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**The State of Ohio and Ohio
Civil Service Employees Association
Labor Arbitration Proceeding**

In the Matter of the Arbitration Between:

The State of Ohio, Department
of Taxation

-and-

Ohio Civil Service Employees
Association, Local 11, AFL-CIO

Grievant: **Jean Cain**
Grievance No.: 30-08 (95-01-20) - 0698-01-09

Arbitrator's Opinion and Award
Arbitrator: David M. Pincus
Date: September 16, 1997

Appearances

For the Union

Jean Cain
Claudia Hubbard
Jerry Buty
William Anthony

Grievant
Supervisor
Staff Representative
Advocate

For the Employer

Peter M. Sutu
Rodney Sampson
Barbara Mitchell

Timothy D. Stauffer

Observer
Second Chair
Administrator-Assessment
Division
Advocate

Introduction

This is a proceeding under Article 25 - Grievance Procedure, Section 25.02, Step 5 - Arbitration of the Agreement between the State of Ohio, Department of Taxation, hereinafter referred to as the "Employer", and the Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO hereinafter referred to as the "Union", for the period March 1, 1994 to February 28, 1997 (Joint Exhibit 1).

The arbitration hearing was held on June 17, 1997, at the Union's office in Columbus, Ohio. The parties had selected David M. Pincus as the Arbitrator.

At the hearing, the parties were given the opportunity to present their respective position on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties agreed to submit briefs.

Issue

Did the Grievant document in her application for the position of Clerk 3, vacancy No. 457, that she possessed and was proficient in the position specific minimum qualifications contained in the position description. If so, what shall the remedy be?

Pertinent Contract Provisions

Article 17 - Promotions, Transfers and Relocations

17.05 - Applications

Employees may file timely applications for permanent transfers, promotions or lateral transfers. Upon receipt of all bids the Agency shall divide them as follows:

A. For the vacancies that the Employer intends to fill by promotion the applications shall be divided as follows:

1. All employees in the office (or offices if there is more than one office in the county), "institution" or county where the vacancy is located, who possess and are proficient in the minimum qualifications contained in the classification specification and the position description.
2. All employees within the geographic district of the Agency (see Appendix J) where the vacancy is located, who presently hold a position in the same, similar or related class series (see Appendix I), and who possess and are proficient in the minimum qualifications contained in the classification specification and the position description.
3. All other employees within the geographic district of ...the Agency (see Appendix J) where the vacancy is located, who possess and are proficient in the minimum qualifications contained in the classification specification and the position description.
4. All other employees of the Agency.
5. All other employees of the State.

ODOT positions designated as district-wide positions shall be reviewed pursuant to (2) and (3) above.

Employees serving either in an initial probationary period or promotional probationary period shall not be permitted to bid on job vacancies.

B. For vacancies that the Employer intends to fill by permanent transfer, the applications shall be listed according to those in the same classification who possess and are proficient in the minimum qualifications of the classification specification and position description of the posted position in descending order of the most senior to the least senior.

17.06 - Selection

A.1. The Agency shall first review the bids of the applicants from within the office (or offices if there is more than one office in the county), county or "institution." If the position is in a classification which is assigned to pay range thirty (30) or lower, 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. If the position is in a classification which is assigned to pay range thirty-one (31) or higher, the job shall be awarded to an eligible bargaining unit employee on the basis of qualifications, experience and education. When these factors are substantially equal, State seniority shall be the determining factor. Affirmative action shall be a valid criterion for determining demonstrably superior. Interviews may be scheduled at the discretion of the Agency. Such interviews may cease when an applicant is selected for the position.

(Joint Exhibit 1, pgs. 46-47)

Joint Stipulations

1. This matter is properly before the Arbitrator.
2. Seniority credits:
 - A. Jean Cain - 115
 - B. Theresa Goeller - 108

Case History

Jean Cain, the Grievant, enjoyed intermittent employee status with the Income Tax Division of the Department of Taxation from January of 1989 to April of 1990. For the last four (4) years, she has attained a position as a Clerk 2 in the Department of Taxation Sales/Use Tax Division..

