#1592

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
Joan Olivieri, Personnel Officer
Rick Corbin, Labor Relations Specialist
Ron Nelson, Labor Relations Administrator
Rebecca Fair, Personnel Director P&CS

For the Union
Bill Brant, Administrative Organizer
Tim Mericle, Parole Officer (Grievant)

Case-Specific Data
Hearing Held
May 17, 2002

Grievance No.
No. 28-03-12-20-00-137-2012

Case Decided
July 14, 2002

Subject of Dispute
Promotion/Fill Posted Vacancy

Award
Grievance Denied

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I. Procedural History

The Parties to this dispute selected the undersigned from their permanent panel of grievance arbitrators to hear this matter and agreed on May 17, 2002 as a hearing date. An arbitral hearing was convened on that date before the Undersigned, at the Ohio Office of Collective Bargaining, in Columbus Ohio. The dispute contained no outstanding procedural issues, and the parties stipulated that the matter was properly before this Arbitrator. The Undersigned afforded the Parties a full and fair opportunity to present evidence and arguments in support of their positions in this matter. Specifically, they were permitted to: (1) make opening statements; (2) introduce admissible documentary evidence, which was available to all relevant objections; and (3) present witnesses who offered sworn testimony and were duly cross-examined. Finally, the parties elected to submit Post-Hearing Briefs in lieu of closing arguments. The last Post-Hearing Brief was received on or about May 31, 2002 when the arbitral record was closed.

	II. Factual Stipulations
1.	The grievance is properly before the Arbitrator.
2.	The applicants' Seniority Dates are: The Grievant, August 13, 1990; Ms. Gates, February 4, 1991.
3.	Original Screening Points for Vacancy PCN 8212.0 (Parole Services Coordinator) were 67 for the Grievant and 68 for Ms. Gates.
4.	Although Tim Mericle was six months senior, Mary Gates was awarded PCN 8212.0.
5.	The maximum of 20 points is available for each category.
6.	The Grievant and Ms. Gates were both parole officers at the time they applied for PCN 8212.0.

	III. Joint Exhibits
Exhibit Number	Description of Exhibit
1.	The Undersigned's Opinion regarding Grievance 28-05-971028-0083-02-12 (Promotion/Fill Posted Vacancy)
2a.	Contract (2000-2003)
2b.	Contract from 1997-2000
2c.	Contract from 1989-1992
2d.	Contract from 1986-1989
3a.	Grievance Trail—Grievance Form and Step 2 Response
3b.	Union's Letter of Intent to Arbitrate
4a.	Questions for Grievant re: Knowledge of Training Skills and APA Mission, Goals, Policies and Practices
4b.	Questions for Ms. Gates re: Knowledge of Training Skills and APA Mission, Goals, Policies and Practices
5a.	Grievant's Scores for: Education and Work Performance
5b.	Ms. Gates' Scores for: Education and Work Performance
6.	Screening Instructions for Parole Services Coordinator
7.	Recommendations for Selection of Parole Services Coordinator for PCN 8212-0
8.	Screening Summary Sheet
9.	Degrees Related to the Corrections Field
10a.	Grievant's Applications

10b.	Ms. Gates' Application
11.	Corrections to Scoring of Experience for Ms. Gates
12a.	Grievant's Performance Evaluations
12b.	Ms. Gates' Performance Evaluations

IV. The Facts

The Parties to this dispute are District 1199/SEIU ("Union") and the Adult Parole Authority, a branch of the Ohio Department of Rehabilitations and Corrections ("DR&C" or "Employer"). The facts are basically straightforward. The dispute, in this case, sprang from DR&C's decision to promote a junior employee over a more senior one. Before one delves into an examination of the facts and circumstances surrounding the applicants in question here, some discussion of DR&C's promotional standards and procedures is indicated.

Promotions are governed by Article 30.02 of the Parties' Collective-Bargaining Agreement, which mandates use of the following screening criteria: "qualifications, experience, education, and work record, *and affirmative action*."[1] Based on these criteria, promotions are awarded to the most senior, qualified applicant, unless a less-senior applicant is "significantly more qualified."[2] According to DR&C's unilaterally developed definition, a junior applicant is "significantly more qualified" than a senior applicant when the junior scores at least two points above the senior for each year of seniority separating them. If, for example, the total score of an applicant with one year of seniority over a junior competitor is 60, then the junior applicant must score at least 62 to be considered "significantly more qualified."[3]

Following is a brief discussion of the criteria that DR&C uses to decide which applicant is promoted, with an emphasis on "qualifications," because it is the focus of this dispute.

