

ARBITRATION DECISION NO.:

396

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Department of Health

DATE OF ARBITRATION:

March 20, 1991

DATE OF DECISION:

November 18, 1991

GRIEVANT:

Lynn Ogden

OCB GRIEVANCE NO.:

14-00-(90-03-05)-0021-01-13

ARBITRATOR:

Harry Graham

FOR THE UNION:

John Feldmeier

FOR THE EMPLOYER:

Michael D'Arcy

KEY WORDS:

Minimum Qualifications

Promotion

Microbiologist 3

Knowledge to be Developed

After Employed

Late Bid by Successful

Bidder

ARTICLES:

Article 17 - Promotions

and Transfers

§17.01-Promotion

§17.05-Applications

§17.06-Selection

Article 25 - Grievance

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Procedure
§25.01-Process

FACTS:

The grievant, a Microbiologist 2 with the Department of Health, is a veteran of nineteen years of service with the State. On January 30, 1990, the Employer posted for bids for a vacant Microbiologist 3 position. The grievant bid for this position but was not awarded the position which was then awarded to a junior applicant. The Employer told the grievant that the reason she did not get the job was that she did not meet the minimum qualifications for the position.

UNION'S POSITION:

There are specific qualifications for the position which were not met by the grievant. These include knowledge of ELISA and Western Blot procedures for example. However, on the position description they carry with them an asterisk (*). The use of the asterisk indicates that such knowledge is to be gained after employment and are not to be used as part of the minimum qualifications for hiring. The Department of Administrative Services has sanctioned use of the asterisk to show that it denotes attributes to be developed after employment, not prior to the filling of a position.

The Employer contends that the grievant did not indicate on her application that she met all of the required qualifications for the position. However, the union pointed out that the successful applicant also failed to list that she possessed all of the attributes sought by the State for the position. Furthermore, the successful applicant's application should not have been considered by the State because it was untimely submitted. On the bottom of the application form it indicates it will not be accepted if the oath is omitted. The deadline for receipt of applications was February 13, 1990 but the successful applicant did not get her application notarized until after that date. The Contract at Section 17.05 provides that employees may file "timely" applications for vacancies. Given these circumstances, the Union insists that the grievant be awarded the Microbiologist 3 position with full back pay and benefits.

EMPLOYER'S POSITION:

The successful bidder worked in the Serology Unit which is the same unit for which the position was posted. Thus, it is reasonable for the employer to assume she knew how to use the equipment required for the position even if she did not list it on her application. The grievant however did not list all of the required qualifications on her application. Applicants must fill out the application form completely in order to inform the employer of their qualifications.

The Contract does not prescribe that application forms be notarized. The successful applicant's application was not notarized until after the application deadline but this is not a defect in her application. Further, the use of the asterisk on the position description should be given no consideration in

determining this dispute. Use of the asterisk indicates critical elements in the position description which applicants must possess according to the State.

ARBITRATOR'S OPINION:

The contention of the State that no weight should be attached to the fact that the successful applicant's application was notarized after the deadline for filing is misplaced. The application clearly states that it will not be accepted if the oath of veracity is omitted. Employees are entitled to expect that if they follow prescribed procedures and others fail to do so that such failure will carry with it a penalty.

The "Guidelines for Completing Position Descriptions" issued by DAS provide that worker characteristics that are to be learned after employment are to be marked with an asterisk and not to be used as minimum qualifications. The State cannot hold employees to standards before employment that its own requirements indicate are to be developed after employment.

The union correctly points out that the successful applicant did not specifically indicate on her application that she possessed all of the attributes desired by the Employer. Neither did the grievant. The employer held those omissions against the grievant but did not do so when evaluating the successful applicant's application. The State does not have the responsibility to make a detailed inquiry of applicants' qualifications. It does however have the responsibility to treat applicants equally. It did not do so in this case.

AWARD:

The grievance is sustained. The grievant is to be placed in the disputed Microbiologist 3 position. She is to receive all pay and benefits at the straight time rate to which she would have been entitled but for this violation of the Contract.

