

ARBITRATION SUMMARY AND AWARD LOG

OCB AWARD NUMBER: 748

OCB GRIEVANCE NUMBER: 28-04-900910-0025-02-12

GRIEVANT NAME: STARR, LAWRENCE, ET AL.

UNION: 1199

DEPARTMENT: REHAB & CORR

ARBITRATOR: JOHNSON, MARGARET NANCY

MANAGEMENT ADVOCATE: ABDURRAGIB, IDRIS

2ND CHAIR: DAUBENMIRE, RICHARD

UNION ADVOCATE: MARGEVICIUS, MARIA

ARBITRATION DATE: FEBRUARY 7, 1992

DECISION DATE: MARCH 30, 1992

DECISION: DENIED

CONTRACT SECTIONS

AND/OR ISSUES: MANAGEMENT PROMOTED A JUNIOR APPLICANT  
OVER THREE MORE SENIOR APPLICANTS

HOLDING: SUBSEQUENT TO THE RATINGS ON CONTRACTUAL CRITERIA  
OF QUALIFICATIONS, EXPERIENCE, EDUCATION, AND WORK  
RECORD, MGMT FURTHER REVIEWED QUALIFICATIONS. AS A  
RESULT OF THIS ADDITIONAL REVIEW, MGMT DETERMINED  
THE SELECTEE WOULD BE BETTER PREPARED TO ASSIST  
LOWER LEVEL OFFICERS.

COST: NO BILL AS OF YET

STATE OF OHIO  
LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration Between:

#748

Ohio Department of Rehabilitation )  
and Correction )  
Adult Parole Authority )  
Office of Collective Bargaining )  
State of Ohio )

and )

Ohio Health Care Employees Union )  
District 1199 )  
National Union of Hospital and )  
Health Care Employees, )  
SEIU, AFL-CIO, CLC )

OPINION AND AWARD

GRIEVANCE OF  
LAWRENCE STARR, et al.

28-04-900910-0025-02-12  
Tidwell & Dodds

This matter came on for hearing on February 7, 1992 in a conference room at the Adult Parole Authority in Cleveland, Ohio, before Margaret Nancy Johnson, member of the Arbitration Panel selected in accordance with the terms of the Agreement between the Parties.

The case for the Union was argued by Maria Margevicius, Organizer. Also present on behalf of the Union were Carolyn M. Tidwell, Lawrence A. Starr, and Kenneth G. Dodds, grievants.

Idris Abdurragib was the advocate for the Adult Parole Authority. He was assisted by Thomas E. Durkee. Also in attendance for the Authority were Dick Daubenmire, Office of Collective Bargaining; Jay R. Denton, Adult Parole Authority;

and Rebecca L. Fair, Bureau of Personnel, Department of Rehabilitation and Correction.

There were no objections as to the arbitrability of the pending dispute, either upon procedural or upon substantive grounds. Accordingly, then, this matter is properly before the Arbitrator for a final and binding decision.

#### GRIEVANCES

The instant case involves three grievances which arise from the same nuclei of facts and which have been consolidated for the purpose of this proceeding.

The grievance of Carolyn M. Tidwell, reads as follows:

On 5-30-90, I applied for the position of Parole Services Co-ordinator, P.C.N. #9220.0. On 9-5-90 I received a letter advising me this position was awarded to Judy Novy, a person with more then 4 years less seniority then myself (sic).

The selection of Judy Novy came as a complete "shock" to me due to the number of applicants including myself who have far more seniority then (sic) Ms. Novy.

By selecting Judy Novy, management has demonstrated the most blatant form of favoritism, discrimination and total disregard for a contractual agreement I've ever witnessed, not to mention, been a victim of.

The same job posting and promotion was grieved by Lawrence Starr:

On 9-24-90 grievant was informed Judith Novy, applicant for Parole Services Co-ordinator, Cuyahoga County PCN 9222.0 was awarded said posting; inspite of grievant having the greater seniority and having been determined to be an equal applicant.

