#1358

**OPINION AND AWARD**

**IN THE MATTER OF THE ARBITRATION BETWEEN**
**Ohio Department of Corrections—Adult Parole Authority**

**-AND-**

**Ohio Health Care and Social Service Union District 1199/SEIU**

**APPEARANCES**
**For the Adult Parole Authority**
Pat Mogan, Operations Team Leader, OCB
Beth Lewis, Labor Relations Specialist, OCB
Rebecca L. Fair, Personnel Director/P & CS/ DR & C
Eric Simmons, Assistant Training Administrator/POCS/ DR & C

**For the Union**
Matt Mahoney, Administrative Organizer, District 1199
Richard Ferguson, Parole Officer III

**Case-Specific Data**
Hearing Held
February 24, 1999

Grievance #
28-05-971028-0083-02-12

Case Decided
April 6, 1999

Arbitrator: Robert Brookins, J.D., Ph.D.
Subject: Promotion/Fill Posted Vacancy

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## FACTUAL STIPULATIONS

### Joint Stipulations

1. Grievance is properly before the Arbitrator.
2. Grievant's seniority date is 8/10/87.
3. Jan Short's seniority date is 2/13/75.
4. Jackie Webb's seniority date 11/20/89.
5. Alice McDaniel's seniority date is 9/10/90.
6. Screening point totals for vacancy identified as PCN 7204.0 (Parole Services Coordinator)
   a. Grievant - 53
   b. Jackie Webb - 59.5
   c. Alice McDaniel - 64
7. Jackie Webb was selected to PCN 7204.0 although the Grievant was two years senior.
8. Maximum number of points available for category D is 20.
9. Jan Short, who was 12 years senior to the Grievant, was selected to PCN 7226.0.
10. All applicants noted above were Parole Officers at the time they applied for either of these positions.

## III. The Facts

The state of Ohio (the State) has employed Mr. Richard Ferguson (the Grievant) for approximately 20.5 years.[1] During that period, the Grievant rendered exemplary service for several Ohio agencies. This dispute arose because the Grievant's current employer, the Adult Parole Authority (APA), denied him a promotion to the position of Parole Services Coordinator, Position Control Number 7204.0 (PCN 7204.0).[2] Relying on an evaluative device that it had developed and used for approximately 12 years ("screening criteria"), the APA awarded PCN 7204.0 to Ms. Jackie M. Webb whom the APA hired approximately 2 years after the Grievant.[3]

The nature of the issue in this dispute requires some discussion of the Grievant's outstanding work record. The Grievant began his employment with Ohio in 1970. Since then, he has worked for the Columbus Police Department and the APA for approximately 10 and 13 years respectively. Also, he was commissioned with the Madison County Sheriff Department where he performed basic street duties such as investigating traffic accidents and domestic disputes. Subsequently, the Grievant served in both the Internal Bureau and Helicopter Division of the Police Department and was a liaison with the Ohio court system.

In 1987, the Grievant transferred to the Ohio Department of Rehabilitation & Corrections (DRC) where he became an Identification Officer, set up the Identification Bureau, and brought the first inmates into the system. Afterwards, he served as a Transportation Officer with the APA for approximately 18 months and ultimately earned his current title of Parole Officer III.

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[1] Joint exhibit 1, p. 2.

[2] The APA is a division of the Ohio Department of Rehabilitation and Corrections.

[3] Joint exhibit 5, p. 2. Ms. Webb's seniority date is 11/20/89, and the Grievant's is 8/10/87. *See* List of Joint Stipulations. Also, although the names of several other competitive employees were mentioned during the arbitral hearing, the dispute submitted before this Arbitrator involved Ms. Webb and the Grievant. Accordingly, the Arbitrator's opinion is limited to the dispute between these two employees for the right to fill PCN 7204.0.

As an Adult Parole Officer with the APA, the Grievant has worked several counties in Ohio and has had to "do it all," rural and city case loads. He has worked case loads involving sex offenders and completed a correctional supervision course for which he earned a certificate.