TEXT OF THE OPINION:

In the Matter of Arbitration
Between

OCSEA/AFSCME Local 11

and

**The State of Ohio,
Department of Health**

Case Number:
14-00-(90-03-05)-0021-01-13

Before:
Harry Graham

Appearances:

For OCSEA/AFSCME Local 11:

John Feldmeier

For Department of Health:

Michael D'Arcy

Introduction:

This dispute came to be heard on March 20, 1991 as part of a series of similar disputes involving the failure of the State to promote a number of senior bidders for vacancies in State service. The various disputes generally involve an allegation by the Union that the Grievants met the minimum qualifications for the posted vacancies and should have been awarded them by virtue of their seniority. The State disagrees with that view. The facts of each particular dispute vary somewhat and each is decided on its merits as perceived by the Arbitrator.

Issue:

The issue in this dispute is:

"Was Lynn Ogden improperly denied a promotion? If so, what shall the remedy be?"

Background:

There is no controversy surrounding the events that prompt this proceeding. The Grievant, Lynn Ogden, is a veteran of nineteen years of service with the State. She was serving as a Microbiologist 2 at the time the events under review arose. She had accumulated eleven years of service as a Microbiologist 2. On January 30, 1991 the Employer posted for bids for a vacant position as a Microbiologist 3. Among the bidders was the Grievant, Lynn Ogden. Ms. Ogden was not awarded the position. It was given to another bidder, Katie Cohen. Ms. Cohen was junior to Ms. Ogden.

In order to protest the award of the Microbiologist 3 position to a junior bidder Ms. Ogden properly filed a grievance. That grievance was not resolved in the procedure of the parties and they agree it is properly before the Arbitrator for determination on its merits.

Position of the Union:

According to the Union the State has violated Section 17.05 of the Agreement in this situation. The language in Section 17.05 provides that the State will receive bids from employees and classify them in a particular order. It continues to specify that bidders are to be proficient in the minimum qualifications contained in the classification specification and position description. The Classification Specification for the Microbiologist 3 position prescribes that bidders must have completed a "graduate core program in microbiology or an undergraduate core program in microbiology; 12 months experience as a microbiologist or 6 months experience as a Microbiologist 2 or alternative, equivalent evidence of major worker characteristics." The word "or" indicates that not all requirements must be met. Only one requirement must be satisfied. Ms. Ogden had 11 years of service as a Microbiologist 2 which more than satisfies the requirement of 6 months experience as a Microbiologist 2.

When the Employer posted the Microbiologist 3 vacancy it went beyond the minimum qualifications for the position. It required bidders possess knowledge in a variety of areas. These included serology, ELISA and Western Blot procedures, computer knowledge, as well as knowledge of Hamilton-Transfer Center, plate washers, diluters, pipettors, spectrophotometers, Universal Blood Precautions and the ability to write and edit scientific, technical or advanced literary publications. The State may not require such qualifications for the posted vacancy according to the Union. On the position description they are listed as "Minimum Acceptable Characteristics," not minimum qualifications. The Agreement refers solely to minimum qualifications. Even if it is granted that Minimum Acceptable Characteristics are equated to minimum qualifications, the Classification Specification provides that bidders are to show "Or alternative, equivalent evidence of the Major Workers Characteristics." Ms. Ogden had such evidence by virtue of her eleven years of service as a Microbiologist 2 according to the Union.

There are specific qualifications for the Microbiologist 3 position which were not met by Ms. Ogden. These include knowledge of ELISA and Western Blot procedures for example. On the position description they carry with them an asterisk (*). Use of the asterisk indicates that such knowledge is to be gained after employment and are is not to be used as part of the minimum qualifications for hiring. The Department of Administrative Services has sanctioned use of the asterisk to show that it denotes attributes to be developed after employment, not prior to filling of a position.

During the processing of this dispute the Employer made a point of indicating that Ms. Ogden's application was deficient in that she did not indicate that she possessed all of her knowledge that may have qualified her for the position. That is untrue according to the Union. In completing her application Ms. Ogden indicated that she could meet the requirements of the position for which she was applying. Such a response is sufficient to indicate to the Employer that the applicant met the minimum qualifications for the position upon which she was bidding, at least in her opinion.

Ms. Cohen, the successful bidder, similarly did not indicate on her application that she possessed all of the attributes sought by the State for the

position. For instance, her application does not show that she had knowledge of Hamilton-Sample Transfer Center or Biosafety Level II practices. In spite of these omissions on her application, similar in nature to those on Ms. Ogden's, Ms. Cohen was awarded the position.

