

#729

 *
 In the Matter of Arbitration *
 *
 Between * Case Number: *
 *
 OCSEA/AFSCME Local 11 * 24-09-(06-26-90)-0402-01-
 * 04
 *
 and *
 * Before: Harry Graham
 *
 The State of Ohio, Department of *
 *
 Mental Retardation and *
 *
 Developmental Disabilities *
 *

Appearances: For OCSEA/AFSCME Local 11:

Brenda Goheen
 Staff Representative
 OCSEA/AFSCME Local 11
 1680 Watermark Dr.
 Columbus, OH. 43215

For Department of Mental Retardation and Developmental Disabilities:

Stephen Gulyassy
 Department of Mental Retardation and
 Developmental Disabilities
 30 East Broad St., Room 1210
 Columbus, OH. 43215

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter on January 22, 1992 before Harry Graham. At that hearing the parties were provided complete opportunity to present evidence and testimony. The record in this dispute was closed at the conclusion of oral argument.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Did the State properly list a Water Safety Instructor

Certificate as a minimum qualification requirement on the General Activity Therapist 2 position posting which resulted in denial of that position to Bargaining Unit member, Julie Zimmerman? If so, what shall the remedy be?

Background: The facts that prompt this proceeding are clear and not in dispute. The Department operates a facility in Mount Vernon, OH., the Mount Vernon Developmental Center. The Center followed the proper internal procedures and secured approval to fill a vacant position of General Activity Therapist 2. In accord with the Collective Bargaining Agreement the position was posted from May 10, 1990 through May 19, 1990. A number of bids were received, among them, one from the Grievant, Julie Zimmerman. The posting contained the normal information common to such documents including the pay, the shift, the location, the duties and the required qualifications for the position. Included among the "duties" was the requirement that bidders possess a "valid water safety instructor certificate and valid Ohio driver's license...." Ms. Zimmerman did not possess a water safety instructor certificate. In due course the position was awarded to an outside applicant. That applicant met the stated requirement of possession of a water safety instructor certificate.

In order to protest the award of the vacant position to a person from outside of the bargaining unit rather than herself Ms. Zimmerman filed a grievance. That grievance was

not resolved in the procedure of the parties and they agree it is properly before the Arbitrator for determination on its merits.

Position of the Union: The Union points out that Sections 17.04, 17.05 and 17.06 of the Agreement govern this dispute. Section 17.04 deals with the posting of vacant positions. It indicates that postings will carry on them the attributes specified by the position description. These are to include the knowledge, abilities, skills and duties as prescribed by the position description. The State cannot go beyond those characteristics when filling a vacancy in the Union's view.

Section 17.05 establishes a hierarchy of bidders for vacant positions in State service. It is undisputed that Ms. Zimmerman falls into the second category of bidders. (17.05 B) The language at Section 17.05 provides that the State is to consider applicants in the office, institution or county where the vacancy is located "who possess and are proficient in the minimum qualifications contained in the class specification and the position description." The language of Section 17.05 must be read in conjunction with the language of Section 17.06 which establishes that the job shall be awarded to the "qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee." In this situation Ms. Zimmerman, an employee with 14 years of State

service was bypassed in favor of an applicant from the street. The Union insists that cannot occur in this situation. Examination of the Classification Specification for the position of General Activities Therapist 2 indicates that people in that classification are to possess knowledge of "safety practices pertaining to general activity therapy*" the asterisk (*) indicates that that characteristic is to be "developed after employment." In the Union's view, to require that applicants at the Mount Vernon Center possess the desired characteristic before employment is impermissible. The State cannot add to the position description attributes required before a candidate may be considered when the State's own rules provide they may be secured after employment the Union insists. In the Union's opinion, Ms. Zimmerman met the minimum qualifications required by the position. She possessed seniority in State service. As such, the Agreement requires she be awarded the position over an outside applicant insists the Union.

Position of the Employer: The State asserts it acted properly in this situation. One of the requirements for the holder of the General Activity Therapist 2 position at Mount Vernon Developmental Center is that the incumbent conduct therapeutic and instructional activities via swimming. In order to do so the person who holds the position must possess a valid Water Safety Instructor Certificate. The Center has

historically required possession of that Certificate of persons in the General Activity Therapist 2 position. Furthermore, the State's internal rules for licensure which must be met by the Center require that swimming pools are to be used only in the presence of a person with "Red Cross or equivalent training." Ms. Zimmerman did not possess the requisite qualifications for the position. Hence, no violation of the Agreement occurred when the State denied her application and hired from outside of the bargaining unit in its opinion.