Besides holding almost all of the training certificates that the DRC offers, the Grievant has earned numerous other certificates, citations, and commendations for on-the-job performance. A partial list includes:

1. Gold Star (excellence)
2. In-line supervisor commendation
3. Commendation from fellow employees for giving greater than 100%
4. Parole Officer of the Year

Finally, the Grievant has crowned these impressive achievements with a discipline-free work record.[4]

Despite the Grievant's accomplishments, the APA awarded PCN 7204.0 to Ms. Webb, who has less on-the-job experience and holds fewer commendations than the Grievant. Nevertheless, Ms. Webb holds a Bachelors Degree with an emphasis in sociology and criminal justice and the Grievant holds a high school diploma. The "screening criteria" used to evaluate applicants' fitness for posted vacancies examines essentially four parameters: education, work record/performance, experience, and qualifications. The maximum number of points available for each parameter is 20. The APA evaluates the first three components by reviewing documents such as applicants' personnel files. In contrast, procedures for evaluating "qualifications," requires each applicant to appear before an APA tripartite panel for a personal interview.

### A. The "Screening Criteria"

Because the "screening criteria" is a critical factor in this dispute, a brief description of the variables in that evaluation system and how the Grievant and Ms. Webb achieved their scores is indicated.

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[4] *See* Joint exhibit 4, p. 2.

## 1. Education

| Education | | | |
|---|---|---|---|
| **Degrees/Total Scores** | **Points Available[5]** | **Grievant's Score** | **Ms. Webb's Score** |
| High School Diploma | 1 | 1 | |
| Associate Degree | 5 | | |
| Bachelors of Arts/Science | 10 | | 10 |
| Masters or above | 15 | | |
| Degrees in related fields | 5 | | 5 |
| **Total scores** | | 1 | 15 |

To avoid undervaluing education relative to the other three parameters, the "screening criteria" allows 20 points for education. The Grievant's high school diploma earned 1 point for education as compared to the 15 points Ms. Webb received for her Bachelor's Degree—10 points for the degree itself and 5 for the emphasis in the related fields of sociology and criminal justice.

## 2. Work Record/Performance

| Work Record/Performance | | | |
|---|---|---|---|
| **Categories** | **Points Available** | **Grievant's Score** | **Ms. Webb's Score** |
| Performance Evaluation | 20 | 20 | 20 |
| Disciplinary Action | -1 through -20 | 0 | 0 |
| Total scores | | 20 | 20 |

This Work Record/Performance parameter comprises performance evaluation and disciplinary action and carries a maximum of 20 points. Both the Grievant and Ms. Webb received the 20-point maximum for performance evaluation. The APA deducts points for any disciplinary action "not expunged per the current Ohio Health Care Employees District 1199 Labor Agreement."[6] Since neither the Grievant nor Ms. Webb had any relevant disciplinary actions, they received no negative points for disciplinary action.

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5 Five extra points are awarded for degrees in related fields.

6 Joint exhibit 4.

### 3. Experience

| Experience | | | |
|---|---|---|---|
| **Categories/Total Scores** | **Points Available** | **Grievant's Experience/Score** | **Ms. Webb's Experience/Score** |
| One year of paid, full-time work in related field. | 1 | 20.5 years/18 | 9.16 years/11.5 |
| More than 6 months of paid full-time work in related field. | 1/2 | | |
| One year of volunteer or part-time experience in related field. | 1/2 | | |
| **Total Scores** | | 18 | 11.5 |

The 20-point maximum for this parameter comprises 18 points for actual work experience and 2 points for either trainer experience or 40 hours of instructional courses. The Grievant received the 20-point maximum here, but Ms. Webb received only 11.5 points—9.5 points for experience and 2 points for either trainer experience or having completed a 40-hour instructional course.

### 4. Qualifications

| "Qualifications" | | | |
|---|---|---|---|
| **Categories/Total Scores** | **Points Available** | **Grievant's Score** | **Ms. Webb's Score** |
| knowledge of training skills | 0-5 | 1 | 2 |
| knowledge of APA mission, goals, policies | 0-5 | 3 | 3 |
| knowledge of APA mission, goals, policies | 0-5 | 3 | 3 |
| knowledge of APA mission, goals, policies | 0-5 | 5 | 5 |
| Total Scores | | 12 | 13 |

For the "qualifications" parameter, the Grievant and Ms. Webb received totals of 12 and 13 points respectively.

Determining an applicant's "qualifications" involves a slightly different process. To assess this parameter, the APA established a tripartite review panel (the panel) to examine, "the relationship between [an] . . . applicant's background and the expected job duties."[7] Each applicant must appear before the panel for

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[7] Joint exhibit 5, p. 2.

a personal interview. Before an applicant enters the interview room, panelists usually decide which of them will question the applicant.

