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IN ARBITRATION PROCEEDINGS PURSUANT TO

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

SEIU DISTRICT 1199

and

OHIO DEPARTMENT OF HEALTH

Case No. 14-41-050519-017-02-12
Grievant: Crystal Willis
Re: Job Selection

ARBITRATOR'S

OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between SEIU DISTRICT 1199 ("1199" or "the Union") and THE STATE OF OHIO ("the Employer"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her decision shall be final and binding pursuant to the Agreement.

Hearing was held January 26, 2006 and March 6, 2006 in Columbus, Ohio. The parties were afforded full opportunity for the examination and

cross-examination of witnesses, the introduction of exhibits, and for argument. Both parties submitted timely post-hearing briefs to the Arbitrator.

APPEARANCES:

On behalf of the Union:

LEE EVANS, Ohio State Director, SEIU District 1199, AFL-CIO, 1395 Dublin Rd., Columbus, OH 43215.

On behalf of the Employer:

CHRIS R. KEPPLER, Labor Relations Officer 3, Ohio Department of Health, 246 N. High St., Columbus, OH 43215.

STIPULATED ISSUE

Did the Employer violate Article 30.02 of the Agreement when it promoted a bargaining unit member with less seniority than the Grievant? If so, what shall the remedy be?

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

. . .

ARTICLE 5 - MANAGEMENT RIGHTS

Except to the extent modified by this Agreement, the Employer reserves, exclusively, all of the inherent rights and authority to manage and operate its facilities and programs. The exclusive rights and authority of management include specifically, but are not limited to, the rights expressed in Section 4117.08(C)(1)-(9) of the Ohio Revised Code, and the determination of the location and number of facilities; the determination and management

of its facilities, equipment, operations, programs and services; the determination and promulgation of the standards of quality and work performance to be maintained; the determination of the management organization, including selection, retention and promotion to positions not within the scope of this Agreement; the determination of the need and use of contractual services; and the ability to take all necessary and specific actions during emergency operational situations. Management will not discriminate against any employee in the exercise of these rights or for the purpose of invalidating any contract provision.

ARTICLE 6 - NON-DISCRIMINATION

6.01 Non Discrimination

Neither the Employer nor the Union shall unlawfully discriminate against any employee of the bargaining units on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, union affiliation and activity, handicap or sexual orientation, or discriminate in the application or interpretation of the provisions of this Agreement, except those positions which are necessarily exempted by bona fide occupational qualifications due to the uniqueness of the job, and in compliance with the existing laws of the United States or the State of Ohio. In addition, the Employer shall comply with all the requirements of the federal Americans with Disabilities Act and the regulations promulgated under that Act.

The Employer and Union hereby state a mutual commitment to equal employment opportunity, in regards to job opportunities within the agencies covered by this Agreement.

6.02 Agreement Rights

No employee shall be discriminated against, intimidated, restrained, harassed, or coerced in the exercise of rights granted by this Agreement.

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ARTICLE 30 - VACANCIES

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30.02 Awarding the Job (Transfers and Promotions and Demotions)

...

...Applicants must clearly demonstrate on the application how they possess the minimum qualifications for the position. Failure to do so will result in the application being screened out and rendered ineligible for further consideration. All eligible applications shall be reviewed considering the following criteria: qualifications, experience, education, and work record. Employment diversity may be a factor in the selection. The Employer maintains the right to administer a test or instrument to measure the listed criteria. 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. The union may challenge the validity of the test or instrument as part of a non-selection grievance.

...

ARTICLE 31 - PROFESSIONAL COMMITTEES

31.01 State Professional Committee

There shall be a statewide Professional Committee which shall consist of representatives from agencies with more than thirty (30) bargaining unit members. The Committee may address any statewide issue it deems appropriate, including but not limited to: classification studies, client care, staffing, professional development and health and safety policies.

31.02 Agency Professional Committees

There shall be an Agency Professional Committee at each agency which has fifteen (15) or more bargaining unit members. There shall be regional professional committees within the Adult Parole Authority.

