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IN THE MATTER OF ARBITRATION
BETWEEN
THE OHIO DEPARTMENT OF TRANSPORTATION
AND
THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 31-04(04-05-099) 0019-01-06
Dennis Isla, Grievant

Advocate(s) for the UNION:

Linda Kemp, Field Staff Representative
John Porter, 2nd Chair
OCSEA Local 11, AFSCME, AFL-CIO
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Advocate for the EMPLOYER:

Greg Zemla, LRO
Ed Flynn, LRO
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INTRODUCTION

A hearing on the above referenced matter was held on April 24, 2001 in Canton, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties made closing arguments in lieu of submitting briefs. The hearing was closed on April 24, 2001. The Arbitrator's decision is to be issued within forty-five (45) calendar days or no later than June 8, 2001.

ISSUE

The parties agreed upon the following definition of the issues:

Did the Employer violate Article 17 when it failed to promote the Grievant, Dennis Isla? If not, what should be the remedy?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 17 DISCIPLINE**BACKGROUND**

The Grievant in this matter is Dennis Isla, a Highway Maintenance Worker 2 (HMW 2) employed with the Ohio Department of Transportation ("Employer" or "ODOT") at its District 4 facility located in Stark County, Ohio. He was originally hired by ODOT on 11/2/87 (JX 5g). This case concerns the Employer's determination that Mr. Isla did not meet the minimum qualifications for a promotion to HMW 3, the next promotional step in the HMW series (JX 4). The position was posted on 11/4/98. Mr. Isla applied for the position on 11/13/98 and was interviewed on the same day (JX 5a). Following his interview he participated in an "Equipment Operation Skills Evaluation" on 12/16/98 (JX 5e,f).

The Employer determined that Mr. Isla did not meet minimum qualifications for the position of HMW 3, although he was the most senior applicant who applied for it. The Grievant disagreed with the Employer's assessment of his qualifications and claimed the Employer violated Article 17, as well as any other pertinent articles of the Agreement.

UNION'S POSITION

The Union contends the Grievant, an 11 year veteran of ODOT at the time, had more seniority than any other applicant for the two HMW 3 positions that were posted. The Union argues that Mr. Isla met the minimum qualifications for the position and should have been awarded it. ODOT did not ever demonstrated that the "junior" employee was demonstrably superior to the Grievant was required by Article 17.05, asserts the Union.

The Union also rejects ODOT's use of the "Equipment Operation Skills Evaluation." It claims this proficiency test was misused in violation of Article 17.06 and was "tainted" when the Grievant was tested on equipment that was not even listed in the classification specification or posting.

Based upon the above, the Union requests that the grievance be granted.

EMPLOYER'S POSITION

The Employer argues that the Grievant neither met nor was proficient in the minimum qualifications for the position of HMW 3. The Employer argues that it arrived at these conclusions based upon the Grievant's application, his interview, and the outcome of the proficiency test. All the applicants for the two HMW 3 positions were given a

reasonable opportunity to establish that they met and were proficient in the minimum qualifications pursuant to Article 17.04 of the Agreement, asserts the Employer.

The Employer also argues that all employees were provided with opportunities to become proficient in the minimum qualifications at its expense. It points out that there are training courses available and department equipment that employees can use to practice. The Employer argues that the Grievant did not take advantage of these opportunities.

Based upon the above, the Employer requests the grievance be denied.

DISCUSSION

Candidates for promotions must possess and be proficient in the minimum qualifications for a position in accordance with Article 17.04. The "possess and be proficient" language is found throughout Article 17.04. In his 1992 decision involving the Bureau of Workers Compensation, Arbitrator Graham reaffirmed the intent of the parties. He stated that bidders for promotion "*...must possess and be proficient in the minimum qualifications contained in the class specifications and the position description.*" I concur with this finding and agree that the language of Sections 17.04 and 17.05 clearly and unequivocally requires a qualified

bidder to be one who possesses and is proficient in the minimum qualifications that are published in the class specifications and the position description.

In Article 17.06 the parties agreed that the Employer could use proficiency testing to determine whether a job bidder meets minimum qualifications of a position. Article 27.06 states in pertinent part:

"Proficiency testing shall be used only to determine whether or not a candidate meets the minimum qualifications of the classification specification or position description and shall not be used for purpose of determining relative skill and ability."

In the instant matter the Employer contends that it used the Grievant's application, the results of his interview, and the results of his proficiency test to determine that he did not meet the minimum qualifications for HMW 3. The intent of the parties regarding the importance of possessing and being proficient in the minimum qualifications is underscored in Section 17.05 (3). In this section the standards of having to "possess and be proficient in minimum qualifications of the position description and the classification specification" are requirements that successful candidates for lateral transfers (individuals who already hold the same classification) must meet.

The content of the position description and classification specification for HMW 3 is contained in JXs 3 and 2a respectively. The classification specification for HMW 3 states that minimum class qualifications can be met in one of three ways. It can be met by a

combination of education and experience, by having 6 months experience as a Highway Maintenance Worker 2, or it can be met by *"alternative, equivalent evidence of the Major Worker Characteristics noted above."*

The Grievant held the classification of HMW 2 for some eleven years. According to the class specification for HMW 2 he was supposed to possess or develop skill in the operation of heavy motorized equipment such as the truck mounted backhoe. (JX 2C). However, when the Grievant took a subsequent proficiency test he had a great deal of difficulty with the fundamentals of operating the backhoe, a piece of equipment common to the work of ODOT. He needed guidance on its most basic operation and he failed to place the "stabilizer pads" down to secure the equipment when he was required to dig a hole (JX5f), a seemingly fundamental step to operating it safely. When the Grievant was asked to operate a Gradall, he stated he had never been in one and essentially was unable to operate it. He also had difficulty operating the bulldozer, failing to keep it in a straight line.