In the Union's view, Ms. Cohen's application should not even have been considered by the State. It was late. On the bottom of the application form it indicates it will not be accepted if the oath is omitted. Applicants must appear before a notary or authorized official in order to authenticate their applications. The deadline for receipt of applications was 4:30PM on February 13, 1990. Ms. Cohen did not get her application notarized until February 28, 1990. It was notarized by Kathy Zeigler who was interviewing her for the position. The Agreement at Section 17.05 provides that employees may file "timely" applications for vacancies. Ms. Cohen's application was late. Given these circumstances the Union insists Ms. Ogden be awarded the Microbiologist position with full back pay and benefits.

Position of the Employer:

Ms. Cohen, the successful bidder, worked in the Serology Unit. She was familiar with the Hamilton Transfer equipment. It was reasonable for the Employer to assume she knew how to use it. Ms. Ogden did not indicate she had knowledge of that equipment on her application. It is not the responsibility of the Employer to know all attributes of all bidder. Applicants must fill out the application form completely in order to fully inform the employer of the qualifications they bring to the position.

The Agreement does not prescribe that application forms be notarized. That Ms. Cohen's application for the Microbiologist 3 vacancy was not notarized until well after the closing date and time for receipt of applications is not a defect in her application in the State's view.

That Ms. Ogden indicated her opinion that she was qualified for the position should not be given weight in the State's view. To permit that opinion of a bidder to control the outcome of the bidding process would be to require the State to make detailed inquiry of bidders qualifications. It would be required to go beyond evidence submitted on the application. This is an impossible situation according to the State.

The use of the asterisk (*) on the position description should be given no consideration in determining this dispute according to the State. Use of the asterisk indicates critical elements in the position description which applicants must possess according to the State.

Discussion:

The contention of the State that no weight should be attached to the fact that Ms. Cohen's application was notarized well after the deadline for filing is misplaced. The application clearly states that it will not be accepted if the oath of veracity is omitted. The deadline for filing of the application was February

13, 1990, not February 28, 1990 when Ms. Cohen's application was completed. This is not some minimal technical defect in the application process as might be thought at first blush. The question arises concerning when an application may be considered complete. The State designed the application form and clearly specified that it would not be considered if the oath were to be omitted. The deadline for application was February 13, 1990, not February 28, 1990. Ms. Cohen's application was incomplete at the time it was submitted. Either the Employer has procedures and follows them consistently or it does not. Employees are entitled to expect that if they follow prescribed procedures and others fail to do so that such failure will carry with it a penalty. That did not occur in this instance.

Union Exhibit 1 are the Guidelines for Completing Position Descriptions as promulgated by the Department of Administrative Services. They provide that worker characteristics that are to be learned after employment are to be marked with an asterisk and not to be used as minimum qualifications. In addition, the Classification Specification for the Microbiologist 3 position requires as "Major Worker Characteristics" that people have "Knowledge of microbiology; microbiological laboratory techniques & related safety practices; chemistry; employee training and development.*" The asterisk refers to the phrase "(*) Developed after employment." (Emphasis supplied) The State cannot hold employees to standards before employment that its own requirements indicate are to be developed after employment. On two of its own documents, one generic and one specific to this position, the State indicates that employees are to learn certain elements of the position after occupying it. The State must be bound by its own rules.

The Union correctly points out that Ms. Cohen did not specifically indicate on her application that she possessed all of the attributes desired by the Employer. Neither did Ms. Ogden. The Employer held those omissions against the Grievant and did not do so when evaluating Ms. Cohen's application. There is additional evidence to this effect. Employer Exhibit 1 is a matrix it developed setting forth the qualifications of various bidders for the Microbiologist 3 position. It indicates that Ms. Cohen possesses knowledge of Hamilton-Sample Transfer. That is not indicated on her application. If the Employer wishes to weigh attributes of which it has knowledge but which are not specified by applications in its promotion decision it does so at its risk.

The minimum qualifications for the Microbiologist 3 position are extensive but they are not cumulative. That is, by its own actions the State has set forth a number of ways employees may qualify for the position. Included among these is the requirement that applicants have six months experience as a Microbiologist 2. Ms. Ogden had eleven years as a Microbiologist 2 when she applied for the position as a Microbiologist 3.

The State does not have the responsibility to make a detailed inquiry of applicants qualifications. It does have the responsibility to treat applicants equally. It did not do so in this case.

Award:

The grievance is SUSTAINED. The grievant is to be placed in the disputed Microbiologist 3 position. She is to receive all pay and benefits at the straight time rate to which she would have been entitled but for this violation of the Agreement.

Signed and dated this 18th day of November, 1991 at South Russell, OH.

Harry Graham
Arbitrator