A third grievance filed by Kenneth Dodds states "the promotion of Judith Novy to Parole Services Co-ordinator, PCN 9220.0, is a violation of the 1199 Union contract with the State of Ohio."

Denied at each step of the grievance procedure, the matter was collectively appealed to arbitration.

### ISSUE

The issue in this proceeding may be stated thusly: Did the Agency violate the Agreement between the parties when it promoted a junior applicant to the position of Parole Services Co-ordinator, and, if so, to what remedy, if any, are the grievants entitled?

### CONTRACT PROVISIONS

The following provisions from the Agreement between the parties are deemed to be pertinent to the within dispute:

#### **ARTICLE 30 - VACANCIES**

##### **§ 30.01 Job Vacancies**

A vacancy is defined as an opening in a full-time permanent or part-time permanent position in the bargaining unit which the agency has determined is necessary to fill.

When a vacancy is created by an incumbent employee leaving the position, and that incumbent is above the entry level position in the classification series, the job shall be posted at the level in the classification series of the leaving employee, provided the duties and responsibilities remain the same. After the employees have had the opportunity to bid for lateral transfers or for promotions, the position can be reduced in the classification series.

When a vacancy will be created by an incumbent employee leaving a position, the agency may post the vacancy and interview and provisionally select a candidate anytime after receiving notice that the position will be vacated.

A job vacancy shall be posted for a minimum of seven (7) days on designated bulletin boards within the agency at the facility where the vacancy exists. Applicants will be notified within thirty (30) days after the final filing date of the status of their application.

Any employee who desires to be considered for a position(s) in another agency(s) shall submit an Ohio Civil Service Application (ADM-4268) to the appointing authority of the agency or institution where employment is sought. Such application shall specify the desired classification(s) and worksite(s). These applications will be maintained on file for one (1) year from the date of receipt by the appointing authority. If a posted vacancy is not filled pursuant to steps A and B of this article, any applicant meeting qualifications for this position shall be considered pursuant to step C of this article.

The Employer shall prepare and make available a booklet detailing the classifications available in various agencies, including a listing of the appointing authorities to which applications are to be sent.

Notice of newly-created classifications shall be provided to the Union's central office thirty (30) days prior to initial posting.

#### **§ 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.

The Employer and the Union agree, through each Agency Professional Committee to review and discuss the agency's approved affirmative action plan annually prior to submission to EEO. Such plans shall include specific hiring goals where necessary.

Job vacancies shall be awarded in the following sequential manner:

A. The job shall first be awarded to a bargaining unit 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 a bargaining unit 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 supersedes Ohio Civil Service Laws and Rules regarding eligibility lists for promotions.

#### STATEMENT OF THE CASE

The dispute in this case arose when the Agency selected a junior employee to fill a position that had been posted for bid on May 21, 1990 pursuant to Article 30 of the Collective Bargaining Agreement. In doing so, the Agency bypassed senior applicants, three of whom grieved the Agency's action. The grievances were appealed through the contractual procedures and consolidated for hearing in the instant Arbitration.

At the time of the job bidding under consideration the grievants were Probation Officers with the Agency. The position for which each grievant had applied was that of Parole Services Co-ordinator. After the bidding had been closed, each applicant was reviewed by the Agency in accordance with a Standard Personnel Selection Evaluation. Pursuant to this evaluation each candidate is ascribed points in the categories of qualifications, experience, education and work record. The score of an oral interview at which questions pertinent to the job are asked is added to qualifications. The cumulative points of the applicants are then used to screen the candidates. A review of the Personnel Evaluation conducted in accordance with this procedure indicates the following scores:

Judith Novy	17 points
Lawrence Starr	16 points
Kenneth Dodds	10 points
Carolyn Tidwell	8 points

In a memorandum dated August 9, 1990 (Management Exhibit 1), the Deputy Superintendent Probation Development Section recommended the selection of Judith Novy. On August 20, 1990 the appointing authority approved the appointment of Ms. Novy (Management Exhibit 4).

