#1069

In the Matter of Arbitration	*	
Between	*	Case Number:
OCSEA/AFSCME Local 11	*	27-13-(931008)-0713-01-03
and	*	Before: Harry Graham
The State of Ohio, Department of Rehabilitation and Correction	*	

Appearances: For OCSEA/AFSCME Local 11:

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Staff Representative
OCSEA/AFSCME Local 11
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For Department of Rehabilitation and Correction:

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Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were filed in this dispute. They were exchanged by the arbitrator on July 12, 1995 and the record in this dispute was closed.

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

> Did Management violate Article 17 of the 1992-1994 Agreement when it promoted a junior applicant to the position of Correction Supervisor 1 and, if so, what

shall the remedy be?

Background: The facts prompting this proceeding are uncontroverted. The Grievant, Donald Brake, has been employed at the London Correctional Institution since 1980. During his tenure he has worked in various job classifications. At the time this dispute arose he was classified as a Correction Officer. Richard Chappel was employed at London Correctional from July, 1984 to May, 1989. He too, was a Correction Officer. From May, 1989 through May, 1992 he was classified as a Correction Supervisor. Thereupon he experienced a break in service. On September 21, 1992 he returned to London as a Correction Officer. Mr. Brake is white. Mr. Chappel is black. In the Fall of 1993 there developed a vacancy at London in the Correction Supervisor classification. Both Messrs. Brake and Chappel bid on the vacancy. Both were found to be qualified. The position was awarded to Mr. Chappel. A grievance protesting that action was filed by Mr. Brake. It was processed through the machinery of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

Position of the Union: The Grievant, Donald Brake, brought to his application thirteen years of seniority. The successful bidder, Richard Chappel, carried with his application a seniority date of September, 1992. Brake had substantially greater seniority than Chappel. He also had an extensive

training record. (Joint Ex. 7). By virtue of his seniority and training he was well qualified for the vacancy at issue in this proceeding. On September 27, 1993 the Program Deputy, Steve Dorsey, forwarded his promotional recommendation to the Warden, Melody Turner. He recommended that Mr. Chappel be awarded the position due to his prior service as a Correctional Supervisor and his race. He noted that Brake had an oral reprimand on his record. The Union views Dorsey's recommendation of Chappel over Brake to be flawed. Brake has a medical condition that has resulted in seizures from time to time. It is controlled by medication. Nonetheless, Dorsey has taken the view that Brake is "nuts."

The Union stresses the disparate seniority brought by Brake and Chappel to their promotional applications. Obviously, that of Brake is substantially greater than that of Chappel. Furthermore, he has extensive in-service training. In the Union's view, the State cannot justify its selection of Chappel by glossing over his comparative lack training. Nor may it assert that such training was not made available to him. Nothing is on the record to indicate that training was denied to Chappel.

Section 17.06 A 1 of the Agreement provides that in promotion situations "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. Affirmative Action shall be a valid criterion for determining demonstrably superior." As the Union views that phraseology Affirmative Action is "a" critera, not "the" criteria that can tip the scales for a junior applicant and make that applicant "demonstrably superior" to a senior applicant. In order for the scales to be tipped, the junior applicant must be more qualified than the senior employee prior to consideration of Affirmative Action.

The Union proposes three scenarios for implementation of the contract language. In one straightforward situation a more senior bidder is indisputably more qualified than a junior bidder, hence, must be awarded the job. In the second, the more and less senior bidders are equally qualified. The senior bidder prevails as the junior bidder is not demonstrably superior. Finally, the junior bidder is substantially more qualified than the senior bidder though the senior bidder meets the minimum qualifications for the position. In that case, the less senior bidder may be awarded the vacancy. As the Union views the criteria of Affirmative Action, it is merely a factor in the selection process along with such other factors as education, training, work record and seniority. Standing alone, it cannot control the outcome of a particular bid. Specifically, it cannot vault a junior bidder above a senior bidder. Only if a junior bidder is

closely matched to the senior bidder may affirmative action tip the scales in favor of the junior applicant according to the Union.

The parties have been involved in a number of arbitration proceedings concerning the issue of the demonstrably superior standard in promotion disputes. As the Union reads them, they make the following points:

1. The employer bears the burden for proving a junior bidder is demonstrably superior.

2. There must be a substantial difference in favor of the junior bidder to justify promotion over the senior bidder.

3. The senior bidder must be qualified.

Use of the word "a" in Section 17.06 A rather than the word "the" means that affirmative action is one of several, not the governing standard, to apply in promotion disputes. The former Director of the State Office of Collective testified in another arbitration proceeding that affirmative action would not control in a situation when qualifications of bidders were not relatively equal. (Jt. Ex. 11).

