

OCB # 1522

In the Matter of Arbitration *
Between * Case No.:
OCSEA/AFSCME Local 11 * 14-00-990106-0002-01-14
and * Before: Harry Graham
The State of Ohio, Department *
of Health *

APPEARANCES: For OCSEA/AFSCME Local 11:

Brenda Goheen
Staff Representative
OCSEA/AFSCME Local 11
1680 Watermark Dr.
Columbus, OH. 43215

For Department of Health:

Chris Keppler
Ohio Department of Health
246 North High St.
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INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. The record in this dispute was closed at the conclusion of oral argument in Columbus, OH. on November 8, 1999

ISSUE: At the hearing the parties agreed upon the issues in dispute between them. Those issues are:

Did the Employer violate the Collective Bargaining Agreement which it did not interview the Grievant for the

vacant position of Fiscal Specialist 2?

and

Did the Employer violate the Collective Bargaining Agreement when it did not award the vacant position of Fiscal Specialist 2 to the Grievant? If so, what shall the remedy be?

BACKGROUND: The events prompting this proceeding are not in dispute. The Grievant, Bridget Edwards, has been employed by the State of Ohio since January, 1990. She has had various positions while in State service. Most recently, on July 1, 1997 she assumed the position of Fiscal Specialist 1 in the Department of Health. In November, 1998 the Department of Health posted for a vacant position as a Fiscal Specialist 2. Ms. Edwards properly applied for the position. On her application she itemized her education which included an Associate and Bachelor's degree in Business. She also itemized her experience. As is required by the application she set forth the coursework she regarded as being relevant as well as various training she had had that she considered pertinent to the position. She also indicated her computer skills.

A number of other employees of the Department also applied for the position. Among them was Jacqueline Dennis. As did the Grievant, she set forth her qualifications for the position. These included coursework at Cuttington University in Liberia and the courses she deemed relevant to her

application. Like the Grievant she included her work history and detailed her computer skills. Ms. Dennis' seniority date is April 1, 1996. Ms. Dennis was awarded the Fiscal Specialist 2 position. This was protested through the grievance procedure by the Grievant, Ms. Edwards. No resolution of her grievance was had and the parties agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE UNION: The Union asserts the Agreement has been violated in this instance. It points to Article 17, Section 17.05 of the Agreement dealing with selection of employees for promotion. In relevant part it reads:

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.

As indicated above, Ms. Edwards is senior to Ms. Dennis who was awarded the vacancy. It cannot be argued that she is not qualified for the position. Her record reflects college coursework germane to the Fiscal Analyst 2 position. She is certainly "substantially equal" to Ms. Dennis, the selected applicant.

The Union is well aware that the State will raise Ms. Edwards work history in defense of her non-selection. It has

several disciplinary entries on it. These include a recent suspension. The Union points out that these various disciplines are being protested in the grievance procedure. They have not been resolved or adjudicated in arbitration.

• That history may not properly play a role in determining among bidders for a vacancy according to the Union. The only factors the Employer may properly consider are those itemized in the Agreement: qualifications, experience and education. Ms. Edwards meets those standards by virtue of her prior work as a Fiscal Specialist 1. Her college coursework shows a Bachelor's degree in business and an Associate Degree in Business Management. She has five courses in accounting. Her computer skills show knowledge of many of the standard programs related to wordprocessing, spreadsheet and database management as called for on the application. It is impossible to conclude that the Grievant is not "substantially equal" to the successful bidder. As that is the case she must be awarded the vacancy due to her greater State seniority the Union insists.

In this situation the Grievant did not even secure an interview. This is mysterious when comparing the Grievant and the successful bidder. As noted above, Ms. Edwards has two degrees in Business. Ms. Dennis has coursework and three years of attendance at a university. Ms. Edwards has 15 years.

of arguably relevant experience in the field, Ms. Dennis has eight. Ms. Edwards is senior to Ms. Dennis. Weighing all criteria specified in the Agreement, the Grievant is substantially equal, or better than the successful bidder. She must be awarded the position according to the Union. Any consideration of her work record is precluded by the Agreement which specifies qualifications, experience and education as the factors that govern selection. When those are substantially equal among bidders, State seniority governs. As that is the case, the grievance must be sustained according to the Union. It urges an award on its behalf and backpay as appropriate.

