

#1248

IN THE MATTER OF THE ARBITRATION BETWEEN: * Grievance Nos. 27-11-

The State of Ohio

*** 951109-0377-02-11 and**

-and-

*** 27-11-951109-0378-02-11**

Service Employees International Union, District 1199

*** Grievant: Bradley Kochunas**

Arbitrator: Mollie H. Bowers

Appearances:

For the State:

Colleen Ryan, Operations Team Leader, Office of Collective Bargaining

Michael Duco, Second Chair

Ronald Hart, Labor Relations Officer, Ohio Department of Rehabilitation and
Correction

Robert Bogan, Representative, Ohio Department of Rehabilitation and
Correction

David Weill, Mental Health Administrator, Southwest Ohio Correctional Facilities

For the Union:

Harry W. Proctor, Administrative Organizer, Service Employees International
Union, District 1199

District 1199 of the Service Employees International Union (the Union) brought this matter to arbitration, challenging as arbitrary and capricious the October, 1995 and the January, 1996, decisions by the State of Ohio, Department of Rehabilitation and Corrections (the State) to deny Bradley Kochunas (the Grievant) a Psychology Assistant II position posted as available to two separate institutions. The Hearing was held on December 3, 1997. Both parties were represented and stipulated the case is properly before the Arbitrator. The parties had a full and fair opportunity to present evidence and testimony in support of their case, and to cross-examine that presented by the opposing party. At the close of the Hearing, the parties presented oral argument in support of their positions.

ISSUES

Did the Grievant meet the qualifications for the Psychology Assistant II position offered in two separate postings, on two separate dates, by two separate institutions?

Did the State violate Article 30 of the collective bargaining Agreement when it denied the Grievant the Psychology Assistant II position?

If so, what shall the remedy be?

PERTINENT CONTRACT LANGUAGE

ARTICLE 30 - Vacancies

Section 30.02 - Awarding the Job (Transfers and Promotions)

. . . 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.

. . .

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.

. . .

This Agreement supersedes Ohio Civil Service Laws and Rules regarding eligibility lists for promotions.

BACKGROUND

The Grievant was employed by the State of Ohio Department of Mental Health as a Psychiatric Social Worker II at Lebanon Correctional Institution (LCI) beginning in July of 1983. At the time he was hired, the Grievant had a B.A. from Baldwin-Wallace College where he majored in religion. Two years after he began working at Lebanon, the Grievant achieved a M.A. in religion from Miami (Ohio) University.

The events which gave rise to this case began in May of 1995, when the LCI posted a job opening for a Psychology Assistant II. At that time, there were four methods for meeting the minimum qualifications for the position. These methods were:

1. A doctoral degree in psychology or other doctoral degree deemed equivalent by the Ohio State Board of Psychology; or
2. a. A Master's degree in psychology from an educational institution accredited or recognized by national or regional accrediting agency, or a Master's degree deemed equivalent by the Ohio State Board of Psychology;

b. 3 years psychological work experience of type satisfactory to the Ohio State Board of Psychology; or
3. 3 years of experience as a Psychology Assistant I; or
4. Alternative, equivalent evidence of the minimum qualifications.

The Grievant was one of four candidates to apply for the position. He sent his resume and a cover letter to the correct address. He subsequently learned an application was required and filed one. Of the four applicants, the Grievant was the most senior bargaining unit employee. A

panel of three, David Weill, James Barron, and James Newton screened the applications and determined the Grievant did not meet the minimum qualifications for the position. Specifically, the panel noted:

1. The Grievant did not possess a doctoral degree.
2. a. The Grievant did not possess a Masters degree in psychology and provided no evidence his Masters degree in religion was the equivalent of a Masters degree in psychology.

b. The Grievant did not have three years of psychological work experience. His work as a Psychiatric Social Worker II did not qualify because he was not supervised by a licensed psychologist nor registered with the Ohio State Board of Psychology.
3. The Grievant did not have three years of work experience as a Psychology Assistant I.

At the conclusion of the screening process, the panel determined that only one of the four applicants, a non-bargaining unit person, met the minimum qualifications for the position in question. This person was hired after being interviewed.

While this selection process was in progress, in August of 1995, a second Psychology Assistant II position was posted at the Montgomery Educational Pre-Release Center (MEPRC) in Dayton. The Grievant applied for this position by providing an application, a resume, and a transcript. A screening panel, utilizing the same process as the LCI panel, determined neither the Grievant nor any other applicant met the minimum qualifications for the position. A decision was made to re-post the position.