In the opinion of the Union in order for affirmative action to apply in a promotion decision involving consideration of demonstrably superior the State must demonstrate a need for it. (See University of California v. Bakke, 438 US 265, 985 Ct 2733). In this case, the Employer made affirmative action the controlling factor. Only that standard was used to award Mr. Chappel the job. The Grievant

was excluded on the basis [illegible] in the Union's eyes.

Arbitrator Rhonda Rive [illegible] Action in the Chris Hade case. (3 [illegible] The Union sharply disagrees wi[illegible] that case the Arbitrator was of the view that Affirmative Action "trumped" all other criteria in promotion disputes. Not only does the Union dispute that view, it finds it irrelevant to this dispute as Hade was concerned with sexual as opposed to racial considerations in promotion. The holding in Hade extends only to sex, not race disputes in the Union view. Hade is not applicable to this dispute it insists.

The Employer cannot show that Chappel was "demonstrably superior" to Brake. There is no "substantial difference" in favor of the junior bidder. (Castle and Thomas, Case No. G87-0411, Graham, Arb.). That is the standard to which the Employer must be held according to Castle and Thomas and the Employer cannot meet it in light of the seniority, experience and training possessed by the Grievant according to the Union.

The State improperly applied the affirmative action criteria in this situation. In the Union's view of events, it was a crutch to justify selection of a person other than the Grievant. This was due to Dorsey's low opinion of Brake. Brake was "nuts" in Dorsey's view as he experienced seizures

from time to time. In fact, Brake, no less than Chappel, is covered by affirmative action. If that is to be considered, he should be advantaged, not disadvantaged by its use. In addition, the Affirmative Action plan calls for use of a Selection Process Worksheet. That was not done. In essence, Affirmative Action was invoked after the fact to justify selection of a person other that the Grievant. In fact, no need existed to utilize affirmative action in this particular promotion process whatsoever. The State promoted a black man, then five white men and then a female. It provided no affirmative action rationale in support of those actions. In fact, the Equal Employment Officer of the Department was subpoenaed to appear at the arbitration hearing. He disregarded the subpoena. His failure to appear is significant according to the Union. It is representative of the inability of the Department to justify its application of affirmative action in this dispute according to the Union. It urges the grievance be sustained and the disputed position awarded to the Grievant together with a make whole remedy.

Position of the Employer: Documentation introduced by the State indicates that it was falling short of its affirmative action goals in the Fall of 1993. The discrepancy between the plan and the reality was substantial. Specifically, the Correction Supervisor position had sixteen members, two of whom were minorities. Of those two, one was Mr. Chappel. Were

he not to have been promoted, only one Correction Supervisor would have been a minority. As the Affirmative Action Plan called for a seventeen percent (17%) minority representation it was obvious that steps were required to increase minority employment throughout the institution.

The State disputes the notion advanced by the Union that it had improper motives in selecting Chappel over Brake. The Warden at London, Ms. Turner, was not at the facility as the decision making process was developing during the summer of 1993. When she determined to promote Chappel to the vacancy she was unaware of any medical problems being experienced by Brake. In this situation, Ms. Turner made a good-faith selection of a minority candidate to fill a vacancy. Both applicants were qualified. As that was the case, it was proper of her to consider affirmative action goals in selecting one candidate over the other. Affirmative action is a proper consideration when applicants are relatively equal. In this situation, they were. Hence, reliance on affirmative action to tip the scales for Chappel over Brake was proper the State asserts. Granted that he was junior to Brake, he met the contractual mandate of being "demonstrably superior" by virtue of affirmative action criteria and more experience than Brake in custodial duties. At the time of his application, Chappel had approximately nine years of experience. He had served for three years as a Correction

Supervisor, the precise position at issue in this dispute. Brake brought to his application more varied experience, including time as a sales manager in the prison commissary. By virtue of experience, Chappel was more suited than Brake for the vacancy. To that must be added affirmative action considerations. Taken with his work history, they reach the standard of "demonstrably superior" according to the State.

This situation meets the test outlined by Arbitrator Rivera in Hade in the State's view. In Hade, a junior bidder was promoted over a senior bidder. Arbitrator Rivera determined the junior applicant met the "demonstrably superior" standard as both applicants were equal in the qualifications they brought to the vacancy. When that occurs, "then considerations of affirmative action trump." Those considerations make one candidate "head and shoulders" above the other. In the absence of a showing of "bad faith, prejudice, improper or unfair procedure or clear objective factual error" it was Arbitrator Rivera's view that she could not substitute her judgement for that of the Employer. The same standard applies in this case in the State's view. Applying the standard of Hade to this case, both applicants met the minimum qualifications for the vacancy. Chappel had more custody experience than Brake. He was a minority. Those circumstances made him "demonstrably superior" to Brake. As that was the case, the State urges the grievance be denied.