The selection of a junior applicant occasioned the filing of the grievances of Carolyn Tidwell (Joint Exhibit 2); Lawrence Starr (Joint Exhibit 3) and Kenneth Dodds (Joint Exhibit 4). As each grievance challenged the results of the Personnel Selection Evaluation, reevaluations were conducted. Although adjustments were made in the scores as a consequence of the reevaluations,

the modifications to the scoring did not cause a change in the selection.

#### POSITION OF THE UNION

The Union protests the selection of a junior employee for the vacancy in the position of Parole Services Co-ordinator. It is the position of the Union that each grievant in this proceeding possessed the requisite qualifications. Accordingly, the most senior grievant was contractually entitled to the appointment. The failure of the Agency to select pursuant to seniority as required by Article 30 of the Collective Bargaining Agreement deprived the most senior grievant of a promotional opportunity. Additionally, however, the selection had an adverse impact upon the job opportunities of the other grievants, creating a domino effect.

The Union conducted a separate review of the qualifications of each grievant in this proceeding. Grievant Starr maintains that as his qualifications were relatively equal to those of Judith Novy, he was entitled to the appointment by reason of his greater seniority. Moreover, Grievant Starr challenges the points assessed for his experience. The grievant contends that he should have been awarded three points for the completion of 61 months of experience as of June 9, 1990. Alternatively or in addition thereto, the grievant maintains he ought to have been awarded credit for his work as a Senior Security Person for the Ohio Turnpike Commission, a quasi-governmental law enforcement agency.



Grievant Dodds argues that he was not awarded all the credit he should have received for qualifications and work record. The Agency failed to give any points for either training other employees or providing work direction. The evidence establishes that Grievant Dodds engaged in training of other employees. Moreover, pursuant to the position description for a Probation Officer II (Union Exhibit 3), the grievant was required to direct work of and to provide case consultation to other employees. The job specifications further establish the requirement that the Parole Officer II engages in responsibility for case consultation and on-job training (Union Exhibit 5). Although the aggrieved consistently scored above average on his annual performance review (Union Exhibit 7), the Agency failed to award any points for his work record. Additionally, the Agency failed to take account of the fact the aggrieved being an epileptic is a handicapped individual. Had the Agency properly evaluated the grievant, his score would have entitled him to the appointment above the junior applicant, on the basis of his seniority date, August 1, 1983.

Grievant Tidwell, having a seniority date of May 9, 1981, is the most senior of the grievants herein. The Union maintains that the Agency erred in failing to grant any points to Grievant Tidwell for training other employees and in providing work direction to other employees. Moreover, the Agency failed to provide any credit for direction, supervision, training and work performed at Bellaire Community Center.

The evidence submitted by the Union indicates the Agency lacks a uniform system of selection. The Union argues that the inconsistency in evaluation of employees is demonstrated by Union Exhibit 8. Pursuant to the screening for a vacancy in the same position in April, 1990, the aggrieved Tidwell was given points she was subsequently denied in May, 1990. The fact that a senior qualified employee is entitled to selection for a job vacancy is indicated by Union Exhibit 10. In this grievance response, the Agency took the position that "management appointed the selectee purely on the basis of seniority." In the pending case, however, the Agency failed to consider seniority in the selection process.

Finally, Grievant Tidwell alleges a discriminatory motive. The aggrieved is a black female. Thus, pursuant to Affirmative Action, as well as her seniority, experience and qualifications, this grievant ought to have been awarded the vacancy.

The Union argues the Agency erred in promoting a junior employee who was not significantly more qualified than the senior employees. The promotion was not made on the basis of Affirmative Action, although this argument was made in the step 3 answers to the grievances. Indeed, the Supervisor proposing the selection of the junior employee unequivocally testified that Affirmative Action had nothing to do with his recommendation.

The evidence establishes discrepancies in how the Agency evaluates job bidders. The errors made by the appointing officers must be rectified in this case. The most senior

employee should have been appointed to the vacancy posted in May, 1990. Her appointment would then have enabled the other grievants to move into available openings as they arose. This contract violation deprived the grievants of promotions and increased earnings. Each grievant is entitled to compensation for these losses.

The grievances should be sustained.

