

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD #: 552

OCB GRIEVANCE NUMBER: 16-00-891113-0081-02

GRIEVANT NAME: COMBS, FRANKIE AND STEPHENS, PHYLLIS

UNION: 1199

DEPARTMENT: HUMAN SERVICES

ARBITRATOR: FULLMER, JERRY

MANAGEMENT ADVOCATE: SAMPSON, RODNEY

2ND CHAIR: THOMPSON, JOHN

UNION ADVOCATE: HETRICK, LISA

ARBITRATION DATE: JANUARY 16, 1991

DECISION DATE: JANUARY 30, 1991

DECISION: DENIED

CONTRACT SECTIONS
AND/OR ISSUES:

DID THE EMPLOYER VIOLATED CONTRACT ARTICLE 30.02 IN
PROMOTING THE SENIOR EMPLOYEE TO A VACANT POSITION?

HOLDING: "ON THE BASIS OF THE PRESENT LANGUAGE AND EVIDENCE OF BARGAINING
HISTORY THE ARBITRATOR CANNOT HOLD THAT THERE IS AN OBLIGATION ON
THE PART OF THE EMPLOYER TO AWARD VACANCIES TO JUNIOR APPLICANTS
WHO THE UNION CLAIMS ARE 'SIGNIFICANTLY MORE QUALIFIED.'"

ARB COST: \$960.85

IN THE MATTER OF ARBITRATION

Between

STATE OF OHIO,
DEPARTMENT OF HUMAN SERVICES

The Employer

and

OHIO HEALTH CARE EMPLOYEES UNION
DISTRICT 1199, WV/KY/OH
NATIONAL UNION OF HOSPITAL
AND HEALTH CARE EMPLOYEES,
SEIU, AFL-CIO

The Union

OPINION AND AWARD

Phyllis L. Stephens
Job Vacancy Grievance

16-00-891113-0081-02

APPEARANCES

For the Employer:

Rodney D. Sampson
Asst. Chief Arbitration Services

John Thompson, Office of Collective Bargaining
Terry Piwnicki, Labor Relations Office
Cecilia Zurick, Preadmission Supervisor
Debra L. Moscardino, Acting Chief Bureau of DD Services
Don Stiltner, Civil Rights Officer
Michael J. D'Arcy, Chief, Personnel Services

For the Union:

Lisa Hetrick,
Administrative Organizer

Frankie Combs, Grievant
Phyllis L. Stephens, Grievant

JERRY A. FULLMER
Attorney-Arbitrator
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This case ¹ concerns a claim that a job vacancy for a Rehab Program Spec 1 should have been awarded to the Grievant, Phyllis Stephens.

I. FACTS

Prior to July 7, 1989 the following four employees were working for the Department on an eighteen month appointment. They are listed in declining order of seniority and with a notation of their race and sex.²

<u>Name</u>	<u>Sex</u>	<u>Race</u>
Guy Piscione	M	White
Phyllis Stephens	F	Black
Frankie Combs	F	Black

¹ The State of Ohio (hereafter referred to as "the Employer" and Ohio Health Care Employees Union, District 1199, WV/KY/OH National Union of Hospital and Health Care Employees, SEIU, AFL-CIO (hereafter referred to as "the Union"), are parties to a collective bargaining agreement (Jt. Ex. 1) providing in Article 7 for settlement of disputes through a grievance and arbitration procedure. A dispute has arisen between the parties concerning a claim that a job vacancy for a Rehab Program Spec 1 should have been awarded to the Grievant, Phyllis Stephens. .

The Union's grievance (Jt. Ex. 3, #16-00-89113-0081-02) concerning this matter was dated September 20, 1989. It was submitted to arbitration before this arbitrator who serves on the parties' permanent arbitration panel. A hearing was held on January 16, 1991 in Conference Room B of the Employer's Office of Collective Bargaining in Columbus, Ohio. Both advocates made opening and closing statements and presented and cross-examined witnesses. It was stipulated by the parties that the grievance was both procedurally and substantively arbitrable; that the time limits in the grievance procedure had either been met or waived and that the arbitrator has been properly chosen and has jurisdiction to hear the case.

² There was another white female in the group. However her name did not figure prominently in the evidence.

These employees all enjoyed the right to apply for permanent job vacancies.

On July 7, 1989 such a vacancy arose with the posting of an opening for a Rehab Program Spec 1 in the Division of Long Term Care, Work Unit of Developmental Disability, under the supervision of Cecilia Zurick. The posting (Joint Exhibit) 4, described the Job Duties in the following terms:

"Under direction from the Utilization Review Supervisor, reviews all preadmission requests for Intermediate Care Facility-Mental Retardation Development Disabilities (ICF-MR/DD) level of care assignments (i.e., verbal & written social, psychological, & related medical information utilized in the appropriate determination of the ICF-MR/DD level of care in accordance with Title XIX Medicaid regulations); gathers & relays sufficient information for preadmission or utilization Review Committee determination of ICF-MR/DD level of care.