A. Qualifications

No more than 20 points are awarded for "qualifications."[4] To assess an applicant's "qualifications," DR&C empanels a tripartite panel, before which each applicant must appear for an interview. In order to correlate an applicant's background to expected job duties in the vacant position,

the panel interviews each applicant, using the same four prescribed questions that address four different areas of the vacant position. Upon completion of the interview, an applicant leaves the interview room. Then the panelists discuss their scores of the applicant's answers relative to the "satisfactory responses" and ultimately agree upon one score for each of the four questions posed to the applicant. Each question has a list of "satisfactory responses" and is worth no more than 5 points for a maximum 20-point total. Finally, to preserve the integrity of the process, there are 26 different sets of questions available for interviews.

B. Other Criteria

A maximum of 20 points may be awarded for related work experience. Up to 20 points may be awarded for education or training. The more job-related the education or training, the more points awarded. Work record comprises job performance and discipline, and is worth no more than 20 points. Points are added for competent job performance and deducted for discipline imposed. Affirmative action is not a consideration in this particular dispute.

Timothy Mericle ("Grievant") is employed by the Division of Parole and Community Services as a Parole Officer in the Cleveland region, where he has worked for the Division of Parole for 11 years and 9 months. During this period, the Grievant has either met or exceed DR&C's performance standards.

The Grievant and Ms. Mary Gates, also a Parole Officer, applied for promotion to Parole Services Coordinator (vacancy PCN 8212.0.) in DR&C. The Grievant has six months of seniority over Ms. Gates. After interviewing all applicants for the position, including the Grievant and Ms. Gates, DR&C awarded the position to Ms. Gates because her total score was 68 and the Grievant's was 67. The Union filed Grievance No. 28-03-12-20-00-137-2012 on December 11 2000, claiming that a one point difference hardly demonstrated that Ms. Gates was substantially more qualified than the Grievant and that "Management unreasonably and/or arbitrarily and/or capriciously and/or discriminatorily filled a vacancy with a less-senior employee.[5] Sometime in mid-April 2002, DR&C offered to award the Grievant the

position, and he countered by asking for back pay. DR&C rejected the Grievant's counteroffer and the dispute continued. Approximately 18 months after promoting Ms. Gates on the one-point difference, DR&C announced that it had undervalued Ms. Gates' experience by approximately eight points and, therefore, her actual total score was 76 instead of 68. The Union rejected that position and persisted with the Grievance.

On December 15, 2000, the Step-1 Supervisor indicated his inability to resolve the Grievance.[6] On December 20, 2000, the Step-2 Supervisor essentially offered the same response.[7] DR&C offered no Step-3 response, and the Union declared its intent to arbitrate.[8]

Both the Grievant and Ms. Gates were well qualified applicants with strong records of performance.[9] Moreover, both applicants performed well in the other various evaluative screens to which they were subjected.

V. Relevant Contractual Language

Article 30.02

> 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.

VI. The Issue

Did Management violate Article 30.02 of the 2000-2003 Contract between SEIU/District 1199 and the State of Ohio by not selecting the Grievant Tim Mericle, for PCN 8212.0 in favor of a junior applicant, Mary Gates'? If so, what shall the remedy be?

VII. Summaries of Parties' Arguments

A. Summary of Union's Arguments

1. Management's decision to fill PCN 8212.0 with a less senior employee is unreasonable, arbitrary, capricious, and violative of Article 30.02. Specifically, the Union argues:
   a. The additional eight points that DR&C added to Ms. Gates's score are irrelevant, since the decision to promote her flowed from her score of 68, as compared to the Grievant's 67. Thus the dispute pertains to a one-point difference.
   b. As to the meaning of "significantly more qualified, the Union looks to Article 30.02. The Union seems to argue that commonsense indicates that "significantly more qualified" and six months seniority represent a magnitude of difference that cannot reasonably rest on a single point difference.
   d. It is statistically impossible for each member of the tripartite panel of interviewers to

have assigned the Grievant nine points.

e. The Grievant deserved additional experiential points for his teaching experience at Lakeland Community College.

f. The arbitral precedent in this case is irrelevant and wholly distinguishable because it involved a 6.5 point difference between the grievant there and the successful applicant.

g. The decision of the Seventh Circuit Court of Appeals is relevant to show that a different definition may me used in promotion decisions.