#### POSITION OF THE AGENCY

The Agency maintains that it did not violate the terms of the Agreement between the parties when it appointed a junior employee to fill a vacancy in the position of Parole Services Co-Ordinator. Each applicant for the posted vacancy was screened pursuant to the provisions of Article 30. As a result of the screening the most qualified Affirmative Action candidate was chosen.

The language of Article 30 provides that the most senior applicant is entitled to a promotion unless a junior employee is significantly more qualified. In the case at hand the most senior employee was, indeed, by-passed by a junior employee with substantially better qualifications. The most senior applicant did not grieve the selection of a junior candidate. The contract is silent as to the next senior applicant and provides no limitation on the agency beyond the most senior qualified candidate. In the absence of specific language restricting the Agency, management was free to choose the best qualified

candidate regardless of seniority once the most senior candidate had been by-passed.

The only candidate who originally scored in the area of the chosen applicant had only fourteen days greater seniority than the junior candidate. Accordingly, seniority was less of a factor in the selection process. Moreover, this candidate was subsequently re-evaluated. Points that had initially been given to him for his work with the Ohio Turnpike Commission were later removed. The Turnpike Commission is not a law enforcement agency. Therefore, he could not be credited with this prior work experience.

Moreover, the Agency can justify the selection of the junior candidate on the basis of Affirmative Action. The evidence establishes Agency under-utilization of females in the position in issue. As the junior candidate was the best qualified Affirmative Action candidate, she was properly selected.

In fairness to the candidates the Agency performed a second screening of the grievants and the selectee. The second screening confirmed the results of the earlier evaluation even though some changes in scoring were made. The Agency maintains it made the selection in question on the basis of Affirmative Action. The Cleveland Probation Office was under-utilized by one female and the highest scorer on the evaluation was a female. By reason of Affirmative Action she became the significantly better qualified candidate. There has been no contract violation in this matter.

The grievance should be denied.

#### DECISION

The grievances consolidated for hearing in this proceeding address the filling of vacancies and promotional opportunities for bargaining unit members as set forth in Article 30 of the Collective Bargaining Agreement. The applicable contract language very specifically identifies the factors to be used in filling job openings. These are "qualifications, experience, education and work record, and Affirmative Action." The agreement further provides that unless a junior employee is substantially more qualified, the job shall be awarded to the applicant with the most seniority. The three grievants in this proceeding are senior to the employee selected by the Agency for a vacancy in the position of Parole Services Co-ordinator posted for bid in May, 1990 and filled in September, 1990.

The Agency has in place a Personnel Selection Evaluation procedure. Pursuant to this system the education, experience, work performance and qualifications of each applicant for a job opening are measured. For example, a maximum of ten (10) points may be awarded for qualifications determined by evidence the individual has trained other employees, provided work direction and supervision, and by performance on an oral interview. Up to four (4) points are given for prior institutional correctional work, public law enforcement, probation, parole, law or social work. The score for education (up to six (6) points) is determined by undergraduate and graduate degrees. A possible

two (2) points can be earned for a work record including an average score of 80 or above on the last five (5) evaluations.

This procedure is designed to assure objectivity and uniformity in promotional matters consistent with contractual constraints. These grievances raise several questions pertaining to the application of Article 30. For example, what impact, if any, does Affirmative Action have on the selection process? Does seniority become an irrelevant factor once the singular job applicant with the greatest seniority is bypassed by a substantially better qualified junior employee?<sup>?</sup> What recourse does an employee have for errors in his/her personnel evaluations?

Although the grievances each protest the failure of the Agency to select pursuant to seniority, the Arbitrator finds that individually the grievances raise issues that must be separately addressed. Accordingly, this decision and award is rendered in three parts.

A. Grievance of Carolyn Tidwell.

Carolyn Tidwell is the grievant with the greatest seniority in this proceeding. However, having scored lower than other applicants in the Personnel Selection Evaluation, Ms. Tidwell was bypassed for the position of Parole Services Co-ordinator. Her grievance alleges that the selection of a junior applicant was discriminatory and that the scoring on her evaluation was inaccurate.