Discussion: Section 17.06 A of the Agreement provides in relevant part that in cases of promotion:

> 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. Affirmative action shall be a valid criterion for determining demonstrably superior.

That phraseology has been interpreted to mean that the State must demonstrate that in order for a junior employee to be promoted over a senior employee the junior employee must enjoy a "substantial difference" in his or her favor. (Castle and Thomas, p. 22). It is the State that bears the burden of demonstrating that the junior bidder meets this standard. As noted in Castle and Thomas (p.23) and at Section 17.06 A 1 of the Agreement, the senior bidder does not have to be anything more than "qualified" for the vacancy. In this case, the rationale proffered by the State that Chappel was more qualified than Brake by virtue of his assertedly greater experience with custodial tasks is beside the point. Throughout this proceeding the State has acknowledged that Brake was qualified for the disputed vacancy. Under the holding in Castle and Thomas there is a presumption that he is entitled to the position unless, to use the term of Arbitrator Rivera, something intervenes to "trump" his vastly superior seniority credit. Obviously the Employer views its trump card in this dispute to be the minority status and affirmative action consideration afforded to the promoted

employee, Chappel.

In his testimony (incorporated by reference in Joint Ex. 11) former Director Brundige opined that a junior employee could be promoted over a more senior bidder based upon affirmative action considerations when the bidders were "relatively equal." Brundige continued to express the opinion that affirmative action would not carry the day for a junior bidder "when qualifications were not relatively equal." Brundige's view was amplified by Arbitrator Rivera in Hade. She indicated that "If two applicants are equal in their qualifications for a job, then considerations of affirmative action trump." (Hade, p.19 emphasis supplied). She continued to observe that "Between two equally proficient candidates, affirmative action makes one candidate 'head and shoulders' over the other." (Hade, p.21 emphasis supplied). Arbitrator Rivera's views must be applied to this dispute. In particular, attention is directed to her observation concerning the relationship between "two equally proficient candidates" vieing for promotion. Before affirmative action considerations are reached, the candidates must be determined to be "equally proficient." Joint Exhibit 5 is the report of the Interviewing Committee to Steve Dorsey, the Programs Deputy, concerning its recommended candidate for the vacancy. Lieutenant Hampton rated Chappel one notch above Brake, second versus third in the applicant pool. Marie Nibert,

Personnel Officer at the facility, ranked Brake first and Chappel second. Major Kelly for an inexplicable reason did not rank Brake. Chappel was last among the candidates he rated. Standing by itself, the documentation utilized by the facility does not support a finding that Chappel and Brake were equally proficient. Chappel was rated last by one rater. Brake was rated first by another. They were closely ranked by the third observer. If anything, the Committee report prefers Brake over Chappel.

Turning attention to Brake's training record (Union Ex. 1) it suffices to observe that it is extensive. No similar documentation is on the record for Chappel.

As noted above, Brake had thirteen years of service at the time of his bid. Chappel carried eleven months of seniority with his bid. Chappel's eleven months of service trumped Brake's thirteen years of service and substantial training record when the Employer came to make the promotional decision. The equal proficiency test outlined by Arbitrator Rivera is not satisfied in this instance. The two applicants were not remotely similar in terms of seniority. Brake had extensive training. Chappel's training record is unknown to the arbitrator of this dispute. The internal ranking of the Interviewing Committee produced no clear favorite though Brake was rated first by one member and Chappel last by another. By the terms of Section 17.06 A 1

the Employer must show that the junior employee is "demonstrably superior" to the "qualified employee with the most state seniority." It has failed to do so in this instance. The only consideration favoring Chappel over Brake was race. That is not contemplated by the Agreement. The governing word is "a" as in "Affirmative Action shall be a valid criterion for determining demonstrably superior." (Emphasis supplied) It is one of several criteria to be examined in determining among candidates for promotion. The normal sorts of credentials employees bring to their bids must be considered as well. Education, training, work record, and seniority enter into the mix. Only if the candidates are "equally proficient" does affirmative action carry the day. In this case the record before the Arbitrator does not satisfy that standard.

That the Department was falling short of its affirmative action goals in the Fall of 1993 cannot control the outcome of this dispute. The controlling factor is the Labor Agreement. It mandates 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." (Emphasis added) In this situation, that has not occurred.

Award: The grievance is SUSTAINED. The grievant is to be awarded the position of Correction Supervisor 1 retroactive

to October 17, 1993. He is to be paid all wages and benefits he would have received but for the contract violation found to have occurred in this instance.

Signed and dated this 11th day of August, 1995 at Solon, OH.

Harry Graham

Harry Graham
Arbitrator