Once the interview begins, the designated panelist(s) will ask an applicant four job-related questions. Each question is worth no more than 5 points (totaling 20 points for "qualifications"), and each question has a list of "satisfactory responses." The questions are designed to evaluate an applicant's knowledge of training skills and of the APA's mission, goals, and policies. To preserve the integrity of interviews, the APA developed 26 sets of different questions that examine the same 4 areas. An applicant's score in this area is directly related to the proximity of his/her answers to the "satisfactory responses." After an applicant completes the interview and leaves the interview room, panelists discuss the applicant's answers and reach a consensus his/her score on each of the four questions.

### 5. Summary of Total "Screening Criteria" Scores

| Total "screening criteria" Scores | | |
|---|---|---|
| **Criteria/Totals** | **Grievant** | **Ms. Webb** |
| Education | 1 | 15 |
| Work Record | 20 | 20 |
| Experience | 20 | 11.5 |
| Qualifications | 12 | 13 |
| **Total Points** | **53** | **59.5** |

## B. "Significantly More Qualified"

If, under the current Contract, a junior and a senior employee are both "qualified" to fill a posted vacancy, the APA "breaks the tie" by determining whether the junior employee is "significantly more qualified" than the senior competitor. To be "significantly more qualified," a junior employee's total score must exceed the senior employee's by at least two points for each year of seniority between the two employees.[8] In the instant case, Ms. Webb gives up two years of seniority to Ms. Webb. Therefore, to be "significantly more

[8] Joint exhibit 5, p. 2.

qualified," Ms. Webb's total score must have exceeded the Grievant's by at least 4 points (for a total of 57 as compared to the Grievant's 53). As previously mentioned, however, Ms. Webb accumulated 59.5 total points, thereby eclipsing the Grievant's by 6.5 points, clearly satisfying the APA's version of the "significantly more qualified" standard. In light of Ms. Webb's overall score, the Grievant was deemed minimally, but not best, qualified for PCN 7204.0.

The decision to promote Ms. Webb to PCN 7204.0 triggered grievance # 28-05-971028-0083-02-12 which states: "The Grievant was not promoted to Parole Services Coordinator in Columbus Unit 3 though he had *more seniority* than the person to whom the job was given."[9] The parties raised no procedural or substantive issues of arbitrability, therefore, the foregoing grievance is properly before the Arbitrator.

## IV. Relevant Contractual Language

Article 28.02 of the 1986-1989 Contract states in relevant part: "[A]ll timely filed applications shall be reviewed considering the following criteria: qualifications, experience, education and work record. Where applicants' qualifications are *relatively equal*, according to the above criteria, the job shall be awarded to the applicant with the greatest state seniority."

Article 30.02 of the 1989-1992 Contract states in relevant part:

> 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*.[10]

Article 30.02 of the 1997- 2000 Contract (current Contract or Contract) also states in relevant part:

> 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*.[11]

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9 Joint exhibit 2 (10/27/97) (emphasis added).

10 The 1989-1992 Contract also contains this language.

11 The 1989-1992 Contract also contains this language.

## V. The Issue

The parties submitted the following joint issue: "Did Management violate Article 30 of the Contract by not selecting the Grievant for PCN 7204.0 in favor of a junior applicant, Jackie Webb; if so, what shall the remedy be?"

## VI. Positions of the Parties

Union's Position

The Union challenges both the APA's implementation of the 4 parameters in Article 30.02 and its interpretation of "significantly more qualified." Essentially, the Union alleges that the "screening criteria", relies on abstract scoring, subjective oral questions, and "a point distribution system that discriminates against those with more than 18 years of service."[12]

APA's Position

In contrast, the APA's insists that it is entitled to interpret and administer the parameters in Article 30.02 and that the "screening criteria" fully complies with those parameters. Moreover, the APA maintains that based on the application of the "screening criteria," Ms. Webb was "significantly more qualified" than the Grievant.

