

IN THE MATTER OF ARBITRATION

BETWEEN

DISTRICT 1199, SEIU

AND

THE OHIO DEPARTMENT OF HEALTH

Before: Robert G. Stein, Arbitrator
Grievance # 14-000-950712-0086-02-11

Advocate for 1199:

Harry Proctor, Organizer
District 1199, SEIU

Advocates for the Employer:

Robert Thornton, OCB
Colleen Wise, OCB
Ohio Dept. of Administrative Services

INTRODUCTION

A hearing was held on the above referenced grievance on September 13, 1996. The Parties had full opportunity to present testimony and evidence on behalf of their respective positions and mutually agreed to conduct closing arguments rather than submitting briefs. The Parties stipulated that the grievance was properly before the Arbitrator and the evidence submitted was not contested by either Party. The Parties mutually agreed to provide the Arbitrator with a post marked award issuance date of October 23, 1996.

ISSUE

The issue in this matter is rather straight forward and was stipulated by the Parties to be:

Did the Ohio Department of Health violate Article 30.02 of the Collective Bargaining Agreement between the Parties by promoting a bargaining unit member less senior than the Grievant? If so, what shall be the remedy?

BACKGROUND

This case concerns a promotional opportunity in the Ohio Department of Health (hereinafter referred to as the Department or Employer). The promotional positions are Health Services Policy Specialist PCN-9204.0 and 9206.0. These were newly created positions in the Department. were posted from May 10, 1995 until May 23, 1995..

The Grievant in this matter is Seth Young, a Health Planning Administrator in the Department. Dr. Young has been employed by the Department for some seventeen years and he holds a Ph.D. in Preventive Medicine from Ohio State University (1985). In addition, Dr. Young holds an MS in Preventive Medicine (1978), an MBA (1976) and a BS in Physics (1973). Dr. Young applied for the above listed positions on May 19, 1995. His application was considered timely, and he met the minimum qualifications for the positions (Joint Ex. 3). Eight other people applied and were considered minimally qualified for the positions.

The next step in the selection process was an oral interview coupled with the written completion of a "Health Policy Specialist Demonstration Exercise"(hereinafter referred to as the Demonstration Exercise) (Joint Ex. 6). The Grievant was interviewed for the positions on Friday 6/23/95 and completed his Demonstration Exercise on Saturday 6/24/95. (see Grievant's testimony) On Monday 6/26/95 at 8:00am, the

Grievant was told he was not selected for the position. He received a subsequent formal notice of his non selection on 6/29/95 (Joint Ex. 3).

On May 22, 1995 Ms. Tammy Marinko-Shrivers (hereinafter referred to as Ms. Shrivvers) a Social Program Developer in the Department applied for the same Health Services Policy Specialist openings (Joint Ex. 3). Ms. Shrivvers had been employed in the Department since July of 1994. She was the least senior of all nine applicants for the positions. Ms. Shrivvers holds a Masters Degree in Social Work from Ohio State University (1993) and a BS in Psychology (1989). Ms. Shrivvers was interviewed for the position on June 26, 1995 (see testimony of Grievant).

One of the other eight candidates, Mr. Brooke Trissel (who was more senior than the Grievant) was awarded one of the Health Service Policy Specialists' positions; however, he did not accept it. Ms Shrivvers was subsequently awarded one of the Health Specialist positions. The other position was not filled and was converted to a Health Economist position. The Grievant filed a grievance on 7/12/95 claiming the Department had violated Article 30 and 30.02 of the Agreement by not awarding him the position.

RELEVANT ARTICLES

(in pertinent part)

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.

UNION'S POSITION

The Union position in this matter is based upon three arguments, the first being that Ms. Shrivvers, the junior employee did not meet the minimal qualifications for the position of Health Service Policy Specialist. The Union argued that Ms. Shrivvers' failure to list any related course work on Section III EDUCATION AND TRAINING of her application for the position is evidence of her failure to meet minimum qualifications (Joint Ex. 5). The second argument pertains to the Department's use of the Demonstration Exercise as a test. This tool cannot be used to determine qualifications. The requirement to take a test was not included on the posting for the position (Joint Ex. 3) and there is no Department of Administrative Services approved test for this position.

The last argument made by the Union directly addresses the language of Article 30.02 and the issue of qualifications. The junior employee selected, Ms. Shrivvers had one year's seniority compared to the Grievant's seventeen years with the Department. The Grievant possess a Ph.D. in Preventive Medicine, while Ms. Shrivvers has a Master of Social Work degree. In order to be in compliance with Article 30.02, the Department must be able to demonstrate that Ms. Shrivvers was significantly more qualified than the Grievant.