POSITION OF THE EMPLOYER: According to the Employer the qualifications of Ms. Dennis and Ms. Edwards were not "substantially equal" in this situation. Hence, Ms. Edwards was properly denied an interview and the position.

The duties attached to the Fiscal Specialist 2 position are varied. The specific position to be filled in this instance was concerned with dealing with local agencies and their fiscal arrangements. Of great concern to the Employer was the expertise brought to the budget function by the various bidders. In examining the applications the Personnel Officer determined that Ms. Edwards lacked the requisite budget management and control experience. Hence, she was

screened out of the bidding procedure prior to being interviewed.

The Employer also points to other differences between the Grievant and the successful bidder. Ms. Dennis who was awarded the vacancy had an excellent performance evaluation prior to her bid. Conversely, the Grievant was rated poorly, with "below expectations" in four categories. In addition, the Employer properly examined the disciplinary record of the Grievant as it was replete with entries. Since April, 1997 she has had four reprimands and one suspension. The poor performance rating and disciplinary history of Ms. Edwards were properly taken into consideration when denying her an interview, much less the position, according to the State.

Finally, the Employer points to the fact that Ms. Edwards has been at arbitration before. She filed a grievance contending she was working out of classification. The arbitrator thought so little of the merits of that grievance he issued a bench decision denying it. For all of these reasons the State asserts the grievance should be denied in its entirety.

DISCUSSION: That Ms. Edwards has been at arbitration prior to this dispute and lost is irrelevant to this proceeding. Each dispute stands or falls on its merits. The attempt to link Ms. Edwards' prior arbitration experience with this dispute

is rejected.

It is not obvious that the successful bidder, Ms. Dennis, has experience, qualifications and education superior to those of the Grievant. The former has three years of coursework at a Liberian University. The latter has two degrees from American schools. One is a Bachelor's degree, the other an Associate degree. Examination of the applications (Jt. Ex. 4) show that Ms. Edwards itemized related coursework in excess of that shown by Ms. Dennis. Her courses are specific to the duties itemized on the posting.

Turning to experience, on its face the application made by the Grievant indicates her to be superior to that filed by the successful bidder. Both have by their account extensive computer facility. Ms. Edwards has budget experience with the National Black Programming Consortium. She also had budget experience as a Fiscal Specialist 1 in the Ohio Department of Health. So too does Ms. Dennis. At the hearing the Employer placed great emphasis upon Ms. Dennis experience with Liberia Holdings, Inc. in Monrovia, Liberia. She was in its employ for less than two years. By the text on her application she assisted in budget preparations. She assisted, she did not have sole responsibility. By its testimony at the hearing this budget function at Liberia Holdings was given great weight by the Employer in support of its action. The

percentage of time spent on budget activities at Liberia Holdings was not indicated by Ms. Dennis. Nor was the extent or precise nature of her responsibilities and tasks demonstrated other than assisting. Her application does not show her to be superior to Ms. Edwards, the Grievant. Further, the posting, Jt. Ex. 2, does not show the emphasis on budget activity the Employer placed upon it at the hearing. Without reproducing the application, it shows a great variety of tasks associated with the Fiscal Specialist 2 position. There is a great deal of review of accounting systems and other sorts of review to be performed by the Fiscal Specialist 2. There is word processing, data base and spreadsheet software use. By her testimony and on her application Ms. Edwards can do those tasks. There is report writing and assistance to supervisors required of persons who hold the position. The Grievant can perform those duties. One sentence, "Monitors budgeting and accounting activities of assigned special project grants to ensure compliance with applicable fiscal administrative guidance" makes reference to budget function. Either the posting accurately reflects the duties associated with the position or it does not. If it does, then budget work is a fraction of the tasks to be performed by the Fiscal Specialist 2. If it does not, the stress on budget work indicated to be associated with the

position at the arbitration hearing is a ruse. There is simply no evidence on the record to indicate Ms. Dennis is in any way superior on the contractual standards of experience, education and qualifications to the Grievant.

