#1759

IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/BWC

Before: Robert G. Stein

Grievant(s): Jeremiah Morgan
Case # 34-34-020211-0014-01-09
Promotion

Advocate(s) for the UNION:

Lori R. Collins, Staff Representative
OCSEA LOCAL 11, AFL-CIO
390 Worthington Road
Westerville OH 43081

Advocate(s) for the EMPLOYER:

Rhonda Bell, LRO
OHIO BUREAU OF WORKER'S COMPENSATION
30 W. Spring Street, Level 6
Columbus OH 43215

INTRODUCTION

A hearing on the above referenced matter was held on March 16, 2004 in Westerville, Ohio. The parties agreed that the issue is properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. The parties submitted written briefs in lieu of making oral closings.

ISSUE

The parties agreed upon the issue as follows:

Was the Grievant, Jeremiah Morgan, properly denied the Information Technology Consultant 2 position? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(As cited by the parties, listed for reference see Agreement for language)

ARTICLES 17, and see Parties' briefs

BACKGROUND

The Grievant is Jeremiah Morgan ("Grievant", "Morgan"), a Telecommunications Systems Analyst 3 in the Information Technology Division of the Ohio Bureau of Worker's Compensation ("BWC", "Employer" "Bureau"). Brown has been employed with BWC for over nineteen (19) years.

The basic facts of the case indicate the Grievant had applied a newly created promotional position entitled Information Technology Consultant 2 ("ITC2 "), which is in pay range 36, and is subject to the provisions of Article 17.05 of the Collective Bargaining Agreement. Positions at this level are awarded to an eligible bargaining unit employee *"...on the basis of qualifications, experience, and education."* State seniority becomes a factor if the qualifications of the two individuals are substantially equal.

The Grievant applied for the ITC2 position as did bargaining unit employee, Chris Nelson ("Nelson"), who also held the position of Telecommunication Systems Analyst 3. According to Personnel Officer, Heidi Johnson, a total of five candidates applied and were screened by Human Resources (See Johnson's testimony). However, Morgan had more seniority (207 credits) than did Nelson ("103") credits. After the applicants were screened by Human Resources to determine whether

they meet minimum qualifications for the ITC2 position, they participated in a structured interview in which two management officials, Jim Cunningham ("Cunningham"), IT Networking Director, and Brian Galloway ("Galloway"), Information Technology Manager, rated their answers to each response. All the candidates for the ITC2 position were asked the same questions by the same two interviewers, and their answers were assigned points. Nelson scored 200 on the structured interview and the Grievant scored 135. Nelson was awarded the position.

The Grievant filed a grievance, arguing Nelson did not meet minimum qualifications and should not have qualified for the interviews.

SUMMARY OF UNION'S POSITION

The Union's position is that Nelson, who was promoted over the Grievant, did not meet the minimum qualifications for the position of ITC2 as posted. The Union argues that Human Resources erred when they stated Nelson met the minimum qualifications, in spite of the fact he did not possess a bachelor's degree in Math (having completed the course work, but not awarded the degree) or did not posses an undergraduate core curriculum in computer science, as he claimed on his application for the ITC2 position. The Union points out that Nelson admitted he did not meet minimum qualifications for the ITC2 position. Furthermore, the Union asserts that Union Exhibit 2, the Ohio University catalog, supports the

Union's contention that Nelson did not have the correct course work to meet the minimum qualifications for the position.

The Union argues that the Employer, who placed Nelson in a TWL as a Telecommunications Systems Analyst Supervisor ("TWL Supervisor"), gave him an advantage in the structured interview process. The Union contends, that unlike Nelson, the Grievant possessed a bachelor's degree and has more seniority. Morgan was improperly denied the position, argues the Union.

Based upon the above, the Union urges the Arbitrator to grant the grievance.

SUMMARY OF EMPLOYER'S POSITION

The Employer admits that both candidates for the ITC2 position, Nelson and Morgan, provided false information on their application. Morgan possesses a bachelor's degree in Electronic Engineering Technology ("BSEET"); however, on his application the Grievant stated he possessed a degree in Electrical Engineering, contends the Employer. The parties stipulated to the fact that Nelson did not possess a degree at the time of his application and selection for the ITC2 position.

The Employer takes the position that if management would "...*take the Union's stance*" in this case, neither Nelson nor Morgan would have met minimum qualifications for the position. The Employer contends that it treated all applicants in an equal, albeit flawed manner, and took their

claims of accomplishment (on their applications) at face value. The Employer states in its written closing,

> *"In determining which applicants met "minimum qualifications", Heidi Johnson, deemed that all interviewees met the educational (including the core program of study in Computer Science, Electrical Engineering Technology and Telecommunications) and experience sections of the vacancy posting based on information included in their applications" (p. 2).*

The mistakes in qualifying both candidates (Morgan and Nelson) should not in turn disqualify either candidate, contends the Employer. Instead, the most qualified candidate from the interview pool should be chosen, and in this case Nelson scored substantially better than the Grievant in a fairly designed, and properly executed structured interview process. It contends, "*...management is free to use any interviewing process it determines to be appropriate so long as the process is not inherently unfair or biased*" (Employer's closing, p. 1).