The Committees shall address any agency-wide issue they deem appropriate, including but not limited to: client care, staffing levels, health and safety issues, professional development, evaluations and inservice education.

The agency shall inform the Union thirty (30) days prior, where possible, of any additions to or changes in work rules which are applicable to employees in these bargaining units.

Work rules may be discussed at the initiative of either party in the Professional Committee meetings. The Union may make such comments as it feels necessary to the issuing authority about the proposed rules.

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FACTS

The facts are largely not in dispute. On March 16, 2005, the Employer posted the position of Human Service Program Consultant. The posting provides in pertinent part:

> **ONLY APPLICATIONS THAT CLEARLY INDICATE HOW THE MINIMUM QUALIFICATIONS ARE MET WILL BE CONSIDERED.**
>
> ...
>
> **A proficiency/skills assessment may be given as part of the interview process.**
>
> ...
>
> **Job Duties:**
>
> **Acts as a program consultant for the Counseling, Testing, Referral Partner Counseling Referral (CTRPCR) program component of the HIV Prevention Program including the prevention of HIV, other STDs and hepatitis B & C. Coordinates the HIV Prevention Counseling Training Course: determines training dates and trainers; maintains and updates the CTRPCR training and/or protocol manual; obtains training facility; establishes trainer objectives; notifies counseling and testing sites of the availability of training dates; works with the regional AIDS Coordinators to assure counselors are trained; obtains and provides training crediting opportunities to the participants (e.g., CEUs, certificate of attendance). Monitors Lab Supported sites: provides onsite visits, telephone contact and/or printed surveys for compliance with state plan, standards, grant funding and/or quality assurance. Provides technical assistance to counseling and testing sites; reviews agency quarterly reports to obtain**

information for technical assistance needs; provides feedback reports to sites; establishes a plan to assist sites in areas of need; performs technical assistance activities.

Under the direction of the HIV Program Manager, contributes to grant writing and the writing of annual progress reports. Develops and/or revises CTR and PCR program guidelines, standards, policy and procedure manual; prepares and maintains required records and reports (e.g., counselor and site numbers, audit records, quarterly reports); develops and coordinates distribution of newsletters; conducts research/literature reviews and attends trainings, seminars and conferences to keep abreast of HIV/AIDS trends and legislative changes as they relate to CTRPCR and other developments affecting assigned area of expertise, and to expand knowledge and acquire/expand skills; reviews and responds to complaints and inquiries from health care professionals, public, program participants, and government officials regarding CTRPCR issues; operates personal computer and required software...to enter and retrieve date and/or generates documents....

Prepares and delivers presentations to community groups (e.g., community planning, local/state program staff regarding the CTRPCR. Assists in the preparation and review of reports and other correspondence between ODH, CDC, and local program agencies as needed.

Minimum Qualifications:
Completion of undergraduate core program in social or behavioral science, health or pre-medicine or comparable field; 18 mos. exp. In delivery of human services, health care services or medical assistance in governmental, community or private human support services agency or medical provider.

-OR completion of graduate core program in social or behavioral science or medicine-related or comparable field; 6 mos. exp. in delivery of human services, health care services or medical assistance in governmental, community or private human support services agency or medical provider.

Preferred Qualifications:
Applications of those who meed the minimum qualifications will be further evaluated against the following criteria: Experience working in HIV prevention and control activities; presenting training and/or public speaking; writing and developing education/training materials; in counseling; identifying training needs for a program, local agency or provider; with STD prevention; quality assurance, compliance or evaluation of program/agency activities according to standards. Your application must specifically address how you meet the above criteria through your experience, education, skill and ability.

...

Three internal candidates applied.[1] Ms. A, who ultimately was selected, wrote in her cover letter:

> **I have work[sic] for the state almost 15 years and in that time have always been involved in presenting trainings to employees or inmates. I have always received good reviews on my trainings. I have founds[sic] that my career choice has been going the direction of a training officer for quiet[sic] sometime[sic]. I want to continue working with people and supporting them in a healthy life style. I**

[1] Information about the third candidate (i.e., not Ms. A or the Grievant) is not relevant to the analysis of the stipulated issue.

am involved with a community that is at risk for HIV, and would find it very fulfilling to be able to use my skills in training and substance abuse to help end this epidemic.