B. Summary of DR&C's Arguments

1. Management's decision to award PCN 8212.0 to Ms. Gates, a junior employee, is not unreasonable, arbitrary, capricious, or violative of Article 30.02.

   a. The additional eight points were fairly awarded to Ms. Gates and merely emphasize that she was "significantly more qualified."

   b. A qualified junior applicant who totals two points more than her senior counterpart is deemed "significantly more qualified." Therefore, to be "significantly more qualified" than an applicant six months her senior, a junior applicant needs to total only one point more than the senior applicant. Such a conclusion is neither unreasonable, arbitrary, nor capricious.

   c. The Union persists in challenging DR&C's promotional procedures and interpretation of "significantly more qualified" without adducing an alternative procedure. Moreover, the procedure in place today has remained unchanged since 1986, through four Collective-Bargaining Agreements.

   d. The Union's calculations erroneously assume that scoring for the interview process is random. In fact, the process is intentionally designed to produce a consensus among the interviewers for each of the four questions used in the interviews. Viewed in this light, the fact that each interviewer gave the Grievant the same score is understandable.

   e. The Grievant did not deserve additional experiential points for his teaching experience at Lakeland Community College because his documentation did not indicate when he left that position. Nor would the system credit duplicative experience gained during the same time period.

   f. The Arbitral precedent is relevant because nothing has changed since the opinion was rendered.

   g. The Union's Seventh Circuit's decision is irrelevant to this dispute because that case addresses racial discrimination.

VIII. Analysis

A. Relevancy of Additional Eight Points

The question here is whether the additional eight points DR&C assigned to Ms. Gates's experiential total are relevant in this particular dispute. For reasons discussed below, the Arbitrator holds that those points are irrelevant to this dispute. First, DR&C's initial decision to promote Ms. Gates over the Grievant was premised on a one-point difference in their total scores. Second, the Union grieved that decision based on the one-point difference. Then, approximately 1.5 years (18 months) after DR&C

promoted Ms. Gates over the Grievant, it discovered that Ms. Gates' experience had been undervalued by eight points. Eighteen months is simply too late in the day for DR&C to discover and assign eight additional points to Ms. Gates' experiential score. DR&C may not move the "target" after the Union has fired its responsive "arrow." Consequently, one of the issues in this dispute is whether, under the circumstances of this case, a one-point difference between the total scores reasonably establishes that a six-month junior applicant is "significantly more qualified" than the senior applicant.

B. <u>One-Point Difference as "Significantly More Qualified"</u>

The issue here is whether, under the circumstances of this case, one can reasonably conclude that the one-point difference between the total scores of Ms. Gates and the Grievant demonstrates that Ms. Gates is "significantly more qualified" than the Grievant. For the reasons set forth below, the Arbitrator holds in the affirmative.

At the outset, it is obvious that DR&C must have some method or system for pouring content into the vacuous contractual phrase, "significantly more qualified." When attempting to apply this phrase, it makes sense for one to rely on the total scores that applicants received on the hierarchy of criteria used to assess their fitness for a given promotion. Absent considerations of seniority, it would be equally sensible to allow a score or range of scores to solely determine which applicant is qualified for a given promotion. However, because seniority is very much a part of the decision-making process here, DR&C must strike a balance between total test scores on the one hand and seniority on the other. Here DR&C struck that balance by requiring junior employees to accumulate at least two more total points than their senior counterparts for each year of seniority separating them.

As is usually the case, however, the "devil" is in the details. The two-points-per-year-of-seniority is a simple, straight arithmetical ratio that is wholly rational and reasonable on its face. Having accepted this general ratio, however, one is hard-pressed to disavow it anywhere along its continuum. In other words, if two points equal one year of seniority, then it becomes difficult

indeed to argue that one point does not equal a half year of seniority.

Although the Union does not specifically attack the foregoing 2:1 ratio, it stoutly opposes the application of that ratio at the 1:1/2 ratio in this particular dispute. Instead, the Union embraces the bare language of Article 30.02—"significantly more qualified"—and argues that a single point simply cannot override six months of seniority. However, in the Arbitrator's view, it is no greater "sin" to allow a two-point difference in a total score to override a whole year of seniority. A major reason that one adopts a general and rational definition of an ambiguous standard is either to avoid or to at least minimize the influence of creeping subjectivity in tough applications of the standard. DR&C's standard for balancing points assigned against seniority, which is what the Arbitrator understands the Union to be attacking, is reasonable.\10 Furthermore, to scuttle DR&C's definition of "substantially more qualified," the Union must first establish that the definition is at least unreasonable if not otherwise arbitrary, capricious, or discriminatory. Even if the Arbitrator were inclined to supplant DR&C's ratio-based definition of "significantly more qualified" with a different definition, nothing in the record supplies such a definition.