## VII. Standards of Review

Before discussing the issues in this case, the Arbitrator should stress two points regarding the standards of review. First, the APA's discretion to fill posted vacancies is a part of management rights and is restricted only to the extent reflected in the Contract. Consequently, in a dispute such as this, which directly challenges managerial authority to exercise its right to fill posted vacancies, a preponderance of the evidence in the record as a whole must show that the APA's decision to award PCN 7204.0 to Ms. Webb was unreasonable, arbitrary, capricious, or discriminatory. Otherwise, the APA's decision should stand.

## VIII. Discussion

As stated in the submission agreement, the basic issue is whether the APA's decision to award Ms. Webb PCN 7204.0 violated Article 30.02. That is, whether Ms. Webb was "significantly more qualified" than the Grievant to fill PCN 7204.0. Resolution of this issue requires a review of: (1) the application of the four parameters in Article 30.02: and (2) the APA's definition of "significantly more qualified." However, as pointed out earlier, the Union specifically contends that the "screening criteria" relies on abstract scoring,

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[12] Union brief, fourth paragraph.

subjective oral questions, and "a point distribution system that discriminates against those with more than 18 years of service."[13] Therefore, these contentions are discussed first and in turn below.

### A. Abstract Scoring

Although the Union posited this argument, it was never sufficiently developed during the arbitral hearing. Therefore, the Arbitrator lacks a basis from which to address it, except to say that nothing in the arbitral record suggests that the APA's evaluative process is unduly abstract.

### B. Subjective Oral Questions

Here, again, the Union neither explained why it viewed the questions as too subjective nor offered an example of how the APA might objectify them. In the Arbitrator's view, the questions do not seem unduly subjective, given the description of the duties of a Parole Officer III in the record.

### C. Discriminatory Point Distribution System

Here the Union raised and substantially developed two arguments during the arbitral hearing. First, the point distribution within the "screening criteria" discriminates against employees with more than 18 years of seniority. Essentially, the "screening criteria" allegedly overvalues education and undervalues experience. Second, the APA improperly defines "significantly more qualified." These points are discussed in turn below.

#### 1. Experience

The Union argues that the 18-point cap on basic experience discriminates against employees, like the Grievant, with more than 18 years of "service."[14] That is, despite his 20.5 of service with the state of Ohio, the Grievant received only 18 points for basic experience. Conversely, the APA insists that, for selecting

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[13] Union brief, fourth paragraph.

[14] Observe here that "service" is more akin to seniority than to experience. Moreover, "service" (or seniority) is not necessarily synonymous with experience. "Service" or seniority measures the length of an employee's tenure with an employer. Experience, however, measures time spent in a particular job. Still, under certain circumstances, not present in this case, the length of an employee's experience in a particular job can equal the employee's seniority or service with an employer.

employees to fill posted vacancies, experience deserves no more points than the other criteria set forth in Article 30.02.

Although limiting basic experience to 18 total points clearly militates against employees with more than 18 years of experience, the more urgent concern here is whether that 18-point cap violates the intent of Article 30.02.[15] Two facts suggest that it does not. First, Article 30.02 simply lists the four evaluative criteria in straight-line fashion, thereby registering absolutely no intent to weight one criterion more than another for purposes of filling posted vacancies. On its face, this straight-line presentation clearly supports the APA's decision to assign experience the same value as any other criterion. Second, nothing in Article 30.02, the current Contract as a whole, or the arbitral record suggests otherwise. Although the 18-point cap for basic experience discriminates against the Grievant, that discrimination is no more than the parties accepted by not differentiating the four parameters in Article 30.02.

Consequently, the Arbitrator is not persuaded that the APA is somehow obliged to allotting any more than 20 total points to experience—18 for basic experience and 2 for other experiences. Limiting the total points to 20, under these circumstances, was neither unreasonable, arbitrary, capricious, nor discriminatory.

**2. Education**

The basic allegation here is that the APA violated Article 30.02 and/or discriminated against the

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[15] For example, the Grievant received 1 point for each of his 18 years of service, but he actually had accumulated 20 years 6 months of service when he was evaluated for the position. Due to the 18-year limitation, however, he received no points for the last 2.5 years of outstanding service. In short, those years stood for nothing in his quest for PCN 7204.0. Such an outcome is not easily reconciled, especially by the one who actually rendered those 2.5 years of impeccable service. Also, it is not clear that the Grievant was entitled to receive points for the last six months of experience. Section C awards "one-half (½) point for paid, full-time work in a related field of less than one year but *more than 6 months*." However, the record reveals that the Grievant had exactly 20 years, 6 months of service. Since, the Grievant had not accumulated "more than 6 months" of service beyond his twenty years, it is unclear whether he would have received the extra one-half point. Finally, even if the Grievant had received the extra 2.5 points, which would have increased his total to 55.5 points, Ms. Webb still would have prevailed by 4 points, which would have been enough to qualify her as "significantly more qualified" than the Grievant.