Maintains & compiles data on recipient to level of care assignment & residential placement; issues document which establishes approval for payment to recipient for Medicaid covered services.

Consults with County Departments of Human Services (CDHS, hospitals, providers, & other agencies regarding client care, habilitation services & documentation to explain & interpret ICF-MR/DD program requirements or placement of eligible Medicaid recipients; attends meetings, & coordinates with other divisional personnel to make recommendations to bureau chief & program administrators on program effectiveness & efficiency; communicates orally & in writing with providers, recipients, & public & private agencies.

Participates in in-service education for nursing home facility staff, &/or plans & attends educational programs.

The qualifications for the position were set out as follows:

"MUST BE FEDERALLY QUALIFIABLE QMRP - THIS POSITION REQUIRES OCCASIONAL OVERNIGHT TRAVEL.

STATE PERSONNEL QUALIFICATIONS: Completion of coursework for graduate field of study in human services area (e.g.,

rehabilitation counseling, special education, guidance & counseling, psychology, sociology, social work, child & family community services) as required by accredited college or university (or 3 yrs. exp. in position with private or governmental agency responsible for coordination, development & evaluation or habilitative &/or rehabilitative programs); or equivalent.

All three applicants were interviewed by Cecilia Zurick from an identical set of eight job related questions. The parties have stipulated that each of the three applicants was qualified for the vacancy. The conclusions of Ms. Zurick with respect to the three employees were as follows:

Guy Piscione - Recommended

Direct experience with persons with MR or DD; experience with ICF/MR providers; training in current ICF-MR regulations demonstrated knowledge of needs of persons with MR or DD (active treatment, etc.) (Jt. Ex. 9)

Phyllis Stephens - Not recommended

Lack of experience/familiarity with needs of persons with MR or DD. Job requires knowledge of current practices in the field and at least some direct experience with persons with MR or DD. (Jt. Ex. 10)

Frankie Combs - Not recommended

Position requires current knowledge of needs MR/DD persons. While she has some experience due to TAR position, it was in an ICF/SNF, rather than ICF-MR setting. She has no experience with ICFS/MR. (Jt. Ex. 10)

On September 15, 1989 Mss. Stephens and Combs became aware that the vacancy had been awarded to the senior applicant, Mr. Piscione. Five days later the grievance at issue was filed. It proceeded through the steps of the grievance procedure to arbitration.

In the aftermath there were several additional developments on the following dates:

December 15, 1989 - The last pages of the Interviewing Questionnaires of Mss. Stephens and Combs were amended so as to indicate the following:

"Not Recommended due to more senior applicant"

February 15, 1990 - Mr. Piscione left his employment with the Department. Thereafter the position in question remained vacant for approximately eight months because of a hiring freeze.

April 4, 1990 - Frankie Combs signed a settlement agreement of her OCRC/EEOC charge. One provision of that settlement agreement was the Employer's undertaking to consider Ms. Combs for the next available position on a non-discriminatory basis. At the time of the arbitration hearing (January 16, 1991) Ms. Combs was employed by the Employer as a Rehab Program Spec 1.

II. APPLICABLE CONTRACT PROVISIONS

Sec. 30.02 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, 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.

III. STIPULATED ISSUE

Did the Employer, the Ohio Department of Human Services/Toledo District Office, violate Article 30.02 of the collective bargaining agreement when the senior employee among the qualified applicants was awarded the job. If so, what shall the remedy be?

IV. POSITIONS OF THE PARTIES

The Union Position

The Union argues that each of the five criteria of section 30.02 are of equal import and must be given equal weight by the Employer in decisions as to the award of job vacancies. Here Phyllis Stephens was a black female applicant and yet the job was awarded to a white male, Guy Piscione. There is no indication that the Employer gave the "affirmative action" criterium any consideration. It is clear that the Grievant is superior to Mr. Piscione in education (M.A. vs. B.A.) and in experience (25 years vs. 4 years). As such the Grievant is "a junior employee ...significantly more qualified based on the listed criteria." The parties' agreement requires the Employer to award the job to such an applicant. The Grievant should be awarded the Rehab Program Spec 1 job and given back pay.

The Employer Position

The Employer has consistently maintained throughout the grievance procedure that the vacancy was awarded simply on the basis of seniority. The negotiations for Section 30.02 in 1989 strengthened the role of seniority in the filling of vacancies. The former agreement (1986-1989)(Jt. Ex. 2) required only that "Where applicants' qualifications are relatively equal according to the above criteria, the job shall be awarded to the applicant with the greatest state seniority." This was modified to the present language which requires the award to the senior employee "unless a junior employee is significantly more qualified based on the listed criteria." (emphasis added) The Union has always argued that seniority should prevail in the award of vacancies and the

Union certainly cannot show that the Employer is required to hire the best applicant. The evidence in this case indicates that there is no underutilization of minorities in the job category in question. It is clear that the Employer followed section 30.02 in this case. The grievance must be denied.

