

VOLUNTARY LABOR ARBITRATION TRIBUNAL**IN THE MATTER OF ARBITRATION :****BETWEEN :****STATE OF OHIO,
DEPARTMENT OF
ALCOHOL & DRUG
ADDICTION SERVICES****- AND -****DISTRICT 1199,
THE HEALTH CARE AND
SOCIAL SERVICE UNION,
S.E.I.U., AFL-CIO****DECISION IN
AWARDING OF
JOB VACANCY GRIEVANCE
(ZAKEE MUMIN)****GRIEVANCE NO.:** 27-21-930818-0959-02-12**GRIEVANCE:** The Grievance protests the Employer's action of awarding the Alcohol & Drug Program's Specialist II position to a new hire and not the Grievant.**AWARD:** The Grievance is denied.**HEARING:** April 5, 1994**ARBITRATOR:** David W. Stanton, Esq.**APPEARANCES:****FOR THE EMPLOYER**

Renee Coil, Advocate
Mike Duco, Second Chair
Galen Weingart, Supervisor
Michael Link, O.D.A.D.A.S.,
Criminal Justice Administrator
Patrick Lanahan, O.D.A.D.A.S.
Assistant Manager of
Special Programs

FOR THE UNION

Cheryl Hill, Organizer
Zakee Mumin, Grievant

ADMINISTRATION

By letter dated October 1, 1992, from Tim D. Wagner, Chief of Arbitration Services for the State of Ohio, Office of Collective Bargaining, the Undersigned was notified of his mutual selection to serve on a rotating panel of Arbitrators to hear and decide disputes arising between these Parties. The instant matter involves, as the Grievant alleges, the improper denial of the "Alcohol and Drug Program Specialist II" vacancy for which he applied. On April 5, 1994, an Arbitration Hearing was conducted wherein each Party was afforded a fair and adequate opportunity to present testimonial and/or documentary evidence in support of positions advanced; and, where the Grievant appeared and testified on his own behalf. The Record of this proceeding was subsequently closed at the conclusion of the evidentiary Hearing; and, this matter is now ready for final resolution herein.

GRIEVANCE AND QUESTION TO BE RESOLVED

The following Grievance, Joint Exhibit - 2, was filed on August 16, 1993, and contains the subject matter for resolution herein:

STATE OF OHIO - DISTRICT 1199

GRIEVANCE FORM

Grievant's Name: Zakee S. Mumin
Agency: D. R. & C.
Delegate's Name: Zakee S. Mumin
Work Site: O.C.I.
Grievant's Classification: Program Coordinator
Date Grievance Arose: 8-16-93
Statement of Grievance: Grievant is being denied P.A.L. while being entitled to receive P.A.L.
Contract Article(s) and Section(s): Article I;

Article 30, Sections (A), (B), (C) and (D).

Resolution Requested: Grievant wishes to be made whole, including back pay, etc.

Grievant's Signature: /s/ Z. Mumin

Date: 8-16-93

The question to be resolved herein is stated as follows:

"Whether or not the Employer's action of awarding the Alcohol and Drug Program Specialist II vacancy within the Department of Alcohol and Drug Addiction Services to a new hire rather than the Grievant violated Article 30, titled "Vacancies," Section 30.02, titled "Awarding the Job (Transfer and Promotions)," and, if so; what shall be the appropriate remedy?

CITED PROVISIONS OF THE PARTIES'
COLLECTIVE BARGAINING AGREEMENT

The following provisions of the Parties' Collective Bargaining Agreement (Joint Exhibit - 1) were cited; and/or, are deemed relevant herein:

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 in the classification series, the job shall be posted at the level and 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 promotion, 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 a provisionally selected 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 in another Agency shall submit an Ohio Civil Service Application (A.D.M.-4268) to the employing authority of the Agency or institution where employment is sought. Such application shall specify the desired classification and work site. 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 and 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/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; 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 E.E.O. 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 supercedes Ohio Civil Service Laws and Rules regarding eligibility lists for promotions.

* * *

FACTUAL BACKGROUND

The underlying facts which gave rise to the filing of this Grievance are essentially undisputed.