The Union argues the Grievant met the minimum qualifications for the position of HMW 3, and the proficiency test was used in violation of the Agreement. It contends the proficiency test was used to determine relative skills and ability. If one examines some of the wording of JX 9 (a letter from Charles R. Miner, Stark County ODOT manager) the Union's

accusation that ODOT used the proficiency test to measure relative skills and abilities appears to have merit. It uses the words "*most qualified candidates*" and other words that measure candidates against one another. However, other parts of the memorandum state the Grievant "*...did not meet the basic qualifications of the Highway Worker 3 position.*" The memo appears to be saying two things and is inconclusive as definitive evidence that the Employer only used the proficiency test to compare candidates.

The proficiency test could have been designed to better reflect the equipment actually used by HMW 3s. For example, the bulldozer used in the test was an 8-ton bulldozer and not 7 tons as listed in the Position Description (JX 3). The significance of using a bulldozer that weighs an extra ton is unclear, but all candidates had the same disadvantage. The Grievant's lack of basic operating knowledge about the equipment and the modicum of skill he was able to demonstrate on two out of three pieces of equipment raises serious doubts about his minimum qualifications for the position of HMW 3.

According to the Joint Exhibit 2C, Highway Worker 2 is a position (in the series) in which an employee develops skills and abilities in operating heavy equipment in addition to other functions. It prepares an employee for the position of HMW 3. It appears that throughout his eleven years in the position of HMW 2 Mr. Isla did not develop skill in the operation of the

basic equipment that HMW 2s or HMW 3s must operate. There appears to be a rational explanation of his inability to operate the heavy equipment in the proficiency test. The Grievant testified that each of the last six (6) years he has transferred to the position of Project Inspector in construction. Each transfer lasts for about 1,000 hours and takes place during the most favorable weather months. While in this position he does not have an opportunity to operate ODOT equipment and when he resumes his HMW 2 position it is during the time of the year when ODOT concentrates on snow removal and other projects that do not entail extensive use of backhoes and like equipment.

In this position as Project Inspector Mr. Isla received a .50 per hour pay increase. Currently the Grievant has a concrete certification and earns \$1.00 hour more while in temporary position. This is an activity for which ODOT encourages its employees to volunteer according to the testimony of Employer witness, Jim Murray. A list goes up for volunteers and selections for said transfers are made by seniority.

The months Mr. Isla spent as a Project Inspector were during the second and third quarter of the year. These are also the prime months that ODOT uses heavy equipment in the maintenance area and when ODOT offers employees opportunities to attend training in operating heavy equipment and in truck and loader operating. The record indicates Mr. Isla did not take advantage of training during his tenure with

ODOT and most likely had less of an opportunity to take advantage of it during the past six years while he was working as a 1000-hour employee in construction.

Union witness Gaut testified that there has not been ample opportunity for employees to receive training in these areas. JX 6 and 7 indicate that in terms of heavy equipment training no one from District 4 was sent to training during the years between 6/4/90 and 4/4/94. However, the two employees who received the promotions to HMW 3, Beck and Yurick, received formal heavy equipment training on 9/25/95 and 7/12/99 respectively (JX 6, 7). Beck and Yurick also attended Truck and Loader training on the dates of 11/28/94 and 5/10/93 respectively (JX 6, 7). In addition, Mr. Gaut received Truck and Loader training on 8/7/89 and heavy equipment training on 8/14/95 (JX 6, 7). There was no evidence presented that demonstrated that the Grievant was prevented from receiving this training during this time period. However, as stated above much of this training occurred during the construction season, when the Grievant volunteered to be transferred to the position of Project Inspector.

The evidence demonstrates that the Grievant was not proficient in minimum qualifications of heavy equipment operation. He has not received formal training in heavy equipment operation and there was no evidence presented that he has operated the equipment listed in the job

description or specifications for HMW 3 for a minimum of six (6) months. Even though Mr. Isla has been a HMW 2 for eleven (11) years, the evidence indicates he has chosen a different path of development.

Developing skill in operating heavy equipment appears to be expected of employees who are HMW 2s (JX 2C), but this may presume that an HMW 2 is not annually transferring to construction during half of the year to work as a project inspector. However, it is clear from the job specifications and description that a higher level of skill in heavy equipment operation is demanded of HMW 3s. Why it is possible to possess skill in heavy equipment operation and work in construction, it did not appear that the Grievant was able to master this dual role.

If the Grievant had the skill to operate heavy equipment at one time, the proficiency test demonstrated he no longer has it. This does not mean Mr. Isla was not a good employee. It simply means he chose to concentrate his talent and energy in the construction area and has now received his concrete certification, which is further evidence of his advancement.

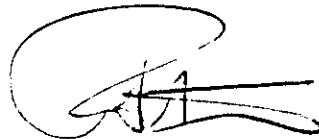
Nevertheless, I find the Employer acted reasonably and did not violate the Agreement when it determined through the interview process and the proficiency testing that the Grievant failed to meet the minimum qualifications for HMW 3. Let me be clear, however, that any use of the proficiency test to determine relative skill and ability of candidates is not

permitted by the Agreement. The portion of JX 9 that refers to relative skill and ability based upon the results of the proficiency test is inappropriate.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 7th day of June, 2001.

A handwritten signature in black ink, appearing to read 'R. Stein', written over a horizontal line.

Robert G. Stein, Arbitrator