V. DISCUSSION

A. Introduction

The present case presents a rather unique threshold issue as to the interpretation of job vacancy award provisions. The Union argues that the Employer is compelled to award the vacant job to the junior applicant on the basis that she is "significantly more qualified" than the senior applicant. The issue is thus the opposite from that faced in the "normal" case where an employer has awarded the vacancy to a junior employee on the basis of his/her ability and a union has processed a grievance on the behalf of the disappointed senior employee.³

We thus turn to the question of whether section 30.02 compels the Employer to award vacancies to junior employees "significantly more qualified" than the senior employee. The discussion will then turn, if necessary, to the other issues raised by the Union.⁴

³ The novelty of the issue does not, of course, mean that the Union's position is without merit. It is simply that before an arbitrator assents to a novel proposition he must assure himself that the result is clearly in accord with clear contractual language or, if the language is ambiguous, with the bargaining history.

⁴ These being essentially whether the five criteria of Section 30.02 are required to be equally weighted; whether the Employer adequately took into account the "affirmative action" criterium; and whether Phyllis Stephens was in fact "significantly more

B. Does Section 30.02 Compel the Employer to Award Job Vacancies to Junior Applicants Who Are "Significantly More Qualified" Than The Senior Applicant?

The first point of reference is, of course, the literal terms of Section 30.02. If those terms settle the question there is no need for reference to aids to interpretation such as bargaining history.

The Employer is required by the second sentence of the first paragraph to review the applications according to the specified criteria. Apparently that is to be done in order to make a judgment as to which applicants are qualified, for the following sentence turns to the award of the vacancy "Among those that are qualified....".

The Employer is then required to award the job because the mandatory word "shall" is used. It seems rather clear that the word "shall" applies to the Employer's duty to award the vacancy to the qualified applicant with the most state seniority. The Employer is relieved of that duty only when there is a junior employee who "is significantly more qualified". In other words, the "shall" applies to the Employer's duty toward the senior qualified applicant rather than to the exception from that duty for the "significantly more qualified" junior applicant.

Reliance need not be placed on the grammar of Section 30.02 alone. The evidence as to the bargaining history of the parties'

qualified" than the senior applicant Guy Piscione.

agreement is consistent with the above conclusion. The matter must first be placed in perspective. Unions historically have sought provisions in their collective bargaining agreements requiring, in as strong terms as are attainable, that job vacancies be awarded on the basis of seniority. Employers have historically resisted provisions requiring that the award be exclusively on the basis of seniority and have instead urged reliance on such factors as ability, experience, knowledge and qualifications.

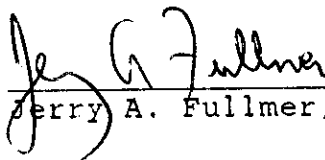
The only evidence as to the bargaining history in this case was offered by the Employer's witness, Michael D'Arcy. Mr. D'Arcy participated in both the 1986 and 1989 negotiations. He indicated that in the 1989 negotiations the Union expressed dissatisfaction with the provisions of the 1986 agreement which required the job to be awarded to the applicant with the greatest state seniority only when the "applicants' qualifications are relatively equal...". The Union instead, according to Mr. D'Arcy, proposed a provision which would require that the job be awarded "to bidder with most seniority who has the ability to do the job". (Employer Ex. 2) Eventually the provision currently (1989-1992) in Section 30.02 was adopted which gave a greater emphasis to seniority by requiring the award to the senior applicant except where the junior applicant is "significantly more qualified" than the senior applicant. In other words the emphasis on seniority was strengthened in the succession from the 1986 to the 1989 contract. There is no evidence in the record contradicting Mr. D'Arcy's testimony.

C. Conclusion

To conclude, it appears to the arbitrator that the literal language of Section 30.02, the general framework of the negotiations between employers and unions on such clauses and the specific negotiating history of Section 30.02 all point to the conclusion that the Employer's duty is to award vacancies to the senior qualified applicant. The Employer has an option to award the vacancy to award a vacancy to a person who it deems to be a significantly more qualified junior applicant. The Employer must then be prepared to face a challenge by the Union in the grievance procedure as to its assessment of the junior applicant. On the basis of the present language and evidence of bargaining history the arbitrator cannot hold that there is an obligation on the part of the Employer to award vacancies to junior applicants who the Union claims are "significantly more qualified".⁵

VI. AWARD

Grievance denied.


Jerry A. Fullmer, Arbitrator

Made and entered this
30th day of January, 1991
at Cleveland, Ohio

⁵ This conclusion on the threshold issue makes it unnecessary to further consider the other issues raised by the Union and obviously there is no finding on their validity. See footnote 4, supra.