The facts, for the most part, are not in dispute. In October of 1994, two (2) Clerk 3 positions in the Assessment Division of the Ohio Department of Taxation (Joint Exhibit 2) were posted for appointment purposes. The record indicates the Grievant was the most senior employee to bid on the Clerk 3 vacancy number 457. And yet, she

was not granted an interview for the position in question. This particular vacancy, however, was awarded to an employee less senior to the Grievant, but already working for the Assessment Division in a lower capacity.

On January 19, 1995, the Grievant formally protested the Employer's decision. She filed a Grievance containing the following statement of facts:

Employee meets minimum qualifications but was not granted an interview. An employee with less seniority was placed in one of the vacancies (456-7). Employee has identical computer training as recently promoted Clerk 3.

(Joint Exhibit 6)

On February 23, 1995, the Employer denied the Grievance in a Step 3 response. As justification for the denial, the Employer opined that a violation of the Agreement (Joint Exhibit 1) did not occur. Also, the record disclosed that the Grievant failed to document that she was proficient in the minimum qualifications contained in the Classification Specification and the position description (Joint Exhibit 6).

Neither party raised substantive nor procedural arbitrability concerns. As such, the Grievance is properly before the Arbitrator.

The Merits of the Case

The Union's Position

The Union argued that the Employer's decision was flawed since the Grievant possessed the ability to perform the duties of a Clerk 3 in the Assessment Division. Since the Grievant was the most senior qualified applicant for a position in a

classification which is assigned to pay range thirty or lower, the Employer was required to show that the qualifications of the less senior selected employee were demonstrably superior to those of the Grievant. By failing to meet this burden, the Employer violated Section 17.06 and should be forced to award vacancy number 457 to the Grievant.

The Grievant was qualified for the vacated position even though she did not work in the Assessment Division at the time she submitted her application. Experience acquired as an intermittent employee in the Assessment Division, and work experience as a Clerk 2 for the Division of Sales/Use, evidence attainment of requisite qualifications for the vacant position in dispute. Her internal application (Joint Exhibit 3) supports the fact that she acquired relevant qualifying experience while working as an intermittent employee. Clearly, this experience provided her with the level of familiarity of the terminology, rules, documents, and files necessary to successfully perform the duties of a Clerk 3. Some of this experience was referenced in an Employee Verification Affidavit (EVA) (Joint Exhibit 3) completed by her former Supervisor, Claudia Hubbard.

The Grievant also gained valuable experience during her tenure in the Division of Sales/Use. Several of the duties she performed are related to those activities engaged in by the Assessment Division. These duties include in pertinent part the processing and use of the following matters: tax rate table (Union Exhibit 2E); the Automated Collection System (ACS) (Union Exhibit 2B); and the Central Information Computer System (CICS) (Union Exhibit 2C).

Not only did the Grievant engage in duties reflecting these relevant activities, but she did them well. All of the Grievant's Employee Performance Reviews (Union Exhibit

1) indicate she met or exceeded all expectations while employed as a Clerk 2 at the Division of Sales/Use. Obviously, these evaluations, in conjunction with her documented experiences, objectively predict a positive outcome if selected for appointment as a Clerk 3 in the Assessment Division.

The Union opined that the Employer acted in a discriminatory manner by refusing to acknowledge the Grievant's application for the vacant Clerk 3 position. Discrimination took place because the Employer distinguished between two applications based on the division from which they originated. It favored the application authored by the less senior employee who worked at the Assessment Division. This practice tends to "lock in" employees from smaller sections, offices, or divisions to lower levels for the duration of their respective careers. It, moreover, allows the appointment of less senior employees working for larger divisions without requiring evidence of demonstrable superiority. None of these options are anticipated by the Clerk 3 class concept (Joint Exhibit 4). It makes no reference to experience in a specific section, division, or agency as relevant criteria for a position.