On May 24, 1993, the position of Alcohol and Drug Program Specialist II within the Ohio Department of Alcohol and Drug Addiction Services, hereinafter referred to as "ODADAS," was posted. As a result thereof, several applicants, including the Grievant, applied for the position. The Parties stipulated that the successful applicant for the aforementioned vacancy was a new hire outside of the Bargaining Unit; and, that the Grievant's

work record and/or educational background is not in dispute.

Zakee S. Mumin, hereinafter referred to as the "Grievant," has served in various capacities while employed by the State of Ohio. He has served as Correctional Programs Specialists at the Ohio Reformatory for Women and the Orient Correctional Institution. While at Orient Correctional Institution he also served as Correctional Program Coordinator/Substance Abuse Coordinator. It is undisputed that the Grievant applied for and was denied the position at issue herein. The posting date referenced on the "Job Opportunity Form," Joint Exhibit - 6 was May 24, 1993, and the deadline for submitting one's application was June 2, 1993. The procedural aspects attendant with the posting of this procedure are not in dispute.

As set forth in Joint Exhibit - 6, the minimum qualifications for this position were as follows:

"Completion of undergraduate core program in Human Services or activity related area (eg. social work, psychology, sociology, counseling, nursing, statistics; twelve (12) months experience in coordination or development of alcohol and drug treatment and prevention services;

Or, twenty-four (24) months experience in delivery of Health/Human Services; twelve (12) months experience in coordination or development of alcohol and drug treatment and prevention services;

Or, twelve (12) months experience in Alcohol and Drug Program Specialist I (69441);

Or, equivalent."

As the evidence of Record demonstrates, the position the Grievant held at the time he made application was at pay range ten (10)

and the position for which he applied was at pay range twelve (12).

The job description/posting of the aforementioned position is replete with references to "TASC - Treatment Alternatives to Street Crime." The Record demonstrates that the position required that the individual have knowledge of and experience with the TASC Program; assist with grant submissions; review and make recommendations; and, to review and monitor the TASC Programs to assure compliance.

Upon receiving the Grievant's application, the application and the attendant documentation was reviewed by those individuals who would conduct the formal interview of the Grievant; i.e., Michael Link and Patrick Lanahan. Both indicated that upon initial review thereof, the Grievant did not possess the minimum qualifications as set forth in the job description. However, they indicated that they had known the Grievant through work, other programs and his involvement in other community activities and therefore afforded him an interview. Both men testified that their initial opinion regarding the Grievant's qualifications was confirmed after the interview was conducted. Of essential importance to this position was the individual's knowledge and experience in the realm of working with State-wide Alcohol and Drug Addiction Services, particularly, with the State-wide TASC Program, which involved the assistance and grant submission reviews and recommendations and reviewing and monitoring the TASC Program to assure compliance. Each indicated that the Grievant

did not possess the requisite knowledge relative to this Program.

Consequently, following the interviewing process, the Grievant was notified on July 21, 1993, by letter from the Department of Alcohol and Drug Addiction Services Personnel Manager Patricia Mounts, that the position was awarded to a new hire. As such, the Grievant filed the instant Grievance alleging that he was improperly denied the position.

When the Parties' efforts to resolve this matter through the course of the Grievance Procedure proved unsuccessful, the Job Vacancy Grievance of Zakee S. Mumin was appealed to Arbitration hereunder.

CONTENTIONS OF THE PARTIES

UNION CONTENTIONS

The Union contends that the Employer's action of awarding the job vacancy to a new hire and not the Grievant violated the clear and unambiguous mandates of Article 30 of the Parties' Collective Bargaining Agreement. The Union notes that Article 30, Section 30.02 clearly states that, "all timely filed applications shall be reviewed considering the following criteria: qualifications; experience; education; work record; and, affirmative action." Furthermore, that Section of Article 30 sets forth the procedural mandates of awarding job vacancies for Bargaining Unit Members. It maintains that, as a Bargaining Unit applicant for which this negotiated vacancy procedure was implemented, the Grievant indeed possessed the "minimum"

qualifications" for the position in question.

The Union asserts that the interviewers "subjective and elitist" remarks have no place herein, but a careful review of the Grievant's job application demonstrates that he indeed met the minimum qualifications for the position. Galen Weingart, the Grievant's immediate Supervisor and a witness called by the State, testified that the Grievant developed program components for substance abuse and alcoholism. The Union recognizes that regardless of the Bargaining Unit Member's experience, there will always be variations and nuances to learn in any new position. The Grievant in this matter is indeed qualified to learn those nuances and adapt to those situations attendant with the position.