The Employer rejects the Union's contention that placing Nelson in a TWL Supervisor was purposeful or helped him to perform better in the structured interview.

Based upon the above, it urges the Arbitrator to deny the grievance.

DISCUSSION

Article 17.05 of the Collective Bargaining Agreement states in pertinent part:

"If the position is in a classification which is assigned to pay range twenty-eight (28) or higher, the job shall be awarded to an eligible bargaining unit employee on the basis of qualifications, experience, and education. When those factors are substantially equal, State seniority shall be the determining factor. Affirmative action shall be a valid criterion for determining demonstrably superiority. Interviews may be scheduled at the discretion of the Agency..." [emphasis added]

The Union made several arguments in this case. It claimed that Nelson was advantaged by being temporarily promoted ("TWL"). However, the evidence and testimony do not support the Union's claim that Nelson was advantaged by his TWL. The TWL appeared to be primarily administrative in nature, lasted for a period of only 6 weeks, and the Union did not present any evidence that this experience aided Nelson in the interview process in any substantial way. The Union also argued that the interview process was flawed. However, I found that the questions utilized to evaluate candidates and the methodology employed was sound. The testimony of management interviewers, Cunningham and Galloway, was credible and convincing. It appears they did their jobs in a professional and fair manner. However, the interview and selection process are not the problem with this case.

Management has considerable latitude to manage its workforce and to select employees for promotion, even after consideration of its obligations under Article 17.5. However, in the exercise of its management rights, the Employer is governed by the rule of reasonableness, and the exercise of its management rights must be done

in the absence of arbitrary, capricious, or unreasonable discretion. *Southern California Edison and Int'l Bhd. of Elec. Workers, Local 47*, 84 Lab. Arb. 1066 (2002). In matters brought to arbitration, an arbitrator has an obligation to make sure the decisions of the Employer are fair and are not arbitrary (*Ohio Univ. and American Fed'n of State, County, and Mun. Employees, Ohio Council 8, Local 1699*, 92 Lab. Arb. 1167 (1989)

I find the Employer violated the Collective Bargaining Agreement, and its own standards of conduct, when it discovered it had wrongly considered Nelson to have met the minimum qualifications for the position of ITC2 and attempted to justify its error by claiming it treated all employees in the same erroneous fashion. Nelson admitted in his testimony that he did not have the core curriculum required to meet minimum qualifications. Furthermore, he admitted that although he had completed all the necessary course work to receive his bachelors' degree, he officially had not been awarded it. Nelson unequivocally claimed in his application that he possessed both. While technically a misstatement, I find claiming to have a bachelor's degree after completion of all the necessary course work and requirements is a minor misrepresentation of the facts. It is a procedural and not a substantive distinction.

However, claiming to have taken a core curriculum in computers and technology when this simply did not occur, is an entirely different

matter. Nelson's assertion of having taken a core curriculum of this nature was not only untrue, it represented a material misrepresentation of his qualifications. Nelson's false claim was the difference between meeting and not meeting minimum qualifications per the job posting. I do not find the Grievant's application to have contained a material misrepresentation of this magnitude.

This arbitrator has presided over many disputes both as an arbitrator and a mediator, where the Employer argued in defense of its actions, that the Grievant did not meet minimum qualifications for a promotional position. In the promotional process the establishment and fair enforcement of meeting minimum qualifications is integral to the promotional process under Article 17. Moreover, it should be noted that falsifying a promotional application has been considered grounds for serious disciplinary action by other state agencies that the undersigned arbitrator and presumably other arbitrators have been required to address through the grievance process.

Labor Relations Officer, Roger A. Coe, who in the experience of this Arbitrator has regularly upheld the concept of fair dealing, states in his step 3 decision:

"...management is free, pursuant to Article 5, to engage in any interview process it deems appropriate so long as that process does not violate an implied covenant of fair dealing. Absent a clear abuse of discretion by management and management having a rational basis for its selection, the contractual propriety of the selection is beyond the authority of an Arbitrator's review. Having determined that no such abuse

has taken place, the grievance is denied in its entirety" (Jx 2) [emphasis added].

From the information provided in the Step 3 hearing notes it appears the Employer and the Union had not uncovered the fact that Nelson made a false qualification claim on his position application. This Arbitrator was the fact-finder when the language of Article 17.5 was altered to allow the Employer to have more latitude to select among eligible candidates for positions in pay range twenty-eight (28) and greater, based upon qualifications, experience, and education. The key word in Article 17.5 that is material to this dispute is the word "*eligible.*" The Employer has a reasonable amount of discretion to choose among "eligible candidates." And, the long-standing practice of the Employer and the Union has been to operate within a promotional system that routinely determines eligibility through meeting minimum qualifications.

When a grievance involves a challenge to a managerial decision, the standard of review is whether a challenged action is arbitrary, capricious, or taken in bad faith. *Kankakee (Ill.) School Dist. No. 111 and Service Employees Int'l Union, Local 73,* 117 Lab. Arb. 1209 (2002).