Grievant in two respects. First, the APA assigned too many points for education—15 for Ms. Webb's Bachelors Degree in a related field—and too few points for experience.[16] Second, the APA should not have considered college degrees in the first instance because PCN 7204.0 does not require a college degree. Again, the APA's rebuttal is that applicants can receive only 20 total points for education as for any other parameter in the "screening criteria."

The APA designed the "screening criteria" in a manner that fairly and consistently values each parameter therein, irrespective of how much "human capital" an applicant has accumulated within a particular parameter. Under education, for example, an applicant with a Ph.D. can receive no more points than another applicant with a Masters Degree. Both degrees are capped at 15 points and would receive 5 extra points if they were in related fields. Thus, the "screening criteria" equally burdens both highly experienced and highly educated applicants. Neither applicants with doctorates nor those with 30 years of experience can receive more than 20 points respectively.

In fact, other things equal, highly experienced applicants with little education may fair better than the well-educated junior applicants with less experience. For example, applicants who receive only 18 points for their 30 years of basic experience may still prevail if they have more seniority than junior competitors who are not "significantly more qualified." In other words, although experience and seniority are defined differently, Article 30.02 counts all experience as seniority, regardless of whether the experience is in a related field.[17] Thus, highly experienced applicants with little formal education may get a "second bite of the apple" relative to highly educated applicants with relatively little basic experience and seniority. This is because neither Article 30.02 nor anything else in the arbitral record indicates rewards education beyond the Masters Degree.

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[16] The Union did not challenge and the Arbitrator, therefore, finds no bases for addressing either the APA's decision to assign extra points for degrees in related fields or its definition of what constitutes a "related field."

[17] However, under the "screening criteria," seniority is not necessarily counted as experience, since to be recognized, experience has to be in a related field.

Consequently, the Arbitrator cannot agree that allotting 20 points to education is unreasonable, arbitrary, capricious, or discriminatory.

Second, the Union suggests that the points given to Ms. Webb for her degree violate Article 30.02 because PCN 7204.0.0 does not require a college degree. This argument also succumbs to fatal errors. First, on its face, Article 30.02 makes no such distinction about education. In other words, education is a factor, whether or not an applicant has it or whether a particular position specifically requires it. Education is almost universally viewed as a plus for any conceivable position. Therefore, treating education as a plus when deciding to fill a posted vacancy is hardly unreasonable, arbitrary, capricious, or discriminatory. At the very least, a formal education is likely to enhance an applicant's capacity for growth in any position.

Third, neither Article 30.02 nor any other evidence in the record suggests that "education" was intended to exclude college degrees, unless the position in question explicitly requires them. Instead, Article 30.02 merely lists "education" as one of four parameters that the parties expressly accept as measures of an applicant's fitness to fill posted positions. The APA is entitled to implement the provisions of Article 30.02 in a manner consistent with Article 30.02 and with the Collective Bargaining Agreement as a whole. In addition, a college degree is undoubtedly one of the most traditional and time-honored symbols of educational achievement. Finally, nothing in the arbitral record suggests (and the Arbitrator cannot find) that it is unreasonable, arbitrary, or capricious to allow 10 points for a college degree and 5 more points if it is in a related field.[18]

In summary, then, although a college degree may not be a specific requirement for PCN 7204.0.0, "education" is a valid, equally-weighted parameter that cannot be logically severed from college degrees. Consequently, because the APA may weight education and the other criteria in Article 30.02 equally, it can allow a total of 20 points for traditional symbols of education like college degrees in related fields.

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[18] The issue of what constitutes a "related field" was not raised in this dispute.