The Union emphasizes that Article 30, Section 30.02 must be interpreted to provide for a working progression for Bargaining Unit Members who apply for vacant positions. If the Employer's interpretation of qualifications needed to perform a Bargaining Unit position is accepted in this forum, it will set a precedent for future transfers and promotions and thus lead to the demise of the very core of the job bidding language negotiated by and between these Parties.

In conclusion, the Union submits that the Grievant indeed met the criteria as set forth in Section 30.02 of Article 30 and, as the sole Bargaining Unit Member who applied for this position, he was unjustly denied the promotion to Alcohol and Drug Program Specialist II.

For all of these reasons, the Union requests that the Grievance be sustained, that the Grievant be awarded the position in question with all back pay and benefits attendant therewith.

EMPLOYER CONTENTIONS

The Employer contends that the Union failed to meet its burden of proof to establish that the Grievant was improperly denied the position of Alcohol and Drug Program Specialist II within the Department of Alcohol and Drug Addiction Services. The Employer maintains that under Section 30.02 of Article 30 of the Parties' Agreement, the senior "eligible" employee was entitled to the vacancy and in this situation that would have resulted in a promotion for the Grievant. It argues that the Grievant did not, however, possess the required minimum qualifications necessary for this vacancy. It maintains that it was imperative that the chosen candidate be thoroughly familiar with the community-based treatment programs, court systems, criminal justice professionals, such as judges, probation officers, bailiffs, community-based treatment staff and, moreover, understand the linkage as a liaison between them. The Employer emphasizes that the successful applicant needed to demonstrate an understanding of the TASC Program and how it operated. That individual needed to display a knowledge of the rules, requirements, limitations on probation, parole and judicial discretion. However, the Employer emphasizes that the testimony from Lanahan and Link, the two (2) individuals who

interviewed the Grievant, demonstrates that he possessed no knowledge or understanding of the aforementioned requirements.

The Grievant's previous work history, it maintains, is dissimilar in nature as a Re-habilitation and Corrections Substance Abuse Coordinator who deals strictly with direct services within an institutional setting. His expertise is in violence prevention and coordinating the mandatory substance abuse program for inmates. The aforementioned requirements relative to the vacancy were beyond the Grievant's realm of experience or knowledge and such was substantiated by his lack of knowledge relative to the TASC Program; i.e., the basic requirement for the vacancy.

The Employer emphasizes that the Grievant clearly had not developed treatment services but only assisted in the writing of a Warden's Order on programming, most of which came from Central Office, and he did not plan, develop, monitor or coordinate State-wide programs as required with this position. He worked with inmates on a day-to-day basis and did not deal with grants, compliance with the Federal requisitions or provide a broad base of support within the justice system; all of which are required with the TASC Program.

To refute the Union's assertion that the action effectuated by the Employer resulted from the Grievant's "bad interviewing" is simply misplaced. Such does not fall within the four corners of the Parties' Agreement to provide any individual who does not possess the minimum qualifications enough time to learn and be

trained for a vacant position.

In conclusion, the Employer emphasizes that its action to award the vacant position to a new hire and not the Grievant was based on careful and thorough evaluation and analysis of the Grievant's qualifications which, as the testimony of the interviewers demonstrates, were lacking.

For all of these reasons, the Employer requests that the Grievance be denied.

DISCUSSION AND FINDINGS

The disposition of this matter hinges upon the determination of whether the Grievant was improperly denied the Alcohol and Drug Program Specialist II vacancy posted on May 24, 1993. As stipulated to by and between these Parties, the Grievant's overall work record and/or educational background are not in dispute; nor are the procedural mandates attendant with the posting and bidding process. The Union does, however, challenge the Employer's action of awarding the vacancy to a new hire when, as it contends, the Grievant - a Bargaining Unit Member - possessed the necessary skills and qualifications to perform the job.

Tantamount to the resolution of this Grievance is the operative language found in Article 30, titled "Vacancies," particularly that in Section 30.02, titled "Awarding the Job (Transfers/Promotions)," which states as follows:

" ... All timely filed applications shall be reviewed considering the following criteria: qualifications;

experience; education; 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."