In October of 1995, while the screening process was on-going at MEPRC, the Grievant learned that a person who was not part of the bargaining unit was hired to fill the Psychology Assistant II position at LCI. He filed a grievance (27-11-951109-0377-02-11) asserting that the

hiring of a non-bargaining unit person, when a qualified bargaining unit employee had applied for the opening, violated Article 30, Section 30.02 of the Agreement. The Step 1 meeting was held on October 30, 1995. At the meeting, the Grievant learned the reasons why the LCI panel concluded he did not meet the minimum educational requirements for the Psychology Assistant II position. In particular, he was told a letter certifying equivalencies must be provided with all applications.

A Step 2 grievance meeting was held on November 25, 1995. Prior to the meeting, the Grievant submitted a letter from the Director of Clinical Training at the University of Cincinnati, expressing his opinion that the Grievant's graduate training was the equivalent to that of a person who had received a Masters in psychology. The Grievant was informed at the meeting the letter of equivalency must be authored by the psychology chairperson of the college from which he received his Masters degree in order for him to receive any further consideration. The grievance was denied at Step 2. No testimony or evidence was presented that the Grievant was told at any step he did not meet the minimum work experience requirements for the position, as well as not meeting the minimum educational requirements.

Within one week of the Step 2 meeting, the MEPRC re-posted the Psychology Assistant II position. The Grievant resubmitted his application, his resume, and the equivalency letter from the University of Cincinnati. Two weeks thereafter, the Grievant received a letter affirming the equivalency of his Masters in religion to a Masters in Psychology from the acting chairman of the Department of Psychology at Miami (Ohio) University. He forwarded a copy of this letter to both the MEPRC and to LCI. A panel reviewed the applications and qualifications of individuals who responded to the re-posting. Again, it concluded none of the applicants, including the Grievant,

meet the minimum qualifications for the position. A decision was made to post the position for a third time.

A Step 3 grievance meeting was held on January 18, 1996. Management at LCI acknowledged receiving the Grievant's equivalency letter from Miami (Ohio) University, but claimed this information was irrelevant because it was not presented in the course of the selection process. The Step 3 Hearing Officer agreed with LCI management in denying the grievance and stated, in essence, it was not management's responsibility to speculate about whether a person meets minimum qualifications if the application and resume provide no evidence minimum qualifications were met. Thereafter, the Union provided notice of its intent to advance the grievance to arbitration.

In late January, 1996, the MEPRC re-posted its job opening but, this time, changed the minimum qualifications for the Psychology Assistant II position. The allowance for an applicant to demonstrate an equivalency to a Masters degree in psychology with a Masters degree in another field was eliminated. Within one week's time, the Grievant filed a second grievance (27-11-951109-0378-02-11), again maintaining the State violated Article 30, Section 30.02 of the Agreement by failing to award him the position. This grievance was filed at Step 3, in accordance with Article 7.06 of the Agreement. The grievance was denied, and the Union filed notice of its intent to arbitrate this grievance.

POSITIONS OF THE PARTIES

State Position

The State contends the Grievant was properly denied the Psychology Assistant II position

at both LCI and MEPRC. It asserts the Grievant, even considering the educational equivalencies he provided, still does not satisfy the minimum qualifications for the position. In particular, the Grievant has no applicable work experience, and has not been registered with the Ohio State Board of Psychology. The State emphasizes it is illegal to perform psychological work in Ohio without registration with the Board and only experience achieved under such registration would meet the Psychology Assistant II minimum requirements.

With respect to the LCI position, the State maintains, at the time the screening process was in progress, the Grievant had submitted **only** an application and a resume. He offered no supporting documentation to show he met the minimum qualifications for the position, either in terms of education or work experience. The State contends the burden is on the applicant to timely establish he/she is qualified for the position. The panel had no way of knowing if the Grievant's degrees met the educational requirements as no statement of equivalency was provided. Additionally, there was no indication the Grievant was registered with the State Board of Psychology and his work experience was under the supervision of a licensed Psychologist. Lacking this evidence, the State maintains the panel had no choice but to reject the Grievant's application because he did not meet the minimum qualifications for the position in question.

It is also the State's position the Grievant again failed to meet the minimum qualifications for the Psychology Assistant II position posted at MEPRC in November of 1995. While it can be argued that the additional documentation he provided establishes an equivalency to the mandatory Masters degree in psychology, the State stresses the Grievant still presented no evidence of Board registration and work experience consonant with the minimum requirements.

Based upon the evidence and credible testimony of record, the State asks that both

grievances be denied in their entirety.

Union Position:

The Union asserts the State's decision to deny the Grievant both of the Psychology Assistant II positions was arbitrary and capricious, and in violation of Article 30, Section 30.02 of the Agreement. According to the Union, the Grievant met the criteria for these positions by having a Masters degree from an accredited institution which is equivalent to a Masters degree in psychology. It also emphasizes that neither posting stipulates an applicant must produce a letter attesting to educational equivalency. Once the Grievant became aware such documentation was necessary, it was supplied to MEPRC in response to the November, 1995, posting. The Union therefore contends the State had absolutely no appropriate justification for claiming the Grievant failed to meet the minimum qualifications for the position at MEPRC.