## D. Effects of the 1989 Amendment

### 1. "Qualifications" vs. "Relatively Equal"

Among other things, the 1989 amendment manifests an intent to strengthen the role of seniority and, hence, afford senior applicants a greater edge over junior competitors. Before 1989, Article 28.02 used seniority as a basis for selecting senior applicants over junior applicants only where the "applicants' qualifications . . . [were] relatively equal. . . ." That is, seniority became a "tie breaker" among junior and senior applicants upon the occurrence of one precondition: their respective qualifications began to *approach the same levels*. After the 1989 amendment, however, the first precondition changed and seniority became a "tie breaker" among junior and senior applicants if both were merely "qualified" for the positions in question.[19] No longer must the qualifications of junior and senior applicants began to converge for seniority to trigger a decision for senior applicants. Now a senior applicant may be promoted over a junior applicant where the two are merely minimally qualified for the positions in question. Nevertheless, after the 1989 amendment, seniority could not assume its broader role if a junior applicant was "significantly more qualified" than a senior counterpart.

### 2. "Significantly More Qualified"

In challenging the APA's decision to promote Ms. Webb over the Grievant, the Union questioned the legitimacy of the APA's definition that Ms. Webb is "significantly more qualified" than the Grievant. At bottom, this challenge implicates the propriety of the APA's definition of "significantly more qualified." To address this issue, one must first determine, as far as possible, the parties' intent for adding "significantly more qualified" to the 1989 amendment of Article 28.02 and for retaining that phrase in the current Contract.

Article 28.02 provided: "[A]ll timely filed applications shall be reviewed considering the following criteria: qualifications, experience, education and work record. Where applicants' qualifications are *relatively*

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[19] This, of course assumes that junior applicants were not "significantly more qualified."

*equal*, according to the above criteria, the job shall be awarded to the applicant with the greatest state seniority."[20] In 1989, the parties amended this language (the 1989 Amendment) and placed it under Article 30.02 of the 1989-1992 Contract. The same language also appears in Article 30.02 of the current Contract, which provides:

> 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.*[21]

The italicized language represents the actual amendment to Article 28.02 in the 1986-1989 Contract.

The Union argues that "significantly more qualified" converts Article 30.02 from an ordinary "relative ability" seniority clause ("relative ability" clause) into one that obliges the APA to base its promotional decisions on "clear and convincing qualifications" and not on "a subjective and discriminatory test."[22] Although the APA offers no general interpretation of "significantly more qualified," it does offer a working definition of that standard. To be "significantly more qualified" than a senior employee, a junior employee's total score on the "screening criteria" must exceed the senior employee's by at least two points for each year of seniority separating the two employees.[23]

Because "significantly more qualified" is ambiguous on its face, the Arbitrator must search elsewhere for guidance. The first sources are other provisions in the Contract and past practices. This search is unavailing, however. No other provision in either the 1986-1989, the 1989-1992, or the current Contract reveals the parties' intent in adopting the language in Article 30.02. Nor does the arbitral record offer any past

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20 (emphasis added).

21 (emphasis added).

22 Union brief.

23 Management's brief at 2.

practices or bargaining history.[24]

The Arbitrator is, therefore, left with essentially three interpretative guidelines: (1) the fact that Articles 28.02 was an ordinary "relative ability" clause; and (2) arbitral precedent regarding "relative ability" clauses. The purpose here is to determine whether adding "significantly more qualified" to the language of an ordinary "relative ability" clause substantially changes its requirements as the Union contends.

Article 28.02 is a typical "relative ability" clause that favors senior applicants over their junior counterparts only if both senior and junior applicants have relatively equal job skills as measured by the parameters enumerated in Article 28.02, which, except for affirmative action, are the same as those in Article 30.02. Article 28.02 focuses on whether junior and senior applicants are "relatively equal" in the desired job skills. Arbitrators and at least one labor-management authority agree that "relatively equal" does not mean "exactly equal" but merely "substantially equal."[25] When determining how much additional ability a junior applicant must have to prevail over a senior applicant where the two are "substantially equal" under a "relative ability" clause, arbitrators subscribe to either of two schools of thought. Some arbitrators insist that junior employees need not be "head and shoulders above" senior competitors to get a promotion, so long as "the difference . . . [is] capable of *objective measurement* but not so overwhelming as the 'head and shoulders' test requires."[26] Other arbitrators hold that where junior and senior applicants are relatively or substantially equal, junior applicants must be "substantially superior" to prevail.[27] Therefore, even though "relative ability" clauses like

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[24] The APA alleged that the bargaining history did not offer a reason for having changed the language.

[25] Elkouri and Elkouri, How Arbitration Works, 611, nn. 108-110 (4th ed. 1985).