The Grievant wrote in her cover letter:

> **I believe my experience, and educational achievements, make me an excellent candidate for the position of Human Service Program Consultant-69413, PCN: 110408.0[.]**
>
> **I have worked in state government for over 15 years with 10 plus years in delivery of human services. I have daily use of the computer and various training to include computer operator training while serving active duty in the United States Army. I have a personal commitment to work hard, and to perform well in all professional and educational endeavors.**
>
> **I would like to speak to you further about this position and my qualifications at your earliest convince[sic]. I may be reached at (614) 466-[XXXX] or (614) 203-[XXXX]. I would like to thank you in advance for your time and attention[.]**

In the "Summary of Qualifications" section of the Ohio Civil Service Application, Ms. A wrote:

> **Licensed Chemical Dependency Counselor with associate degree. I have worked in health care/mental health for over 13 years. Job descriptions since 1990 have included giving trainings. Professional, dependable and hard working.**

In the "Summary of Qualifications," the Grievant wrote:

> **Completed Master of Science in Education and Community Counseling and had over 10 years in delivery of human services in a governmental agency. I have a family member and close friend living with HIV and Hep C. This adds to my understanding of the issue, increased my interest in gaining knowledge, and enhanced my dedication to sharing prevention information whenever possible. In my SWII position at DYS, I conducted two (2) behavior modification groups a day. I also developed and presented life skills information to include HIV/AIDS Prevention. As Parole Officer, I presented a weekly SA education group. Included in the material developed and presented was material on HIV/AIDS Prevention, STD's, and Hep B&C. In that position I networked with community agencies to include Columbus Aids Task Force, to provide prevention supplies and presentations to the group. In all positions, I prepared and maintain required records, reports, and operate personal computer to enter and retrieve data. In my parole officer position, I assisted in the review of proposed contacts and provided monthly reports on youth and program performance. As EAP coordinator, I provide training on EAP resources to groups at requested state agencies; I have been trained and assist in critical incident stress debriefings.**

In the "Post-High School Education" section of the application, Ms. A indicated she had an Associate degree in Law Enforcement from Columbus State Community College. In response to the question how many courses she took that were "relevant to the position...for which you are applying," she listed one course each in:

Corrections, Community Corrections, Begin[sic] Composition, General Sociology, Essay & Research, Contemporary Corrections, Speech, and Computer Literacy.

The Grievant wrote that she had an Associate degree in Public Administration/EAC from Franklin University, a Bachelor of Science degree in Social Work from Capital University, and a Master of Science degree in Education/Human Development from University of Dayton. The "relevant" courses she listed were:

Psychology (2 courses), Sociology (1), Social Welfare Policy (3), Group Techniques (6), Social Research Methods (2), Statistics (3), Essay and Research (1), Ethics (2), Accounting/Economics (4), Counseling Multicultural Populations (1), Human Behavior/Development (4), Oral Communications (2), Lifetime Health/Biology (2), Soical[sic] Work Practice (6), Abnormal Psychology (1), and Test/Case Study Interpretation (1).

The Employer screened the three applications, and decided all three employees met the minimal qualifications. Accordingly, the Employer sent all three candidates to the interview stage of the Enhanced Selection Process ("ESP").[2]

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[2] HR Letter 5 - Enhanced Selection Process, prepared by the Employer and dated March 15, 2006, describes the ESP's methodology and implementation. With regard to the interview stage, the Letter states in pertinent part:

> Scored Structured Interview. This assessment tool is composed of interview questions and can also include job sample exercises,

(continued...)