The Union asserted the Employer failed to make a reasonable effort to ascertain whether the preference of the Junior employee was justified. The primary defect arose because the EVA's (Joint Exhibit 3) composed by the Grievant's supervisors did not provide a complete factual description of all her duties. This placed the Grievant at a disadvantage when her application was viewed in contrast to the junior employee's application. Her application was allegedly accepted because her supervisors simply copied the language found in the minimum Acceptable Characteristics section contained in the vacancy posting (Joint Exhibit 2).

Admittedly, statements contained in the Grievant's EVAs were vague and less concise than those in the less senior employee's application. With her four years of permanent employment as a Clerk 2, the Employer was obligated to make a reasonable effort to acquire adequate information to determine whether the Grievant possessed the requisite knowledge, skills and abilities to perform the duties of a Clerk 3. At a minimum, she should have been offered an interview to clarify her qualifications for the Clerk 2 position.

The Employer's Position

The Employer maintained the Union failed to establish by a preponderance of the evidence that the Grievant met the minimum qualifications contained in the position description for the position of Clerk 3 (Joint Exhibit 5). As such, Section 17.05(A)(1) was not violated when the Employer failed to have the Grievant interviewed and/or promoted.

Barbara Mitchell, the Administrator of the Assessment Division, testified about the workings of the Assessment Division, and the duties and responsibilities of a Clerk 3. She noted that her group engaged a complex assessment payment process for personal and business taxes as well as the Ohio School District Income Tax (Employer Exhibit 1). Mitchell maintained the Position Specific Minimum Qualifications (PSMQ) established for the Clerk 3 position were critical because of the potential liabilities involved and the complex and detailed responsibilities entailed in the performance of requisite tasks. She, moreover, asserted it would take approximately six (6) to twelve (12) months to train an employee to become proficient in the PSMQs.

The Union never established that she was proficient and had in-depth experience in the relevant PSMQs. Neither her Internal Application (Joint Exhibit 3), nor evidence adduced at the arbitration hearing, supported such a claim. The Employer properly decided not to grant the Grievant an interviewing opportunity.

If the Grievant's previous work experience was not properly documented by her supervisors, this defect was not supported by the record. The Grievant testified she never complained to Supervisor Tim Sachs and Supervisor Claudia Hubbard about the EVAs (Joint Exhibit 3) submitted in her behalf.

The Arbitrator's Opinion and Award

From the evidence and testimony introduced at the hearing, and a complete impartial review of pertinent contract provisions, it is the opinion of the Arbitrator that the Employer did not violate pertinent portions of Article 17, Section 17.05 (A) (1). They were not violated because the record failed to evidence that the Grievant possessed or was proficient in the minimum qualifications contained in the classification specification and the position description. As such, the Employer properly disqualified her application by failing to offer her an interview. This ruling, as a consequence, renders moot the Section 17.06 argument offered by the Union. The burden in this circumstance, regarding the demonstrable superiority of the Junior Employee selected for promotion does not play a role in the analysis which follows.

Unlike some of the citations referenced by the Union, the language contained in Section 17.05 (A) (1) is clear and unambiguous, and somewhat unique. It contains objective standards which are used to establish an applicant pool of those "who

possess and are proficient in the minimum qualifications. Mere exposure and isolated experience can not substitute for the objective criteria contained in this section. Broad-based, in depth experience must be evidenced for the Union to meet its burden that an Employee is a bona fide applicant.

This language may, as the Union opines, place a fairly heavy hinderance in the path of potential promotion of employees from smaller sections or divisions within the same classification series. The previously described criteria may preclude promotional opportunities because it may be virtually impossible to attain sufficient work-related exposure for those not working within a specific work area. An yet, the application criteria were mutually agreed to by the parties. Their outcomes, whether desirable or uneventful, have to be interpreted in light of the parties ' clear intent.