Of course, that conclusion disregards the work history of Ms. Edwards. At the hearing the Employer pointed out that Ms. Dennis was superior to Ms. Edwards in many respects with regard to her work history. The former had a good evaluation for 1998. The latter's was marginal at best. Further, it was emphasized to the Arbitrator that the Grievant has several live disciplines on her record. In toto, the recent disciplinary record of the Grievant is substantial and serious. Turning initially to Ms. Edwards current evaluation, it is poor. The Employer may consider an evaluation in determining whom among various bidders to interview and select. Minor variations between bidders should not control the outcome. Nonetheless, the evaluation is part of the "qualifications" for the position. For instance, a person may be facially qualified for a vacancy but if their attendance record is poor, that may render them unqualified in fact. A person must show up on time and regularly in order to be considered qualified, no matter what sort of experience and qualifications they bring to their bid. In this instance, the evaluation of Ms. Dennis is far superior to that of Ms.

Edwards. By itself that is not sufficient to have denied Ms. Edwards an interview considering the qualifications, experience and education she brought to her application. The opinion of supervisors is entitled to weight in promotion decisions. It cannot be controlling in the face of the Agreement at Section 17.05. A person arguably qualified, as is Ms. Edwards, must be interviewed. In this case it was indicated the supervisor wanted no more than five applicants to interview. That is nowhere sanctioned in the Agreement. Interviewing a number of qualified candidates in excess of five is unwieldy and time consuming. If the Employer desires to restrict the number of qualified interviewees it must do so by the Agreement, not on a case-by-case basis.

More significant in the case of this Grievant is the disciplinary history she brought with her to her application. It is extensive. A single disciplinary record of minor proportion, eg. a written reprimand, would be insufficient to disqualify an otherwise qualified bidder. A series of disciplines, of increasing magnitude, is another matter. In this instance, the Grievant had four reprimands and one suspension since April, 1997. (It was not indicated if the reprimands were oral or written. Examination of the personnel record, Joint Ex. 7a, does not show any written reprimands. It shows one two-day suspension, from April 6 to 8, 1998). At

the arbitration hearing the Union indicated these disciplines are under review in the grievance procedure. Thus, they are not cast in stone, irretrievably part of Ms. Edwards' record. They may be modified or removed in their entirety. It is premature under these circumstances for this Arbitrator to conclude that Ms. Edwards' record has the sort of disciplinary history the Employer urges is the case. The great weight attached to those disciplines by the Employer in making its decision is inappropriate considering their status.

The observations above prompt a conclusion that the Employer violated the Agreement when it concluded that the Grievant lacked the requisite education, experience and qualifications to preclude her consideration for the vacant Fiscal Specialist 2 position at issue in this proceeding. That conclusion is tempered with the conclusion that the Employer may properly weigh in its decisionmaking process the disciplinary record of an applicant.

AWARD: The resolution of this dispute is held in abeyance. If Ms. Edwards' live disciplines are reduced or removed from her record she is to be granted an interview. Should she then not be awarded the Fiscal Specialist 2 position the burden will be on the Employer to demonstrate why not. The Arbitrator will retain jurisdiction over this dispute pending the

outcome of the grievances concerning Ms. Edwards'
disciplines.

Signed and dated this 23rd day of November, 1999 at
Solon, OH.