The Grievant scored the highest of the three candidates in the Qualifications Assessment. Ms. A scored significantly higher in her interview than the Grievant and the third candidate did in their interviews. Pursuant to the Employer's ESP, the interview counts for 80% of a candidate's score, and the Qualifications Assessment is weighted at 20%. Accordingly, Ms. A collected significantly more total points (74.89) than the Grievant (52.69) and the third candidate (56.22). Thus, although Ms. A was not the most senior candidate, she was selected for the position effective June 12, 2005.[3]

The Union filed a grievance dated May 19, 2005 which states in pertinent part:

> **Statement of Grievance**
>
> **Grievant applied for a HSPC position (PCN 69413) and on 5/18/05 was informed she did not recieve[sic] the position. The Grievant clearly**

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[2](...continued)

> job simulations and/or skills tests as long as each component is directly linked to the content of the approved position description. To make this link evident, each interview question must contain a "justification" section where the required skills, knowledge and/or abilities supporting each question are identified on the interview. Each question has a value (point scale) and preset criteria (benchmarks) to serve as a reference for the interviewer rating the candidate. All interviewers MUST document the candidate's response that supports their rating for each question....

(Emphasis original.)

[3] The Grievant was later selected for a comparable HSPC position in the same program effective August 7, 2005.

exceeds the minimal qualifications and is the more senior candidate.

Contract Article(s) and Section(s) allegedly violated, including but not limited to:

Article 30, Article 6 & all others that apply.

POSITIONS OF THE PARTIES

Union Position

The Grievant met the minimum qualifications, but Ms. A did not. Nor was Ms. A significantly more qualified than the Grievant. The ESP is flawed; it violates the intent of Article 30.02. Moreover, the policy was not applied according to the dictates of "HR Letter 5 - Enhanced Selection Process for Non-Exempt Employees."

Unlike OCSEA's selection process, which provides for a vertical ranking of candidates, with the most qualified candidate being awarded the job, 1199's process is a horizontal process. The best-qualified candidate does not have rights to the job. Instead, the most senior candidate who is minimally qualified has rights to the job. The exception is if someone is significantly more qualified based upon education, experience, skill, and work record, that person would be awarded the job.

The structured interview does not test for differences in education, experience, qualifications, and work record. The documentation of the interview answers and the testimony of the two reviewers reveals a subjective evaluation that fails to meet the bar of "significantly more qualified." The interview was more a test of insider jargon and personality traits instead of an objective assessment of the skills, qualifications, education, or work record that might show someone to be significantly more qualified. The interview barely addressed education, and did not address work record at all.

The reviewers' scores are arbitrary and capricious. For example, in question #2, regarding how to ensure providers are meeting standards, the benchmark answers are: experience in communications, dispute resolution skills, and referencing site audits. Reviewer #1's notes on the applicants' responses are:

> **The Grievant (5 points): Review procedures and standards, site visits, communicate with them to insure**
>
> **Ms. A (8 points): Know procedures and protocol, site audit, help them meet goals**

These two answers are almost identical, but Ms. A was given three points more, according to Ms. McClure's testimony, for using the term site "audit"

instead of site "visit." The Grievant mentioned communication, one of the benchmarks, and Ms. A did not, but this apparently is not factored into the Grievant's score.

There was very little written by the reviewers in the "notes" section of the structured interview documentation that shows there was a significant difference in skills or experience. The two reviewers who testified at the arbitration hearing were not able to say what made Ms. A more qualified, other than that they liked her personality, and she elaborated more on her answers than the Grievant did.

The Employer violated its own policy by not documenting the candidates' answers. HR Letter 5 states:

> All interviewers MUST document the candidate's response that supports their rating for each question....This is to ensure operational validity in the administration of this assessment tool.

(2003), p. 3. Mr. Glass suggested the lack of documentation was not of concern because its purpose was simply to remind reviewers why they scored the way they did. However, HR Letter 5 itself suggests the documentation is for the purpose of defending a selection. Mr. Bahns' testimony demonstrated he had little memory of the interview process. Although he remembered Ms. A appeared to be the better candidate, had more complete answers, and would make a better trainer than the Grievant,

he could not remember Ms. A's answers. Ms. McClure's notes do not adequately reveal why she scored the way she did, and even though she had a better memory of the interview process than Mr. Bahns did, she also could not give specifics about the candidates' answers.