To address the contention that the scoring was improper, the Agency re-evaluated the application of this aggrieved. As a

result of the second screening the total score of grievant was raised by one (1) point. As the junior selectee had scored substantially higher than the grievant on both screenings, the Agency affirmed its appointment of the junior applicant.

A review of the scoring process establishes that the Agency accurately measured the candidacy of the aggrieved. The subsequent scoring was within one point of the initial evaluation. Having lost one point for education due to the lack of a degree, the grievant gained an additional point for her work experience at Bellaire Community Center, a social work agency, and another point for on the job training of employees within the Agency as indicated on her job application.

The grievant argues that she scored higher in a March, 1990 bid for the same job position. However, in the opinion of the Arbitrator, a review of the evidence submitted establishes consistency in the evaluations of the aggrieved for the two job bids. Although the aggrieved earned a total of twelve (12) points in the March, 1990 bid, seven (7) of those points were awarded for the interview score. The scores for work performance, education and experience on the March and May bids remained comparable. In the May, 1990 bid, as in the March, the grievant was awarded the maximum score for her oral interview. The Arbitrator finds the scoring of the aggrieved for both the March and May, 1990 bids, was consistent and reflective of the abilities of the aggrieved. Moreover, the evidence indicates there may be variations among evaluators. As long as the evaluator variations are consistent as to the individual job

applicants, such differences are acceptable. Thus, the evaluation of the grievant for the earlier job bid does not provide probative evidence of Agency error in the evaluation now under consideration.

The Union also cites the earlier promotion to support its contention that seniority is the determining factor in job selections. In response to a grievance arising from the preceding appointment to Parole Services Co-Ordinator, the Agency replied "management appointed the selectee purely on the basis of seniority." In the prior instance, however, it was also the senior employee who scored highest in the initial screening and interview. Thus, the prior case is readily distinguishable from the instant situation where a junior candidate scored substantially higher than the senior applicants. The March, 1990 selection exemplifies how both seniority and qualifications impact on promotional opportunities.

Grievant Tidwell also alleges that the appointment in the pending case was discriminatory. The Union argued that the Agency must "begin to promote applicants of color," in accordance with its contractual commitment to Affirmative Action. Although some testimony alluded to "under-utilization of minorities," the grievance before the Arbitrator addresses only the job bid of the grievant. The question before the Arbitrator is whether Grievant Tidwell was by-passed for promotion because of race. The Arbitrator agrees that the contractual acknowledgement of Affirmative Action includes an



Agency obligation to promote minority members. However, an allegation of racial discrimination requires evidence of improper motivation in an employment decision. In the case at hand the junior applicant was substantially more qualified than Grievant Tidwell. The Arbitrator can only conclude, then, that the bypass was based upon qualification and was not racially motivated.

Nor can the Arbitrator conclude that Grievant Tidwell was entitled to selection by reason of Affirmative Action. Pursuant to Article 30, Affirmative Action is a criterion in addition to qualifications, education, experience and work record. Although a member of (a) protected class(es), Grievant Tidwell lacked the personnel evaluation score to entitle her to the promotion.

In the opinion of the Arbitrator the Agency determination to select a junior applicant for the position of Parole Services Co-ordinator above Carolyn Tidwell was not contractually prohibited. On the contrary, the language of the Agreement between the parties specifies that selection is based, first, on qualifications. In the instant case the grievant, though more senior, was less qualified. Accordingly, the agency appointed a junior, substantially more qualified applicant. The grievance of Carolyn Tidwell must be denied.

**B. Grievance of Kenneth Dodds.**

The grievance of Kenneth Dodds is of special interest because in his case the rationale for denying the initial appointment is different from that used in denying the grievance. Following the initial screening Grievant Dodds was

bypassed for selection as a Parole Services Co-Ordinator because a junior applicant had scored substantially higher in the personnel evaluation. Following his grievance, the qualifications of the grievant were reassessed. As a result of the reevaluation, a change was made to the score of the grievant.