Harry Graham
Harry Graham
Arbitrator

In the Matter of Arbitration

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and

The State of Ohio, Department
of Health

Case Number:

14-00-(990106)-0002-01-14

Before: Harry Graham

APPEARANCES: For OCSEA/AFSCME Local 11:

Brenda Goheen
Staff Representative

For The State of Ohio:

Chris R. Keppler
Labor Relations Officer

INTRODUCTION: Pursuant to the procedures of the parties this dispute came to be submitted via briefs for arbitration. It arose from a prior dispute determined by this Arbitrator in 1999. That proceeding involved the failure of the Employer to grant an interview to the Grievant, Bridget Edwards, for the vacant position of Fiscal Specialist 2 and the failure of the Employer to award Ms. Edwards the vacancy. In my decision I determined that complete resolution of the dispute before me was to be held in abeyance. That was due to the fact that Ms. Edwards had pending, but unresolved, disciplines on her record. I continued to hold that if Ms. Edwards' disciplines were reduced or removed from her record that she should be

interviewed for the Fiscal Specialist 2 position. I also indicated that were she interviewed and not awarded the position, the burden would rest with the Employer to demonstrate why that had not occurred. Finally, I retained jurisdiction over this dispute pending the outcome of the grievances involving Ms. Edwards' disciplines. My decision was dated November 23, 1999.

On June 14, 2000 the Union and the Employer resolved a three-day suspension of the Grievant that had been grieved. It was reduced to a one day suspension. In compliance with the terms of my award Ms. Edwards was interviewed for the Fiscal Specialist 2 position. She was not awarded it as set forth to her in a letter from the Employer dated November 17, 2000. On April 11, 2001 the Employer was notified by the Union of its intent to again challenge the non-selection of Ms. Edwards for the vacancy. It is that challenge that is under review in this proceeding.

POSITION OF THE UNION: As the Union recites the record in this matter the parties at arbitration before me in November, 1999 agreed that the State would withdraw reliance upon Ms. Edwards' disciplines. In my decision, I gave her disciplinary record weight. This should not have occurred in the Union's view.

Were it to be the case that Ms. Edwards' record of

discipline is considered, the fact is that she presently has a one-day suspension in her file. As noted above, that represents a reduction from the prior three-day suspension on her record when I heard dispute over Ms. Edwards' non-selection in 1999. When in my decision I evaluated the qualifications of Ms. Edwards and the choice of the Employer, Jacqueline Dennis, I determined that Ms. Dennis' application did "not show her to be superior" to that of Ms. Edwards. (p. 8). As that is the case, the Employer must demonstrate that the various disciplines on Ms. Edwards' record are sufficient to overcome her greater seniority than Ms. Dennis and her obvious qualifications for the vacancy.

This dispute involves Section 17.05 of the Agreement and a position in a pay range for which seniority becomes the relevant factor when "qualifications, experience and education" are "substantially equal." Taking into account Ms. Edwards' history of discipline, the fact remains that she is "substantially equal" to Ms. Dennis in the opinion of the Union. When her application was once again rejected the Employer asserted to contrary. It did not provide evidence in the Union's view. In my decision I found that Ms. Edwards brought to her application many instances of superiority to that of Ms. Dennis. As she now carries a one-day suspension and is otherwise superior to Ms. Dennis, she should be

awarded the position with attendant back pay and benefits the Union contends.

POSITION OF THE EMPLOYER: According to the Employer it complied in full with my November 23, 1999 decision. Ms. Edwards' discipline was reduced. She was interviewed. She was not awarded the position on November 17, 2000. It was not to April, 2001 that the Union again took up her cause. A delay of such magnitude is unreasonable in the Employer's opinion. In the grievance procedure of the parties the Union is permitted sixty days to appeal a grievance to arbitration. Its appeal in this instance was belated and should not be reached on its merits according to the State.

Should Ms. Edwards' appeal be reached, the Employer asserts it acted properly. Once again it relies upon Section 17.05 of the Agreement for support. As noted above, the disputed position is in a pay range for which the Employer must rely upon seniority when "qualifications, experience and education" are "substantially equal." Ms. Edwards is senior to Ms. Dennis. Her qualifications were not "substantially equal to those of Ms. Dennis in the State's opinion. In 1998 she was rated "below expectation" in four areas of her performance evaluation. Ms. Dennis was rated "above expectations" in five areas of her performance evaluation for the same year. Further, Ms. Edwards had five instances of

discipline between April, 1997 and November, 1998. Ms. Dennis had none. This renders her substantially unequal to Ms. Dennis. Thus, the grievance should be denied in its entirety according to the State.