Here, the Employer's application of the unambiguous standards does not reflect any disparte or discriminatory intent or animus. Nothing in the record supports the notion the Grievant was deemed unqualified as a consequence of her employment status as a Clerk 2 in the Department of Taxation Sales/Use Tax Division. Her application for the position in question, and evidence adduced at the hearing clearly established she failed to possess and was not proficient in the position specific minimum qualifications.

Proficiency deficiencies were credibly exposed in three (3) PSMQs referenced in the Position Description (Joint Exhibit 5). The Grievant did not possess sufficient knowledge of terminology and rules pertaining to Assessment Procedures; the Assessment Payment Process; and Assessment and Collection Procedures. Administrator Mitchell testified about the knowledge, skills and abilities necessarily

possessed by qualified applicants. The Grievant's Internal Application (Joint Exhibit 3) and testimony evidence minimal exposure to these qualifications.

The Union admitted that the Grievant's Internal Application (Joint Exhibit 3) was deficient and lacked specificity regarding the previously mentioned characteristics. Blame was placed on the Employer for lack of diligence even though the Grievant was well-aware, at the time of her application, of the content and tone of the enclosed Employment Verification Affidavits. She sat on her rights, without asking for clarifications, and then attempted to raise doubts regarding the specificity and accuracy of these documents. Within this context, her accusations seem misplaced and unwarranted.

When a promotion application is tendered, the applicant needs to engage in efforts to provide an employer with the most accurate available information in support of the application. Nothing in the Agreement (Joint Exhibit 1), nor the internal application process, preclude an applicant from engaging in efforts to clarify a promotion application. In a similar fashion, nothing in the Agreement (Joint Exhibit 1) or pertinent contract provisions require an employer to probe beyond the "four corners" of an application to determine whether an applicant possesses or is proficient in the position specific minimum qualifications. The screening phase at this stage of the application process need not go beyond the information requested for reviewing purposes. That makes the information contained in the Internal Application of utmost import because it can, as evidenced by the present dispute, preclude an interview opportunity.

With respect to the present dispute, the record fails to support the notion that the Employer, or its Agent-Supervisors biased the application/selection process. The Affidavits (Joint Exhibit 3) were in my view accurate characterizations of the Grievant's present and prior work activities. Other than the Grievant, and documents introduced which were unpersuasive of the matters asserted, the Union failed to properly support the Grievant's qualifications. Reliance on the less senior applicant's credentials, specifically the content of submitted Employment Verification Affidavits to establish that the process was somewhat biased, proved to be unpersuasive. Even if his supervisors did copy the position specific minimum qualifications onto their affidavits, their actions do not evidence some underlying pretext. The Union never introduced any evidence suggesting that the less senior employee did not perform these duties or possess the articulated qualifications and characteristics.

Neither testimony provided by the Grievant nor other witnesses at the hearing supported the Grievant's qualification theories. The assessment and processing functions never served as a primary foci of her prior work experiences. Her work was tangentially related in terms of filing or retrieving certain documents, but she never assessed or processed work product to establish necessary qualifications for the

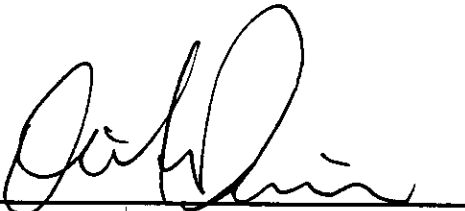
posted vacancy. Some of her testimony was directly contradicted by a prior supervisor who said she had never engaged in certain purported activities as an Intermittent Clerk

1. The supervisor's testimony was never properly rebutted by the Union.

Award

The grievance is denied.

September 16, 1997
Moreland Hills, Ohio



Dr. David M. Pincus
Arbitrator