The initial score had failed to give any credit to the grievant for his work record with the Agency. As the grievant had maintained a performance review score averaging above 80, the grievant was awarded an additional two (2) points for his work performance, bringing his total evaluation score to twelve (12).

The Union argues, as it did with Grievant Tidwell, that the aggrieved ought to have been given credit for training other employees. In the case of Grievant Dodds, however, the second evaluator refused to give additional points for this job duty. It is the position of the Union that assisting with on the job training is a job duty specifically listed in the classification specification of the Parole Officer 2 (Union Exhibit 5). Thus, the Union asserts that Parole Officers 2 should automatically be given credit for training other employees and for directing supervision.

A review of the information submitted by Grievant Dodds to support his job bid does not specifically state training of other employees as a job qualification. In comparison, both Grievant Starr and Grievant Tidwell indicated they had had experience in training of staff. In the opinion of the

Arbitrator it is necessary for the applicant to specifically identify the job duties actually performed to receive credit for the same. The inclusion of a duty on a classification specification does not automatically establish that job is performed by the individual. The job specifications provide parameters of job functions and indicate the task may be assigned "when requested." The specifications do not, however, establish the individual employee has actually performed the duty in question. Thus, the job description for Parole Officer 2 is not a substitute for the clear delineation by the job applicant of work functions actually performed. The arbitrator finds that the Agency did not err in not giving credit to Grievant Dodds for his training of other employees or his providing of work direction.

The adjusted score of Grievant Dodds was two points lower than the adjusted score of the selectee. The Agency determined, however, that in spite of the relative closeness of the scores, the job ought to be awarded to the junior applicant. The position taken by the agency is that because the agency's Cleveland Office was under-utilized by one woman in the Parole Services Co-Ordinator position, it could justify bypassing the aggrieved.

In the opinion of the Arbitrator this position taken by the Agency finds support in the contract language agreed upon by the parties. In the applicant selection process, Affirmative Action is a criterion to be used in addition to the Personnel Selection Evaluation. In addition to the "score" received by a job

applicant, Affirmative Action is a factor to be used in assessing job applicants. The contractual commitment to Affirmative Action establishes that membership in a "protected class" may become the basis upon which an applicant with the necessary qualifications, experience, education and work record, receives a job promotion. When reviewing the job application of Grievant Dodds and the personnel reevaluation, the Agency determined that Affirmative Action justified retaining the selectee in the Parole Services Co-ordinator Position. The Arbitrator cannot find that this decision violated the concepts embodied in Article 30.

The Union further argued that Grievant Dodds was entitled to consideration as a member of a protected class due to a physical handicap. Moreover, the Union maintains the decision to bypass the grievant was discriminatory. As in the case of Grievant Tidwell, to successfully argue discrimination in a job promotion case the Union would have to present evidence that the employee was bypassed because of a sociological or physiological condition. There is no evidence in the case of Grievant Dodds that the appointing entity was even aware of the grievant's epilepsy. Accordingly, it cannot be found that his physical condition was a motivating cause in his being bypassed.

The additional argument made by the Union is that the grievant himself ought to have been considered as a protected applicant entitled to consideration as an Affirmative Action candidate. The evidence is clear, however, that at the time the employment decision was made, the appointing administrators were

not cognizant of the applicant's handicap. The Union argues that the Agency should have known. Yet, in an organization the size of the Adult Parole Authority, it is incumbent upon an applicant to specify qualifying characteristics to be considered for job appointments. Nowhere on the job application of the grievant is there any indication that he ought to be considered as an Affirmative Action candidate. It is the facts known to the Agency at the time a promotional decision is rendered that are subject to arbitral review and scrutiny. In the case at hand the Arbitrator cannot find the Agency erred in the decision made in September, 1990. Information not available to the Agency until after the appointment cannot become the basis for a grievance. Indeed, nowhere on the grievance form itself does the grievant advance the proposition that he is entitled to consideration as an Affirmative Action candidate.

The Arbitrator cannot find that the Agency erred in the case of Grievant Dodds. Based upon the information available to it when evaluating his job application, the Agency acted reasonably and properly. The decision reached in regard to Grievant Dodds did not constitute a contract violation.