Also rejected by the Union was the effort by the State, at this Hearing, to assert the Grievant did not demonstrate acceptable job experience and registration with the State Board of Psychology as contributing factors for denying him the positions. Throughout the Step 1, 2, and 3 grievance meetings, the State contended educational equivalency was the barrier to the Grievant's being selected as Psychology Assistant II. Job experience and registration were never mentioned. The Union argues these alleged "contributing factors" should have been made clear from the start but, since they were never mentioned, they should be discounted in determining what the outcome of this proceeding shall be.

The Union further contends Article 30, Section 30.02 of the Agreement was negotiated to give applicants for promotion every opportunity for advancement and transfer within the

bargaining unit represented by District 1199. It stresses that the language contained in this Section is clear and unambiguous in its meaning if an applicant meets the minimum qualifications and is the most senior bargaining unit employee, he/she should receive the position. The Psychology Assistant II job description makes no reference to a requirement that applicants must provide evidence of academic equivalency. It also makes no reference to registration with the State Board of Psychology. Consequently, the Union maintains the Grievant met the minimum qualifications, as stated in the job description, was the most senior bargaining unit applicant and, thus, must be placed in one of the two positions for which he applied, receive all back pay and benefits, and be made whole in every respect.

ANALYSIS

After carefully reviewing the record, the Arbitrator, for reasons set forth below, has concluded the State has presented sufficient evidence to establish the Grievant did not meet the minimum qualifications for the Psychology Assistant II positions posted at LCI and at MEPRC. The State therefore did not violate Article 30, Section 30.02 of the Agreement when the Grievant was denied these positions.

Several facts become apparent when the Grievant's qualifications are compared with the minimum qualifications for the Psychology Assistant II positions as originally posted at both LCI and MEPRC. There is no dispute the Grievant fails to qualify for the position under methods 1 and 3. The Grievant does not have a doctoral degree (qualification 1) and, according to his application and resume, he has never worked for the State as a Psychology Assistant I (qualification 3). The Union has not challenged the State's decision with regard to method 4.

The record contains no notice of “alternative equivalent evidence” of the Grievant’s qualifications having been presented.

The State and the Union are at odds regarding method 2, wherein two requirements must be met to achieve minimum qualification. The job posting clearly indicates **both** qualifications must be met in order to satisfy the minimum. A semicolon, not the word “or” separates the two qualifications, thus refuting the Union’s claim the Grievant could qualify for the position by satisfying either requirement. The semicolon indicates continuation of a previous point, not separation of two individual points.

The Grievant did satisfy requirement a. of method 2. The job posting does not indicate how educational equivalency is to be established, but as the Hearing Officer at Step 3 pointed out, “it is not management’s responsibility to speculate as to whether one meets the minimum qualification if in fact those minimum qualifications don’t appear in the [individual’s] application and/or resume”. The Grievant clearly did not provide educational equivalency with his application at LCI. This defect was corrected in the application process for the position at MEPRC.

It is in meeting requirement b. of method 2 where the Grievant has his downfall. Unrebutted facts are that a successful applicant for the Psychology Assistant II position **must** be registered with the State Board of Psychology and have worked three years under the direct supervision of a licensed Psychologist. There is no evidence or testimony in the record which indicates the Grievant possessed these minimum work experience qualifications. Fulfillment of these two requirements is the only way an applicant could satisfy the position’s minimum qualifications (per the job posting) of “3 years psychological work experience of type satisfactory to the Ohio State Board of Psychology”. The Grievant did not have these qualifications and,

therefore, could not be awarded either vacancy.

The Arbitrator did note the Union's concern that the minimum qualifications for Psychology Assistant II were changed to eliminate the Masters degree educational equivalency while an existing grievance encompassing that qualification was proceeding toward resolution. If the Grievant or the Union believed this was a grievable offense, a process exists in the Agreement to handle complaints. That concern is not, however, subject matter which is properly before the Arbitrator in the instant case.

The Union stressed that Article 30, Section 30.02 should govern the resolution of this grievance. The Section clearly states qualifications shall be of first importance in judging all applications. As supported by the evidence of record, the Grievant did not meet **all** the minimum requirements of any of the four methods of qualifying for the Psychology Assistant II position. For that reason, the State acted properly when it denied the Grievant both of the subject positions.

AWARD

Both grievances are denied.

Date: January 6, 1998

Mollie H. Bowers
Mollie H. Bowers, Arbitrator