that the Grievant would not have gotten the promotion even if it was not given to Mr. Serluco, she said another junior employee would have gotten the job. When asked why, she never even mentioned the seniority issue, and instead recited qualities which in fact were shared by the Grievant and the other junior employee (such as a graduate degree and teaching experience).

Ms. Seman's insistence on Mr. Serluco's superiority based on being able to "effectively communicate with people" warrants some attention. Because Mr. Serluco did not testify, the Arbitrator obviously has no basis to compare the verbal communication skills of Mr. Serluco and the Grievant. However, the Grievant testified

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[9] In denying a promotion to another senior employee with a doctorate degree, the Employer stated, "The Agency has determined that the type of educational background of the person selected for the Industrial Re-employment Specialist position has direct relevance to the position. Your educational attainment, though greater in terms of degree, does not have as direct relevancy toward the required duties of the position. In addition, the person selected for the position has a longer work experience in the area by four years over yourself." Applying these standards to Mr. Serluco and the Grievant, the Grievant would have gotten the promotion, even if he had less state seniority!

articulately and convincingly at the arbitration hearing for over two hours. He has testified as an expert witness for the Social Security Administration for five years; he has taught on the college level for three years; and Ms. Semen herself gave him consistently high evaluations in the area of communication skills. This is hardly evidence of a lack of an ability to clearly communicate.[10]

Finally, the Employer's entire emphasis on rewarding Mr. Serluco because of his experience outside of the agency rather than giving credit to the Grievant's additional years inside the agency, defeats the whole concept of priority being given to state seniority.

In conclusion, it is clear that the Employer genuinely and sincerely believes that Mr. Serluco is better qualified for the job than the Grievant. Nonetheless, the objective evidence presented to the Arbitrator and the express language of the collective bargaining agreement, compel this Arbitrator to

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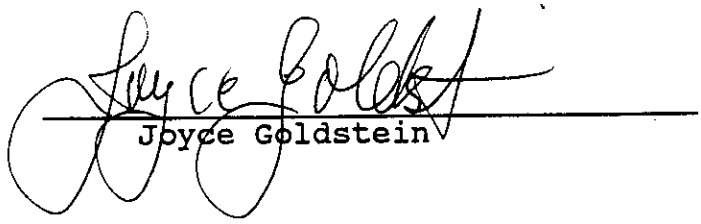
10 In addition, the only written evidence which the Arbitrator could compare on this subject were the applications prepared by the Grievant and Mr. Serluco. Based on their written communication skills, the Grievant was far superior. The Grievant's typed application with three pages of attachments was extremely thorough, describing in detail his education (including degrees received and relevant coursework), experience (both with the agency and for other institutions), and skills. On the other hand, Mr. Serluco's handwritten application was much less compelling. Not only does it lack the content and detail of the Grievant's application, it does not demonstrate the impressive communication skills about which Ms. Seman testified. For example, when asked how he meets the minimum qualifications for the position, Mr. Serluco wrote, "A advantage which is in favor is that my employment skills had me hiring which I will convey to the worker seeking work. What the employer wants to hire. [sic]"

conclude that the agreement was violated when Mr. Serluco was promoted over the Grievant.

VI. **AWARD.**

The grievance is sustained. The Grievant is to be promoted to Industrial Reemployment Specialist at the Youngstown Regional Office with back pay for any difference in wages he would have received had he been promoted at the time the position was awarded to Anthony Serluco on January 14, 1990.



Joyce Goldstein

Cleveland, Ohio
October 15, 1990