#### C. Grievance of Lawrence Starr.

The grievance of Lawrence Starr is markedly distinct from those previously reviewed. Grievant Starr alleges neither discrimination nor error with the personnel evaluation rendered on November 19, 1990. Rather, this grievance asserts that because of the comparability of the qualifications of the

aggrieved and the selectee, seniority ought to have been the determining factor.

Consideration of this grievance is unique, too, in that this is the only instance in which three personnel evaluations were rendered, the third of which resulted in a lower personnel score. In the preceding grievance analyses, the Arbitrator gave consideration to the second screenings in which points initially withheld from the applicants were subsequently ascribed. In the case of Grievant Starr, however, the final screening resulted in a reduction of points.

In assessing the merits of the Starr grievance, the Arbitrator has determined to analyze the first scoring. In the opinion of the Arbitrator, the grievance of Starr can only be appropriately assessed by viewing the facts as they were at the time the grievance was filed. To permit the Agency to reevaluate a candidate downward after a grievance pertaining to a promotion has been filed would jeopardize the grievance process and impugn the credibility of the system. Accordingly, a fair consideration of the Starr grievance requires that his qualifications be analyzed pursuant to the original personnel evaluation.

Extensive testimony was elicited as to whether the aggrieved was entitled to three (3) points or two (2) points in his work experience. The controversy centers upon whether or not the experience of the aggrieved as a security person with the Ohio Turnpike Commission ought to be deemed law enforcement work. Additionally, the grievant argued that regardless of his

Turnpike Commission experience, he had, at the time of his interview for the position in question, worked the requisite 61 months with the Adult Parole Authority, thereby entitling him to three points.

The Arbitrator notes, first, that a determination not to include the security work with the Turnpike Commission is a managerial decision. There is nothing inherently arbitrary or capricious in this decision. It is the type of question upon which an Arbitrator will not substitute his/her judgement for that of management. Therefore, this Arbitrator finds the decision not to afford credit to the grievant for his Turnpike Commission work was a reasonable and proper exercise of administrative authority.

Whether or not the grievant is entitled to credit for more than 60 months with the Agency is a more difficult question. Although the date of hire is clearly the starting point for measuring work with the Agency, it is uncertain what cut-off date was used by the Agency (i.e., the application date, the closing bid date, etc.). The Arbitrator finds there is no evidence as to the date used by the Agency to measure work experience. If, indeed, the Agency used a cut-off date for the grievant that differed from that used for other applicants, the grievant would have a valid objection. A uniform and consistent means of calculating work experience with the Agency must be utilized when evaluating bids for job vacancies. From the evidence submitted, however, the Arbitrator cannot conclude that the Agency erred. It is unclear whether the date used by the

Agency for each applicant was the bid date or some other date. As the Union was the challenging party in this proceeding, it would have been incumbent upon the Union to demonstrate inconsistency or inequity in the calculation of work experience. In the absence of testimony and evidence on this issue, the Arbitrator cannot find that the work experience of the aggrieved was, in fact, figured differently from that of the selectee.

The Arbitrator finds, then, the personnel evaluation of the aggrieved at the time of his job bid was proper and reasonable. The results of this score rendered the grievant's qualifications and personnel screening comparable to that of the selected applicant. Indeed, this conclusion was confirmed by the subsequent reevaluations of both candidates. It remains to consider, then, whether the decision to bypass the grievant for appointment was proper.

The evidence establishes that subsequent to the rating of the applicants on the contractual criteria of qualifications, experience, education, and work record, the Agency further reviewed the qualifications of the grievant and the selectee. As a result of this additional review, the Deputy Superintendent determined the selectee had been more timely in the preparation of reports, and, therefore, would be "better prepared to assist lower level officers . . ." The Arbitrator has difficulty justifying the additional analysis the Agency imposed on this grievant. The aggrieved was evaluated along with eight other applicants pursuant to the established procedure and using the contractual criteria. The evaluation score of the grievant was



almost equal to that of the appointed applicant. In the opinion of the Arbitrator, it is this evaluation which must be utilized to consider the entitlement of the grievant to the job in question.