As referenced therein, the language requires that, as a condition precedent for awarding the job, the individual must meet the necessary qualifications for the position; i.e., "those that are qualified" This language clearly and unambiguously requires that the individual possess at least the minimum qualifications for a position. Moreover, it goes on to state that the job shall be awarded to the applicant with the "most State seniority." Once an individual has met the minimum qualifications as determined by the job posting, then, if everything else is equal, State seniority shall serve as the determining factor as to who is awarded the position. Only after it has been deemed that the applicant is indeed qualified for the position in question does State seniority become an issue. Preference would be given to the senior employee provided that he or she is indeed qualified for the job.

It is generally recognized that Management maintains the inherent right, obligation and responsibility to determine qualifications for a job, provided the factors considered in assessing qualifications relate directly to the duties required of the job and the employee's ability to meet those requirements.

As the evidence of Record demonstrates, those individuals responsible for interviewing the applicants determined, prior to

the interviewing process that, based on the face of the Grievant's application, he did not possess the minimum qualifications for this position. In fact, the essential criteria for the position was that the successful applicant have a working knowledge of the TASC Program. That individual was to serve as a liaison between the community and various governmental agencies, community groups, etc., that were involved with this program. Each interviewer testified that the Grievant did not possess the minimum qualifications relative to this essential element of the job. The determination of qualifications for a job are an inherent managerial right to be exercised in such a way that it is neither arbitrary, capricious or discriminatory. The evidence of Record simply does not demonstrate that the Employer's action in awarding the job to a new hire instead of this Grievant in any way was arbitrary, unreasonable, discriminatory or capricious in nature. In fact, as the testimony of the interviewers demonstrates, the Grievant was provided an interview even though on the face of his application and attendant documentation, he did not possess even the minimum qualifications that would warrant the interviewing process.

To hold that the Employer in some way violated the clear and specific mandates of Article 30, Section 30.02, would require an independent decision regarding the sufficiency of qualifications of a job applicant where that determination has been pre-determined by the Employer under a system which is found herein to have been properly established, thoroughly applied and

objective in the sense that more than one (1) interview was conducted by more than one (1) interviewer. Such, in the opinion of the Arbitrator, would remove an otherwise arbitrary, capricious or discriminatory element which could serve as the basis of overturning an Employer's action relative to the awarding of job vacancies.

As the evidence of Record demonstrates, the Grievant's work history reveals that he is a Rehabilitation and Corrections Substance Abuse Coordinator who deals with inmates participating in a Mandatory Substance Abuse Program. The position in question as testified to by interviewers Michael Link and Patrick Lanahan contains certain elements beyond the Grievant's experience level. Moreover, the Record fails to demonstrate any compelling evidence that would suggest an improper motive or one based on bad faith. The Record does demonstrate that the Grievant was provided the interviewing process even though his application, on its face, did not exhibit the minimum qualifications necessary for the job.

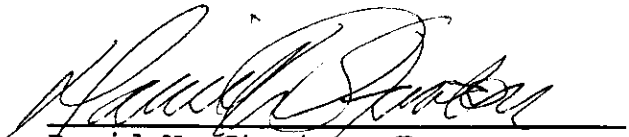
With respect to the other procedural aspects of Section 30.02, the job vacancy in question was awarded to a new employee since in the opinion of Management, no Bargaining Unit applicant possessed the necessary and minimum qualifications for the position. As such, the position was awarded to the outside applicant as permitted under Paragraph (D) therein.

In conclusion, the documentary and testimonial evidence of Record herein establishes that the Employer's action of awarding the job vacancy in question was in compliance with the procedural

mandates of Section 30.02. To hold otherwise would require the Arbitrator to make an independent determination regarding the creation and assessment of qualifications for the position in question and would thereby circumvent Management's ability to exercise this inherent right. Additionally, such a holding would render Management's ability to determine the sufficiency of qualifications meaningless where such a determination was made under a system which was fairly established; which attempted to measure relevant factors in a reasonable matter; and, is objective enough to be found free of contaminating arbitrary, capricious or discriminatory elements. The evidence of Record simply does not establish that the Grievant possessed the minimum qualifications as determined by Management to be awarded the vacancy in question. As such, the Grievance must be, and therefore is, denied.

AWARD

The Grievance is denied.


David W. Stanton, Esq.
Arbitrator

June 3, 1994
Cincinnati, Ohio