Ms. A was picked because the reviewers felt she was a better-qualified candidate, but, in fact, she was not a significantly more qualified candidate. The fancy methodology and scores developed by Ms. Wilson do not overcome the fact that this test did not test for anything other than who seemed to fit in better, not who had significantly better skills, experience, education, and work record.

While the Employer has the right to administer a test, it is violating the intent of Article 30.02 when the interview counts for a hugely disproportionate 80% of the final score. This is simply a back-door way for the Employer to leverage its desire to hire whomever it wants, as long as s/he meets minimum qualifications, or in this case, even if s/he does not meet minimum qualifications.

Arbitrator Brookins held:

> Article 30.02 simply lists the four evaluative criteria in a straight-line fashion, thereby registering absolutely no intent to weight one criterion more than another for purposes of filling posted vacancies.

District 1199 (Ferguson) and Ohio Department of Corrections, Case No. 28-05-971028-0083-02-12 (1999), p. 12. It would then stand to reason that any test should measure the four criteria in order to be in compliance with the intent of Article 30.02. Mr. Glass testified work record was not factored in at all. Ms. Wilson testified the instrument is designed to measure the ability to perform the job. The Qualification Assessment Grid cites only "experience" in all 7 criteria, omitting education and qualifications. The Grievant would have scored higher on education if it had been measured, scored a full 15 points higher (out of 56 possible points) than Ms. A on experience, yet ended up 22 points lower than Ms. A on the total score. This is indicative of a subjective process.

The Employer never notified Union staff of the changes in the testing policy. This violates Article 31.02. Mr. Glass testified he told "the Chapter Presidents," but 1199 does not have Chapter Presidents. He then testified he told the Delegates, but he did not remember who they were. He said the ESP was brought up at an Agency Professional Committee meeting, but he had no evidence this occurred. Mr. Proctor testified the Union had not been notified of the ESP. Even if a Delegate had been informed, that is not the same as informing the Union via a letter or a copy of the policy. Mr. Glass contended the Union had the opportunity to challenge the ESP through a previous

grievance, the W grievance. The ESP was not at issue in the W grievance because that grievant was screened out for allegedly not meeting minimum qualifications. The Employer's failure to notify the Union should invalidate the ESP as a violation of Article 31.02.

Ms. A did not meet the minimum qualifications listed on the job posting. The Union showed Ms. A's Associate Degree in Law Enforcement does not meet the minimum educational requirements. Although the Employer contends it can substitute experience for education, such substitution does not appear on the job posting. Arbitrator Stein held:

> **...[In] the second sentence of Article 30.02...the parties have an agreed upon remedy for employees who fail to "clearly demonstrate" on the application "how they possess the minimum qualifications" for a position.**
>
> > **Failure to do so will result in the applicant being screened out and rendered ineligible for further consideration.**

1199 (Gipson) and Ohio Department of Jobs and Family Services, Case No. 16-11-030825, 26, 27-0025-02-12 (2005), p. 8. If the Employer does have the discretion to substitute experience for education, surely it has to include that information on the job posting.

In sum, the ESP is so subjective and sloppily administered by the Employer that it is worthless in determining how an applicant is significantly

more qualified. The Union has shown Ms. A was not significantly more qualified than the Grievant.

The Union requests the Grievant be awarded the difference in pay between when she was denied the job and when she received a like-position. The Employer should be instructed to cease and desist the use of the ESP until it develops measures that specifically address the criteria listed in Article 30.02, and that would ensure the integrity of the process. Per Article 31.02, the Union should be given a 30-day notice so it can make comments on any new policy.

Employer Position

Contrary to the Union's assertion, Ms. A was minimally qualified based on application of the DAS equivalency guidelines. The "or equivalent" option for meeting minimum qualifications was part of the approved classification specification for Human Services Program Consultant, and so it was a valid criterion, even if the two words "or equivalent" were not posted verbatim. Furthermore, looking at equivalencies to the minimum qualifications is a normal and routine part of the screening process with applications for all posted positions. Ms. Coyle and Mr. Glass testified the information in the "Summary of Qualifications" section of Ms. A's application was reflective of

someone meeting minimum qualifications. Accordingly, Ms. A was properly screened into the applicant pool, and referred for interview.