Moreover, the Arbitrator further finds that the comparison of the turnaround time for reports of the grievant with that of the appointee was inappropriate. To have validity and persuasive value, a comparison of that nature would have to clearly identify similarities in the work load of the individuals compared and in the type of reports being written in the specific time frame covered. Testimony of a greater turnaround time without clearly identifying similar factors in the reports being written is not convincing.

The Agency suggests that because there was only a fourteen day difference in seniority between the grievant and the successful applicant, that seniority was "less" of a factor in the decision-making process. The Arbitrator cannot agree with this proposition. The term "most state seniority" means the greatest length of service--whether that be by one day, one week, or fourteen days. "Greatest seniority" cannot be diminished or modified in the manner suggested by the Agency.

The State also argued that the only applicant having any seniority right to the job was the single applicant with greatest seniority. Once the single most senior applicant was bypassed by "significantly more qualified" junior applicants, the Agency argues that seniority became a non-issue in the selection process. Again, the Arbitrator is not persuaded by

this analysis of the language of Article 30. Seniority is a negotiated right which inures to each individual employee. The seniority interest of each bargaining unit applicant for a posted job vacancy cannot be annulled in the manner proposed by the Agency. The results of the Agency position would be that no employee excepting the single individual with greatest seniority has any seniority privilege to a posted job. In the opinion of the Arbitrator, this argument is the antithesis of seniority and cannot be sustained. While the Agency has reserved the right to select pursuant to specific qualifications, it has also agreed the most senior applicant shall be awarded the job unless a junior applicant is significantly more qualified. The purpose of this provision is to protect promotional opportunities for senior bargaining unit members who satisfy qualification requirements. This recognition of seniority applies to each candidate for the job, not solely the single most senior applicant.

The Agency also argues, however, that it bypassed the grievant because of Affirmative Action. Pursuant to the provisions of Article 30, Affirmative Action, along with qualifications, is a criterion used in reviewing applications. The parties herein have agreed that when considering applications for a job promotion, the State shall take into account the desirability of providing promotional opportunities for "all people . . . without regard to race, color, religion, sex . . . national origin, handicap or age . . ."

The Union maintains that Affirmative Action was not a factor in this case. Indeed, the testimony of the Deputy Superintendent established that his recommendation was not based on Affirmative Action because he believed women were adequately represented in the particular job. Thus, it is the argument of the Union that reliance on Affirmative Action is a fabricated defense to this alleged contract infringement.

While Affirmative Action was apparently not the basis for the recommendation of the Deputy Superintendent, it cannot be concluded that Affirmative Action was not considered by the appointing body. The Deputy Superintendent's recommendation is not binding upon the appointing Agency as is evidenced by Union Exhibit 8 wherein the recommendations of Unit Supervisors and the Regional Administrator were not acted upon. The Arbitrator herein is unable to conclude upon the evidence submitted that Affirmative Action was not a factor in this appointment. The evidence does establish, however, that a statistical study prepared by the Personnel Coordinator (Agency Exhibit 7) in May, 1990 was available for use by the Chief when the disputed appointment was made. Indeed, the unrebutted testimony of the personnel coordinator was that the purpose of the report was to provide influence in filling vacancies. According to the report prepared in May, 1990 and available to the appointment officers, in this instance, females were under-utilized in the Cleveland region in the Parole Services Coordinator position. On the basis of this analysis, the Agency could properly justify selecting a female above a very closely qualified male in

filling the vacancy in question. The fact that Affirmative Action was not enunciated as the rationale in the selection process until a grievance had been filed does not render it any less available to the Agency. Affirmative Action is a contractual criteria to be used in filling vacancies and there is no evidence that the appointing officers did not consider this factor when appointing Ms. Novy. The grievance of Lawrence Starr must, therefore, be denied.

AWARD

The grievances of L. Starr, C. Tidwell, and K. Dodds are hereby denied.

  
MARGARET NANCY JOHNSON

Dated and made effective in Cleveland, Ohio, this 30th day of March, 1992.