The evidence and testimony demonstrate that Ms. Shrivvers did not meet the minimum qualifications for the position of Health Services Policy Specialist. The legitimacy of using the Demonstration Exercise as a test cannot be supported by the evidence and should not be used as a device to consider candidates to be qualified or unqualified for a position. Finally, the Department did not provide evidence to support the contention that Ms. Shrivvers was significantly more qualified for the position.

Therefore, the Union requests the grievance to be sustained and the Grievant awarded the position of Health Services Policy Specialist. The Union also seeks any lost pay(with interest), lost benefits and a waiver of the probationary period.

EMPLOYER'S POSITION

The Employer's position in this matter is uncomplicated; Ms. Shrivvers was selected over the Grievant because she was significantly more qualified based upon the criteria listed in Article 30.02. The testimony of Mr. William Hayes, Acting Director for the Office of Policy and Planning of the Department, clearly established that Dr. Young was not qualified for the position. Dr. Young was not sufficiently proficient in the "state of the art" of this field in spite of possessing a Doctor of Philosophy degree.

On the other hand, Ms. Shrivvers demonstrated far greater knowledge and experience in relevant fields of expertise for the position of Health Services Policy Specialist. Seniority is only one factor in the criteria listed under Article 30.02. The fact that the Agreement provides that the Employer can choose a better qualified junior

candidate underscores this fact. The Employer was not arbitrary nor capricious in making the decision to promote Ms. Shrivvers rather than the Grievant. It considered the Grievant's seniority, but exercised its contractual right to choose the significantly more qualified junior candidate.

The Grievant acknowledged during the interview process that he was not current in the field of health policy analysis. This is not an issue of whether the Grievant was minimally qualified, but best qualified for the position. The evidence indicates he was clearly not the best qualified. This fact was established through the Demonstration Exercise and through the interview process. In both of these forums, Ms. Shrivvers proved to be the significantly more qualified candidate.

A person in the position of Health Services Policy researches and reports information to both the Office of the Governor and the Cabinet. It is a position of great responsibility and one in which a person must be prepared to perform. The Grievant stated he could be brought up to speed in health policy by going to the library for a few days. This is not a training position, but one in which an employee must be prepared to produce from day one. His testimony proved he was not qualified to work in this position without some additional training. In contrast, Ms Shrivvers had the experience and qualifications to immediately perform in the position of Health Services Policy Specialist.

Based upon the above, the Employer requests that the grievance be denied in its entirety.

DISCUSSION

The issue in this case is whether the Department violated Article 30.02 of the Collective Bargaining Agreement when it promoted Ms. Shrivvers, a less senior employee over the Grievant. In matters of promotion, Arbitrators generally show great caution in substituting their judgment for that of the Employer, unless it can be demonstrated that the Employer violated the Collective Bargaining Agreement and/or was capricious and arbitrary in its conduct. This conservative position taken by arbitrators is based upon a recognition of the complexity of most work settings and the esoteric nature of most work.

The Parties have narrowed the issue to a basic comparison of two candidates, Seth Young, the Grievant, and Tammy Marinko-Shrivvers. Article 30.02 of the Agreement requires that among qualified candidates for a position, the Employer has the latitude to select a less senior qualified candidate, if said candidate is significantly more qualified based upon the listed criteria. The listed criteria are qualifications, experience, education, work record, and affirmative action. During the hearing there was no evidence or argument regarding the use of the affirmative action criteria, therefore, this discussion will focus on the other dimensions of criteria listed above.

The facts in this case indicate that the Grievant met the minimum qualifications for the position of Health Services Policy Specialist. His education and experience levels exceed the minimum requirements called for on the position description. As stated

above, the Employer points out this issue is not about who is minimally qualified, but who is best qualified.

Ms. Shrivvers' ability to meet minimum qualifications is less obvious from the evidence provided by the Parties. For example, it is not clear why Ms. Shrivvers was permitted to leave blank Section III EDUCATION AND TRAINING of her Ohio Civil Service Application without penalty. The Employer insists this was not a problem and attachments substituted for same. Of course, it raises the question as to whether all applicants were afforded the same latitude. A review of Ms. Shrivvers' attachments does indirectly address course work but it not very specific. The Union raised the issue of this omission on Ms. Shrivvers' application and considers it to be sufficient to disqualify her from consideration for promotion. However, without any more evidence to give the Arbitrator direction in this matter, it must be assumed such a omission was off set by the attachments Ms. Shrivvers provided with her application.