The ESP is a valid selection instrument. Article 30.02 establishes a two-stage selection process. For candidates who are minimally qualified, Article 30.02 provides their applications will be further reviewed against the following criteria: qualifications, experience, education, and work record. This is exactly what happened in this case. Beyond screening for minimum qualifications, Article 30.02 makes clear the Employer may evaluate candidates' additional education, experience, or other qualifications. In fact, the reference to "minimum qualifications" occurs once, and from that point on the reference is to "qualifications," imply additional qualifications, preferred qualifications, or qualifications otherwise above and beyond the minimum. Further, Article 30.02 gives the Employer the right to use an instrument to measure the relative strength of these qualifications among those candidates who meet the minimum criteria. Even more important is the strong arbitral precedent establishing the Employer's right to determine what those qualifications are, as well as how they are measured.

Arbitrator Stanton held:

> **It is generally recognized that Management maintains the inherent right, obligation and responsibility to determine qualifications for a job, provided the factors considered in assessing**

qualifications relate directly to the duties required of the job and the employee's ability to meet those requirements.

...The determination of qualifications for a job are an inherent managerial right to be exercised in such a way that it is neither arbitrary, capricious or discriminatory.

1199 (Mumin) and Department of Alcohol & Drug Addiction Services, Case No. 27-21-930818-0959-02-12 (1994), pp. 12-13. Similarly, Arbitrator Weisheit held:

By Contract, the Employer has reserved rights to fill a vacancy with a less senior employee under expressly stated terms. In normal contract interpretation, such language grants the employer the right to implement and apply such a provision in a manner that is consistent, does not erode the effect of the primary means of filling the vacancy, and is neither arbitrary nor capricious.

1199 (Veysey) and [Unnamed Agency], Case No. 16-00-960520-0016-02-12 (1998), p. 5. And Arbitrator Goldberg held:

The Employer is correct in its interpretation of many arbitration authorities which hold that employers should have considerable discretion in cases involving the determination of merit or ability versus seniority for job promotions when the determination involves the substantive and technical aspects of a particular job. It is presumed that management is entitled to the benefit of the doubt when matters of technical qualifications are concerned and management selections based upon the substantive qualifications and aspects of a particular job should be accepted unless it can be proved by the Union

> **that management's decision was arbitrary, capricious, irrational or entirely unreasonable under the circumstances.**
>
> **...There is nothing in the Agreement between the parties which prohibits the Employer from creating a test or examination in order to objectively determine the qualifications of the respective candidates. Moreover, there is nothing in the Agreement which prohibits the Employer from giving greater weight to the qualifications component of the criteria so long as the other components of experience, education, work record and affirmative action are considered. The test or examination, however, must be fairly administered in order to provide an equal opportunity for all applicants....**

1199 (Norris) and Department of Human Resources, Case No. 16-00-980515-0015-02-12 (1999), p. 8.

Given precise contractual language allowing management discretion to select a "significantly more qualified" junior candidate over one with greater seniority, and in light of clearly established precedent that presumes management is entitled to the benefit of the doubt in matters of determining technical and substantive qualifications, it is the Union's burden to demonstrate the ESP was arbitrary, unreasonable, irrational, discriminatory, capricious, or otherwise designed to erode the effect of the primary means (seniority) of filling a vacancy. Mr. Glass testified the senior qualified candidate gets selected 78% of the time.

The Union failed to demonstrate any negative motivation on the part of the Employer. With respect to the ESP methodology, the specific instrument used, and the actions of managers involved in the decision, the evidence is clear and convincing: the process was reasonable, rational, and relevant to the job; and the process was objective, fair, and consistent for the candidates considered.