> *Arbitrary conduct is not rooted in reason or judgment but is irrational under the circumstances. It is whimsical in character and not governed by any objective rule or standard. An action is described as arbitrary when it is without consideration and in disregard of facts and circumstances of a case and without a rational basis, justification, or excuse. The term "capricious" also defines a course of action that is whimsical, changeable, fickle, or inconstant.*

City of Solon and Ohio Patrolmen's Benevolent Ass'n, 114 Lab. Arb. 221 (2000). The Employer's decision to retain Nelson in a position for which he did not meet the minimum qualifications was arbitrary.

In defense of its actions to maintain the promotion of Nelson, the Employer declared that there was no verification of any of the several employee applications for the position of ITC2. And the Employer pointed out that the Grievant misrepresented his qualifications. The Grievant stated on his application that his major field of study was *"Electrical Engineering Technology"(Jx 4)*. During the hearing he admitted this was not true and his bachelor's degree was in Electronic, not Electrical Engineering. It is noted, however, that the Grievant correctly listed his degree as a "BSEET." Whether this is a distinction with or without a difference is not known from the evidence. After citing this discrepancy, the Employer did not provide any evidence to clarify the distinction of an electronics degree from an electrical degree, nor did it provide evidence to demonstrate how the misstatements of Nelson and the Grievant were equivalent in magnitude.

While misrepresenting his degree, the Grievant did not falsify his core curriculum. And, it may be argued that the Grievant's qualifications more closely meet the minimum qualifications for the position. He, unlike Nelson, actually possessed a bachelor's degree at the time he applied for the position, and he listed course work in electronic technology, arguably

more directly related to computer technology than a standard mathematics curriculum. Nelson's claim that he possessed a bachelor's degree and completed core course work in computers and technology represents a more serious misrepresentation of fact than what the Employer accuses the Grievant of doing.

However, the reality is the arbitration of this matter is being held well after the instant dispute has taken place. Nelson has now held the ITC2 position for more than two years, and, according to the Employer he is doing a very good job. It is essential in issuing an arbitration award to fashion awards that first draw their essence from the Collective Bargaining Agreement and where possible, represent practical resolutions to disputes. An award well over two years after the fact that simply declares Nelson and the Grievant unqualified would be disruptive to the Employer's operation, unfair to these two bargaining unit employees, and unreasonable at this juncture. Additionally, an award that fails to address the Employer's misapplication of Article 17.5 in a meaningful manner impugns the integrity of the contractual commitments made by the parties.

It is particularly noteworthy that in the structured interview process for the newly created position of ITC2, there was no minimum passing score. Management witness, Galloway, whom I found to be very credible and knowledgeable, frankly stated that the Grievant, who scored second

highest in the structure interview, would have been chosen had not Nelson had a higher interview. This is not surprising given the evidence and testimony that demonstrated both Nelson and Morgan are intelligent and capable employees.

The only workable remedy to this dispute is one that strikes a balance between the Employer's need to maintain its operational efficiency, and the parties' need to maintain the integrity of the language contained in Article 17.5 of the Collective Bargaining Agreement.

AWARD

1. Within two pay periods or less from the date of this Award, the Grievant shall be promoted or reclassified to the ITC2 classification, retroactive to the date Nelson was promoted to the position. The Grievant shall receive all back pay and benefits accorded to such a correction. Moreover, the retroactive reclassification of the Grievant shall be done in a manner that provides him with greater classification seniority than that of Nelson.

2. This Arbitrator has no jurisdiction to maintain or remove Nelson from his current ITC2 position. This Award, which attempts to rectify a very awkward situation, should not be interpreted to suggest Nelson is to be removed from his position.

3. The Arbitrator shall maintain jurisdiction over this Award for a period of sixty-(60) calendar days.

Respectfully submitted to the parties this 17th day of May, 2004.

Robert G. Stein, Arbitrator

[2]

SUPPLEMENT

IN THE MATTER OF ARBITRATION
BETWEEN
OCSEA, AFSCME LOCAL 11, AFL-CIO
AND STATE OF OHIO/BWC

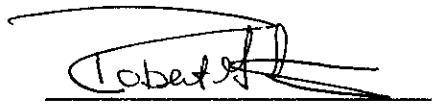
Grievant: Jeremiah Morgan
Case # 34-34-20020211-0014-01-09 (Promotion)

This arbitrator retained jurisdiction over the 05/17/04 Award for a period of sixty (60) calendar days in the above referenced grievance.

Pursuant to the provisions of the award, Herman S. Whitter of OCSEA, the Union and Kenneth R. Couch of OCB, provided information not available at the hearing which persuaded this Arbitrator that pursuant to the parties' contractual language and their long standing practice, arbitrators have jurisdiction to remove an employee from a position if the Arbitrator determined that the employee was inappropriately placed in the position in the first place. And as such, an Arbitrator also has jurisdiction to place the appropriate employee in the position.

The effect of this clarification shall be prospective in nature and does not affect the original decision.

Respectfully submitted to the parties on this 18th day of July 2004.



Robert G. Stein, Arbitrator