Section 17.06 of the Agreement provides that the State must award a vacant position to the most senior "qualified" employee. Ms. Zimmerman was not qualified due to the fact she did not possess the requisite Certificate in the State's view. As that was the case, the State was free to hire a person who met the stated requirements of the position, including possession of the Water Safety Instructor Certificate. Accordingly, the Employer urges the grievance be denied.

Discussion: Section 17.05 of the Agreement provides that employees who "possess and are proficient in the minimum qualifications contained in the class specification and the position description" are to be considered for vacant positions. Bidders must meet the minimum qualifications specified by the State. When Ms. Zimmerman bid on the vacancy

in question she lacked the Water Safety Instructor Certificate sought on the posting. That does not prompt the conclusion sought by the State, that she did not possess the minimum qualifications necessary to press her bid successfully. The Classification Specification for the General Activities Therapist 2 does not specify that applicants possess a Water Safety Instructor Certificate. It provides that people in the classification are to have a knowledge of "safety practices pertaining to general activity therapy*" Inclusion of the asterisk indicates that that knowledge may be secured "after employment." People cannot sit on their hands. They must act in timely fashion to become qualified. Ms. Zimmerman indicated that she was willing to do so. An appropriate course was offered in the community which she was willing to take. Presuming that she would have passed the course, a reasonable presumption as she at one time possessed the Certificate in question, Ms. Zimmerman would have been qualified in timely fashion.

There is no conflict between the Classification Specification and the Position Description. The Position Description provides that one of the minimal acceptable characteristics for the position is possession of a Valid Water Safety Instructor Certificate. It does not specify when they must secure it. As noted above, the Classification Specification provides that knowledge of safety practices may

be developed "after" employment. As long as Ms. Zimmerman was willing to secure the requisite knowledge in timely fashion, which she was, the State cannot require her to possess knowledge in advance when the Classification Specification provides such knowledge may be acquired after employment.

At the hearing testimony was received from an official of the Mount Vernon facility to the effect that possession of the Water Safety Instructor Certificate was "preferred" by the Administration. It might well be that there are other desirable attributes that the facility administration would prefer bidders to possess. It cannot hold bidders to qualifications it desires. It can only hold bidders to qualifications that are required. It is not required that bidders possess the Water Safety Instructor Certificate before securing the position by the plain language of the Classification Specification.

The Administrative Rules pertaining to swimming pools at residential facilities operated by the Department do not specify when applicants for Activities Therapist 2 must secure their Red Cross or equivalent water safety training. The time period in which Therapists must secure the requisite knowledge is "after" employment according to the Classification Specification. As noted above, applicants must not be dilatory in securing the knowledge necessary for the position. They must act expeditiously. But by the plain

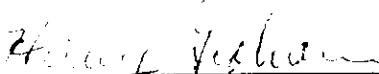
language of the Classification Specification, they may secure the required knowledge after employment in the position.

In this situation the Grievant was interviewed in May, 1990. The vacancy was filled in August, 1990. The Grievant informed the Employer she would secure the Water Safety Instructor Certificate with the next several weeks. In hindsight, the Grievant should have acted immediately to secure the appropriate Certificate. On the other hand, no reason exists for the Employer to have declined to permit Ms. Zimmerman to secure the position and subsequently secure the Certificate as the Classification Specification provides the knowledge of safety practices may be secured "after" employment.

Section 17.06 of the Agreement furnishes no comfort to the State in this situation. It provides that the vacancy is to be awarded to the "qualified employee with the most state seniority unless the Agency can show that a junior employee is demonstrably superior to the senior employee." (Emphasis added) The language is specific and references the circumstances in which a junior employee may be preferred over a senior colleague. That is not the situation in this instance. Here, the Employer hired from outside of State service. A "junior employee" was not preferred. Rather, a person not a member of the State workforce was hired. That is not contemplated by the Agreement.

Award: The grievance is sustained. As noted above, the parties agreed upon the issue in dispute in this proceeding. They specifically posed for the Arbitrator two questions. One was whether or not the Employer violated the Agreement in this situation. That question is answered in the affirmative as indicated by the fact that the grievance has been sustained. The second question posed to the Arbitrator, to be answered in the event the first question was answered in the affirmative, concerns the specific remedy for the contractual violation. The parties explicitly provided the Arbitrator with the authority to fashion a remedy. The appropriate remedy for the violation at issue in this proceeding is for the Employer to award Ms. Zimmerman the position in dispute effective with the date it was filled by the person actually hired by the State. Back pay must accompany this award. Ms. Zimmerman must secure the Water Safety Instructor Certificate forthwith.

Signed and dated this 17th day of February, 1992
at South Russell, OH.



Harry Graham
Arbitrator