Although Ms. Shrivvers has completed graduate course work as required by the minimum qualifications, her ability to meet the 2 year experience requirement in health services research and/or health policy analysis is marginal. At the time of her application she had worked for the Department for ten months (July 94 through May 95). Her previous experience was nine months as a social worker and part time work as a Research Assistant and Graduate Research Associate.

The Employer must be given the benefit of the doubt in accepting Ms. Shrivvers as meeting minimum experience requirements for the position. However, it must be noted that Ms. Shrivvers' work experience marginally meets the minimal qualifications for the

position of Health Services Policy Specialist. The Grievant, on the other hand, has seventeen years of work experience in the Department in a health-related capacity. In terms of work experience, the Employer cannot substantiate that Ms. Shrivvers is significantly more qualified.

The evidence regarding Ms. Shrivvers' education indicates that she had a rich educational background, but not one which can be considered to be superior to that of the Grievant. The Grievant holds a bachelors degree, two masters degrees and a Ph.D. The degrees are in the fields of physics, business, and preventive medicine. Ms. Shrivvers' degrees are in psychology and social work. The subject areas of the Grievant's academic focus appears to be more directly related to the business and science of public health than does the academic work of Ms. Shrivvers. This is particularly evidenced by the Fields of Study identified in the Grievant's Preventive Medicine area of concentration (Joint Ex.4). In addition, the well known rigors of acquiring a degree at the Ph.D. level also provides the Grievant with an academic experience edge that is analytical in nature. As with experience, the Employer cannot substantiate that Ms. Shrivvers is significantly more qualified in the area of education.

Ms. Shrivvers indicates in her application attachments that she has drafted articles for publication submission. The Grievant application indicates he has authored or co-authored several reports and professional proceedings. Ms. Shrivvers' limited publication experience does not support the Employer's argument that she is significantly more qualified than the Grievant to develop analytical documents as required by the position

description of Health Services Policy Specialist. In fact, the available evidence supports the opposite argument.

There was little evidence presented that directly addressed work record. There are descriptions of work listed by each candidate in Joint Exhibits 4 and 5, but no evaluations of this work. What is available in Joint Ex.4 and 5 does indicate that the Grievant has spent a considerable time in the area of immunization. Ms. Shrivvers worked in the areas of AIDS education, prenatal care, counseling, and less than one year in the development of social programs with the Department. Ms. Shrivvers has had broader health care exposure than the Grievant, but none of it was extensive.

Similiarly, Ms. Shrivvers' work record with the Department is relatively brief by comparison to that of the Grievant's. Her professional experience demonstrates that she was starting to become involved in areas directly related to the position of Health Services Policy Specialist (Joint Exhibit 5). For example, Ms. Shrivvers was involved in making presentations concerning health care reform, OhioCare, and managed care. However, the brevity of this experience, coupled with very limited experience in the delivery of health care does not support the Department's contention that she was significantly more qualified than the Grievant.

Arguably Ms. Shriver's may have had a edge over the Grievant in being familiar with health care reform initiatives and directions and with some of the developing trends; however, the position description for Health Services Policy Specialist requires a great deal more. Ms. Shriver's Department experience does not address the application of multiple regression or multivariate analysis, skill in computer programming, research

methodology, or statistical analysis, just to name a few of the major worker characteristics of the position description.

Ms. Shivers may have been more familiar with the latest health care changes to managed care and even capitation, but beyond familiarity, the evidence does not demonstrate she possessed an in-depth competency in the subject area. Many health care institutions run by administrators and medical professionals with decades of health care experience are struggling with the concept of a growing managed care trend. Ms. Shivers appears to be a very bright employee; however, it is implausible that she had reached a level of exposure and experience in health care that would render her significantly more qualified than the Grievant.

The Department through the testimony of the Acting Director of Policy and Planning, William Hayes, argued that Ms. Shivers demonstrated her ability and significantly greater qualifications through the interview process and by her performance with the Demonstration Project. These type of structured interviews can be useful ways to determine what a candidate knows, yet they must be corroborated by evidence of education, experience and work.