Mr. Glass testified the ESP was initially resisted by some managers for the way it limited their discretion; but that implementing a fair and objective selection process was necessary in order for the Agency to successfully defend employment decisions, particularly where previous challenges had led management to ad hoc, after-the-fact rationalizations of which candidate was best qualified.

The ESP should be determined to be a valid process, unless the Arbitrator wishes to substitute her own judgment for the Employer's in two critical elements of the process: 1) weighting of the quantitative and qualitative assessments; and 2) definition of the competitive range. First, Ms. Wilson and Mr. Glass offered a rational explanation for the respective weighting of the quantitative (20%) and qualitative (80%) elements – i.e., any assumptions about a candidate's qualifications based on a paper review were then tested during a structured interview, using knowledge-based,

problem-solving, and situational questions, leading to a more comprehensive understanding of each candidate's qualifications. Second, the ESP competitive range for 1199 positions is a 10% range of scores, with the top of the range automatically set at the highest score from among all interviewed candidates, and the bottom of the range calculated at 90% of that top score. Mr. Glass explained the range is like a graded curve used in academic settings.

These two elements of the process are not appropriate issues to be decided in this case. First, the Parties stipulated to a narrowly defined issue; to address these questions would exceed the Arbitrator's authority. Second, the Union sat on its rights for more than two years after its Delegates were offered the opportunity to attend training on the new process, so these questions are untimely. Mr. Proctor was aware of the ESP in 2004 when he handled another grievance involving its application. Moreover, the Union's contention that the Employer was required to notify the Union's central office of the ESP before its implementation, or to gain the Union's approval of it is unsupported by any contractual language, and is in direct opposition to the clear intent of Article 5 - Management Rights.

What is appropriate for consideration is the specific instrument the Employer used to evaluate candidates' qualifications for the instant vacancy,

and the process the Employer followed in selecting Ms. A over the Grievant. The evidence presented by the Union to either challenge the validity of the specific ESP instrument used in the instant case, or to challenge the process followed by the Employer in selecting Ms. A, was insufficient to prove a contract violation.

First, the Union contends Ms. A did not meet minimum qualifications. Ms. A's education and experience, however, were equivalent to the posted minimum qualifications. Second, the Union contends the Grievant was nervous at the interview. Both candidates experienced the same interview questions, format, and process, however. Third, the Union contends the Employer's interview notes were insufficient. Ms. McClure and Mr. Bahns are experienced interviewers, however, and they followed the ESP process. Fourth, the Union contends insufficient weight was given to the Grievant's education. The Employer, however, has the inherent right to determine qualifications for its positions. In this case, experience was a more important factor than education. Fifth, the Union contends the contractual criterion of work record was not properly considered. The Employer showed, however, that work records were largely reflected in the experience criterion, and that, per the ESP, an employee's disciplinary record might be a consideration after a candidate was assessed, scored, and recommended for

selection.[4] Sixth, the Union contends 1199 and OCSEA have different contractual standards not reflected in the ESP. But because 1199 contractual language gives seniority greater weight than OCSEA contractual language, the ESP used in 1199 vacancies uses a wider competitive range.

The Employer offered compelling evidence that the ESP instrument itself is valid, and the resulting employment decision should be upheld. Any argument over the content, extent, and meaning of individual interviewer notes and scores should not supplant a larger view of the process that takes into account the credible testimony of the managers involved, based on their consistent application of the process and their clear recollections of the performance of the two candidates at issue.

Ms. A scored the equivalent of an "A"; the Grievant scored the equivalent of a "D." An applicant who scores an "A" is significantly more qualified than an applicant who scores a "D." If two candidates had each scored an "A," neither would have been considered significantly more qualified than the other; in that case, the more senior employee would have been selected. Since only Ms. A scored an "A" – i.e., within the competitive

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[4] The Union did not offer testimony to establish what "word record" includes or does not include. Perhaps this is because the Union knows the same things the Employer knows about "work record" – i.e., if it refers to disciplines and evaluations, those things often lead to an appeal that remains unresolved for many months; and if it refers to experience, the Employer already is considering that criterion.

range – Ms. A was, by the Employer's predetermined standard, deemed to be significantly more qualified than the Grievant and the third candidate. Only if more than one candidate scores within the competitive range does seniority then become the tie-breaker. Seniority is not a qualification, and therefore is not given a raw or weighted score in the selection process.