[26] Bd. of Education of the Iowa City [Iowa] Community School Dist. v. SEIU, Local 728, 97 Lab. Arb. (BNA) 903 (1991) (Nathan, Arb.) (emphasis added).

[27] Elkouri and Elkouri, How Arbitration Works, 612, n. 111 (4th ed. 1985) (citing, e.g., Bristol Steel and Iron Works, 47 Lab. Arb. (BNA) 263, 265 (1966) (Volz, Arb.) (Stating that junior employee need not be head and shoulders better, but his greater ability should be clearly discernible to outweigh the factor of seniority).

Article 28.02 do not always expressly state as much, many arbitrators interpret these clauses to mean that junior employees must be "substantially superior" to senior applicants.

The upshot is that by adding "significantly more qualified" to the 1989 contract language, the parties essentially "spelled out" or expressed the intent that many in the arbitral community already commonly embraced. "Significantly more qualified" and "substantially superior" are essentially synonymous. That is, "significantly more qualified" captures the essence of the "substantially superior" test.[28] As mentioned above, in "relative ability" clauses like that in the 1986-1989 Contract, seniority becomes a factor only when the relative abilities of the junior and senior employees are equal or roughly equivalent. Although this fact is commonly understood, it often remains implicit in "relative ability" clauses. In both the 1989-1992 and current contracts, however, the parties explicitly stated this fact by requiring that junior employees be "significantly more qualified" than their senior counterparts.

Still, merely expressing a commonly understood standard does not change that standard. Even if the parties sought to fundamentally enlarge the required level of qualifications that juniors must possess to prevail over senior applicants, that intent is not manifest in Article 30.02. Nothing in the record establishes how much more qualified juniors should be under Article 30.02 as compared to Article 28.02 because the addition of "significantly more qualified" merely states what was already understood. Had the parties intended to require a larger-than-common gap in qualifications between junior and senior applicants under Article 30.02, they might have selected an entirely different phrase like "head and shoulders above." Instead they closely paraphrased the commonly accepted standard. That type of behavior reflects an intent to clarify rather than to fundamentally change the standard.

The Union correctly asserts that to demonstrate that a junior applicant is either "significantly more

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[28] On the other hand, the "head and shoulders" test is more rigorous and requires that the abilities of junior applicants outstrip those of their senior competitors by a greater margin. However, that is not the language of Article 30.02.

qualified" requires clear and convincing evidence that the junior applicant is superior to the senior. However, the "substantially superior" test and similar tests which are commonly used to interpret "relative ability" clauses, would also require a clear and convincing demonstration. Consequently, adding "significantly more qualified" to the original language of Article 28.02 neither enlarges the required gap in qualifications between junior and senior applicants nor requires anything more than the clear and convincing demonstration to which the Union has already alluded.

**E. Propriety of the APA's Definition of "Significantly More Qualified"**

Having determined the general significance of "significantly more qualified" in Article 30.02, the Arbitrator now turns to whether the APA's assessment of Ms. Webb as "significantly more qualified" than the Grievant complies with Article 30.02. In other words, whether it was unreasonable, arbitrary, capricious, or discriminatory, under Article 30.02, to conclude that a junior applicant is "significantly more qualified" than a senior applicant where the junior has accumulated at least two total points for each year of seniority between the junior and senior.

Although some arbitrariness will inevitably taint any standard selected to define a phrase as ambiguous as "significantly more qualified," the APA's definition is reasonable. One might argue that more than two points should be required for each year of seniority between junior and senior applicants. The question then becomes how many more points and why? Furthermore, in the case, Ms. Webb did amass more than two points per year of seniority difference between her and the Grievant. So even if the parties had intended to increase the required gap in qualifications between junior and senior applicants, the outcome in this case might very well have remained the same. The requirement of two points for each year of difference in seniority seems as workable as any other approach that comes to mind. Finally, the Union has offered no "better" definition of "significantly more qualified."

Ultimately, the preponderance of evidence in the record as a whole does not establish that the APA acted unreasonably, arbitrarily, capriciously, or discriminatorily in either deciding to award PCN 7402.0 to

Ms. Webb instead of to the Grievant or in the process of reaching that decision by applying the "screening criteria."

## IX. The Award

For all the foregoing reasons, the grievance is hereby **DENIED.**