C. Applicability of Seventh Circuit Precedent to "Significantly More Qualified"

During the arbitral hearing, the Union submitted *Millbrook v. IBP, Inc.*\11 to show that other standards exist for promotional decisions and that Millbrook embraced such standards. Specifically, the Union notes that Millbrook embraces a "clearly superior" standard and a "reasonable person" standard. Regarding the first, *Millbrook* noted that a passed-over plaintiff's "credentials were not *clearly superior*, and therefore a *reasonable* employer could have concluded that . . . [the promoted employee] was the better person for the job."\12 Because the reasonableness standard is easier to address, the Arbitrator focuses first on that standard. Reasonableness is already a standard against which DR&C's decisions are measured. Indeed, the reasonableness standard permeates the entire Collective-Bargaining Agreement. Thus, one could ask, as stated above, whether a reasonable employer could have reasonably concluded that Ms. Gates was "significantly more qualified" than the Grievant, based on a one-point difference in their total scores. The reasonableness standard is alive and well in this dispute.

The "clearly superior" standard, in *Millbrook*, is the counterpart of the "significantly more qualified" standard in the instant dispute. This creates a problem for the Union if it seeks to supplant "substantially more qualified" with "clearly superior." First, it is by no means obvious that these standards are substantially different, though one could perhaps persuasively argue that "clearly superior" carries slightly more rigor than "significantly more qualified." In any event the difference is slight. Second, and more important, is that because they both are general standards, "significantly more qualified" and "clearly superior" cannot simultaneously serve in the same capacity. Thus, if one is selected, the other is automatically rejected, and therein lies the problem for the Union. In the instant case, the Parties have already selected "significantly more qualified" as their contractual standard. Therefore, the Arbitrator has no authority to substitute "clearly superior" for "significantly more qualified."[13] Thus, *Millbrook* is of little use to the Union.

D. Probative Value of the Union's Statistical Analysis

The Union also produced a statistical calculation to show that it was mathematically impossible for all three interviewers to assign a score of nine to the Grievant for the "Qualifications" criterion. In other words, the Union notes the daunting unlikelihood that three such identical assignments could have been made, absent unfairness and/or collusion. In its defense, DR&C points out that the interview process is hardly random. Instead, after interviewing an applicant, all three interviewers meet to compare notes on that person and to seek a consensus about the proper score to assign. In light of this revelation, it is not surprising that all three interviewers assigned the Grievant the same score. Observe, in passing, that Ms. Gates also received the same score from all three interviewers. Although the post-interview discussion has and will likely continue to be the proverbial "lightening rod," neither the discussion itself nor the uniformity of points assigned supports reasonable inference that the interviewers embraced some sort of wrongdoing or mischief. As a result, the Arbitrator cannot accept the Union's premise here.

E. Propriety of Grievant's Experiential Score

Although the Grievant has been listed as a part-time instructor for Lakeland Community College (LCC) from August 1988 to the present, approximately 23 years, he was not fully credited for that amount of time.\14 DR&C offered two explanations for its decision to discount some of the 23 years. First, Personnel Director Ms. Rebecca L. Fair, offered credible and unrebutted testimony that the Grievant did not include an ending date on his application,\15 which deprived him of credit that he otherwise would have received. Specifically, on his application, the Grievant indicated that he served as a mentor at LCC from August 1988, but he neglected to include an ending date for the time served.\16

Second, DR&C's policy does not permit applicants for promotion to receive credit for duplicate training or experience. The Grievant's application shows that he began teaching at LCC in August 1988 and, according to the Grievant, is still on LCC's list. Again, however, Ms. Fair offered unrebutted, credible testimony that DR&C's evaluative procedure would not accord the Grievant credit for the time he was simultaneously on LCC's list and working for DR&C, a ten-year period from 1990-2002.\17 Thus, even if the Grievant had properly completed his application by showing the ending date for LCC, he was entitled to credit for no more than two years of experience at LCC—from August 1988 through August 1990, when he hired on at DR&C. Consequently, DR&C gave the Grievant experiential credit outside of DR&C only for the four years he taught at Lorain County Community college from 1984-1988. \18

F. Relevancy of Arbitral Precedent

As precedent, DR&C offers an arbitral opinion in which the Undersigned was called upon to resolve a dispute involving a similar issue of promotion, in which the "significantly more qualified" standard was a factor. In that opinion, the Undersigned held that DR&C's evaluative process was reasonable on its face and as applied therein and that the Union did not offer a viable alternative to that process.\19 In reliance on that opinion, DR&C points out that the Union has yet to offer such an

alternative.