DISCUSSION: That the Union took five months to advance Ms. Edwards appeal once again to arbitration is not considered by this Arbitrator sufficient ground to disqualify it. This dispute arose from another. Note that on page 11 of my award in 1999 I indicated that "The resolution of this dispute is held in abeyance." It remained in limbo. This controversy is not new, it is a continuation of the previous unresolved matter. Consequently, the Union is not bound by the provisions of the grievance procedure as found at Section 25.02 of the Agreement.

At page 9 of my previous decision I found that Ms. Edwards' then-current evaluation was poor. I further observed that an evaluation "is part of the 'qualifications' for the position." (p.9, emphasis supplied). Given Ms. Edwards' substantial qualifications for the vacant position I determined that her poor evaluation was insufficient to deny her an interview. In compliance with my award, an interview was held. Ms. Edwards was once-again denied the position.

There is, nonetheless, the record to consider. Ms. Dennis performance evaluation for 1998 is superior to that of

Ms. Edwards. The margin is not close. To the contrary, Ms. Edwards received four "below expectations" on her evaluation compared to the five "above expectations" given to Ms. Dennis. Performance evaluations are part of the decision-making mix in personnel decisions. In this situation they weigh against Ms. Edwards. They are not the sole consideration. Even taken together with the discipline on Ms. Edwards record, they must be evaluated against the standard set forth in the Agreement. To reiterate, that standard is one of "qualifications, experience and education." In the original decision (Nov. 23, 1999) the "qualifications, experience and education" of Ms. Edwards and Ms. Dennis were evaluated. Ms. Dennis has three years of coursework at a Liberian University. Ms. Edwards has two degrees from American Universities. I found her coursework superior to that of Ms. Dennis. (p.7). Ms. Edwards is superior to Ms. Dennis on the contractually mandated criteria of "education." Similarly, the record before me showed that Ms. Edwards experience was "superior" to that of Ms. Dennis. (p.7). Thus, on two of the criteria in the Agreement the Grievant must be ranked ahead of the person selected by the Employer. This is before any consideration is had of seniority, the determining factor in situations where "qualifications, experience and education" are "substantially equal." Those factors are not

substantially equal. Ms. Edwards is superior to Ms. Dennis under the terms of the Agreement. Were there rough equality between them, Ms. Edwards must carry the day by virtue of her seniority. Even rough equality is absent in this situation given the superior credentials of the Grievant on the contractually mandated criteria of education and experience.

In essence, the Employer urges that Ms. Edwards failings in the area of evaluations and discipline, thus, her downgrade on the standard of "qualifications" are sufficient to disqualify her. For the reasons set forth above, that is incorrect. Further, the concept of "qualifications" is expansive. It includes not just discipline and evaluation, but also elements of education and experience. Ms. Dennis is not the proverbial ten and Ms. Edwards the proverbial zero in the area of qualifications. The situation is less clear-cut than that.

Were the position of the Employer to be sustained in this dispute the factors of "experience" and "education" to be evaluated in promotion decisions, would be read out of the Agreement. That cannot occur. Ms. Edwards is superior to Ms. Dennis on those contractually mandated standards. She is due the Fiscal Specialist 2 position even without reference to the factor of seniority.

AWARD: The grievance is sustained. The grievant is to be

awarded the Fiscal Specialist 2 position retroactive to the date it was originally awarded to Jacqueline Dennis. She is to be paid the difference in straight time wages between the amount she earned as a Fiscal Specialist 1 and the amount she would have earned as a Fiscal Specialist 2.

Signed and dated this 17th day of August, 2001 at Solon, OH.

Harry Graham
Harry Graham
Arbitrator