It has been well established in the labor relations field that management has the right to determine qualifications when an agreement has a relative ability clause (see Elkouri and Elkouri, How Arbitration Works, 4th Edition., p 613). However, a Union's right to grieve management decisions that are unreasonable, capricious, arbitrary or discriminatory is also well established. In order to justify the promotion of a junior employee over a senior employee, the margin of difference must be discernible.. Some

arbitrators give latitude to management to choose the more junior employee except in cases where the margin is diminutive (see Ipavic, 72LA524,527). This type of reasoning would be persuasive if Article 30.02 was a typical relative ability clause.

However, Article 30.02 is not typical, it requires the Employer to meet a higher standard of significantly more qualified. Significantly more qualified means the junior employee must be superior, based upon clear and convincing qualifications. A junior employee who may be marginally superior is not sufficient given the requirements of Article 30.02. The burden is on the Employer to demonstrate in a reasonable and sound way that the junior employee is superior.

A structured interview process conducted by knowledgeable supervisors is a persuasive method of selection and bona fide conclusions reached in such a process should be given considerable weight (see Elkouri and Elkouri, How Arbitration Works, 4th Edition (1985), p. 630). However, such a process must be supported by factual evidence to support the supervisor's conclusions. Structured interviews are subjective tools of evaluation that tend to measure breadth of knowledge, verbal facility and the ability to "think on one's feet." They are not necessarily predictors of performance or depth of knowledge. They must be supported by evidence of work experience, demonstrated ability over a reasonable period of time, evidence of analytical reasoning and the demonstration of applied knowledge.

The Employer argued that Ms. Shrivvers responses in the oral interview and in the Demonstration Exercise clearly indicated she was significantly more qualified than the Grievant. The interviews were conducted by William Hayes and Debra Rozansky, Chief

of Women's Health Initiatives. Ms. Rozansky was not present at the hearing and provided no evidence regarding her opinion. Mr. Hayes testified that, "the oral interview answers really guided his thinking about the Grievant's lack of qualifications for the position." The Demonstration Exercise was not used as a test, but was simply a written interview format. According to Mr. Hayes the Grievant did not compose well written answers to the questions and was not able to tie his current work to the requirements of the position of Health Services Policy Specialist.

In his testimony, Mr. Hayes as stated the Demonstration Exercise was originally designed to be a test and he was later told by Human Resources that he could not use it as a test. Under cross examination Mr. Hayes admitted that the first candidates who filled out the Demonstration Exercise were told it was a test and candidates were evaluated on a pass/ fail basis. The first paragraph of the Demonstration Exercise states in pertinent part, "You are being tested for your understanding of health policy analysis issues and techniques, as well as your writing and conceptual abilities." This leaves little doubt that the candidates were being tested for a position that had no testing requirement. To be a valid instrument, it must be job related, requirement related, fair and reasonable in its content, and it must be administered in a non discriminatory manner. And it must be properly evaluated.

The intentions of the Department in trying to establish a reasonable way to evaluate candidates for the new position of Health Services Policy Specialist are understandable. This was new employment territory for the Department and a valid testing instrument can be a very practical way to help to determine the competency of

candidates. It is clear from the evidence and testimony that the Demonstration Exercise was not a requirement of the position, was used prior to validation and was not evaluated by Human Resources before its introduction into the screening process. It is therefore flawed and not a valid predictor of qualifications in this matter.

What was gleaned from a single oral interview is not supported by comparison of the candidate's experience, education and work record. The Department did not meet its burden of proving Ms. Shrivvers was significantly more qualified than the Grievant for the position of Health Services Policy Specialist.

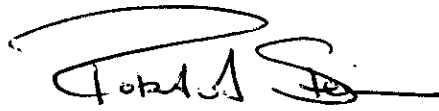
AWARD

Grievance sustained.

The Grievant is to be placed into a position of Health Services Policy Specialist retroactive to the date Ms. Shrivvers was awarded her position. The Grievant is to be made whole for all back pay, benefits, and seniority for said position within two pay periods. The Grievant will be required to serve a probationary period in accordance with Article 30.03 of the Agreement. This probationary period shall commence with the placement of the Grievant in the position of Health Services Policy Specialist or within two complete pay periods from the date of this award, whichever comes sooner.

The Arbitrator will maintain jurisdiction over the implementation of this award for a period of sixty calendar days.

Respectfully submitted this 23rd day of October, 1996 in Summit County, Ohio.

A handwritten signature in black ink, appearing to read "Robert G. Stein", with a large, sweeping flourish above the name.

Robert G. Stein, Arbitrator