The Union offers two arguments in response. First, it contends that the arbitral opinion is irrelevant because the point spread there is 6.5 as compared to the one-point spread here.[20] For reasons discussed above, the Arbitrator cannot agree with the Union on this point. As noted above, if DR&C's 2:1 ratio is rational on its face (and the Union neither offers a different one nor specifically attacks this one), then that ratio should be equally acceptable at the lower levels of 1/.5. Thus, even though the point spread is different in the 1999 case, the principle and applicable ratio is still the same and still reasonable under the circumstances of this case.

Second, the Union argues that it need not offer an alternative definition of "substantially more qualified" ostensibly because that standard speaks for itself in the instant case. In other words, the Union implicitly reiterates its argument, which was addressed above, that a one-point difference could not reasonably support a decision that Ms. Gates was "significantly more qualified" than the Grievant. However, the Arbitrator has addressed this argument elsewhere in the opinion and further discussion of that contention here would shed no additional light on this matter.

IX. The Award

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

Robert Brookins

Robert Brookins, Professor of Law, J.D., Ph.D.

APPENDIX A

The following charts depict the points assigned to the Grievant and Ms. Gates:

	Knowledge of training skills	Knowledge of training skills	Knowledge of APA mission, goals, policies	Knowledge of APA mission, goals, policies
	Grievant	Ms. Gates	Grievant	Ms. Gates
Interviewer No. 1	4	2	9	14
Interviewer No. 2	4	2	9	14
Interviewer No. 3	4	2	9	14
Qualifications Subtotals	12/3 = 4	6/3 = 2	27/3 = 9	42/3 =14
Qualifications Overall Totals	4 + 9 = 13	2 + 14 = 16		

Criteria	Grievant	Ms. Gates
Education	20	20
Work Record	20	20
Experience	14	12
Qualifications	13	16
Overall Totals	67	68

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\1 Joint Exhibit No. 1 at 77. Affirmative action is not an issue in this dispute.

\2 Joint Exhibit No. 2a, at 2.

\3 Joint Exhibit No. 2a, at 2.

\4 Joint Exhibit No. 6.

\5 Joint Exhibit No. 3a.

\6 *Id.*

\7 *Id.* at 2.

\8 Joint Exhibit No. 3b.

\9 Joint Exhibits No.12a and b.

\10 Nevertheless, the reasonableness of a standard itself is distinguishable from the reasonableness of that standard as applied. Similarly, the ratio for balancing points against seniority differs substantially from the more objective process of actually assigning those points in the first instances.

\11 280 F.3d 1169 (7th Cir. 2002).

\12 *Id.* at 1882. *Millbrook* also mentions a summary judgement standard that plaintiffs in Title VII litigation must meet where they have been passed over for promotions. To survive a defendant's motion for summary judgement, a plaintiff must show that his "credentials . . . [are] so *superior* to the credentials of the person selected for the job that *no reasonable person*, in the exercise of impartial judgment, *could have* chosen the candidate selected over the plaintiff for the job in question." *Id.* at 1180 (emphasis added).

\13 Parenthetically, such a substitution might not prove useful, since DR&C still must define or pour content into any standard selected, and if DR&C adopted the 2:1 ratio, the result could duplicate that in this case. On the other hand, insofar as the "clearly superior" standard is more rigorous than "significantly more qualified," DR&C's choices under the 2:1 ratio arguably would be more vulnerable to attack. Therefore, a more rigorous standard could afford slightly more protection for seniority relative to merit.

\14 Joint Exhibit No. 10a, at 2.

\15 *Id.*

\16 *Id.*

\17 *Id.*

\18 *Id.*

\19 Ohio Dept. Corrections—Adult Parole Authority v. Ohio Health Care and Social Service Union, District 1199/SEIU, Grievance No. 28-05-971028-0083-02-12 (1999) (Brookins, Arb).

\20 *id.* at 9.