While the Grievant scored highest on the Qualifications Assessment (weighted at 20%), she scored lowest of the three candidates on the Structured Interview (weighted at 80%). Both the Grievant and the third candidate (the most senior candidate) scored more than ten points below the cutoff for the competitive range. As a result, seniority never became a criterion. Accordingly, the grievance should be denied.

ARBITRATOR'S OPINION

The stipulated issue is characterized by the Employer as narrow:

> **Did the Employer violate Article 30.02 of the Agreement when it promoted a bargaining unit member with less seniority than the Grievant? If so, what shall the remedy be?**

The Arbitrator notes, however, that the relevant language of Article 30.02 is broad and comprehensive, and includes mandates:

> **...Applicants must clearly demonstrate on the application how they possess the minimum qualifications for the position. Failure to do so will result in the application being screened out and rendered ineligible for further consideration. All eligible applications shall be reviewed considering the following criteria: qualifications, experience, education, and work record. Employment diversity may be a factor in the selection. The Employer maintains the right to administer a test or instrument to measure the listed criteria. 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. The union may challenge the validity of the test or instrument as part of a non-selection grievance....**

Thus, in determining whether the Employer violated Article 30.02 when it selected Ms. A over the Grievant, it must be determined whether the Agreement's mandates have been followed:

> **1. Did Ms. A and the Grievant clearly demonstrate on their applications how they possess the minimum qualifications for the position?**
>
> **2. Did the Employer review the eligible applications considering qualifications, experience, education, and work record?**
>
> **3. Based on the listed criteria, was Ms. A significantly more qualified than the Grievant?**

1. <u>Minimum Qualifications</u>

The job posting listed the Minimum Qualifications:

Completion of undergraduate core program in social or behavioral science, health or pre-medicine or comparable field; 18 mos. exp. in delivery of human services, health care services or medical assistance in governmental, community or private human support services agency or medical provider. -OR completion of graduate core program in social or behavioral science or medicine-related or comparable field; 6 mos. exp. In delivery of human services, health care services or medical assistance in governmental, community or private human support services agency or medical provider.

Ms. A indicated her qualifications met the minimum because:

- **she was a Licensed Chemical Dependency Counselor;**
- **she had an Associate degree in Law Enforcement; and**
- **she had worked in health care/mental health for over 13 years.**

These qualifications, however, did <u>not</u> meet the minimum for the posted job. Ms. A did not have a bachelor's degree, which was a listed minimum educational qualification. The only alternative listed educational minimum qualification was a graduate degree (with less work experience required) – which Ms. A obviously also did not have.

The Employer contends Ms. A met the "or equivalent" option for meeting the minimum qualifications. The Employer concedes the "or equivalent" option was not stated in the job posting. Rather, it could be found in the classification specification. The classification specification

includes three options, (the first two being identical to the two options listed in the job posting):

> **1. Bachelor's degree in social or behavioral science, health or pre-medicine or comparable field; plus 18 months of relevant work experience; or**
>
> **2. Master's degree in social or behavioral science or medicine-related or comparable field; plus 6 months of relevant work experience; or**
>
> **3. "Equivalent of Minimum Class Qualifications for Employment noted above."**

Employer witnesses testified Ms. A met the "or equivalent" option based on the "DAS equivalency guidelines." These DAS equivalency guidelines are nowhere to be found in the record, however. The Employer testified the guidelines are "public." Based on that assertion, the Arbitrator is taking arbitral notice of the DAS "Minimum Qualification Conversion Table" found on the DAS website. The Table shows "2 years experience" to be the "equivalency" of an "undergraduate core program."[5]

Accordingly, although the Arbitrator agrees with the Union's assertion that the "or equivalent" option should have been listed on the job posting, it does appear that despite her lack of a bachelor's degree, and despite the fact that her associate's degree was not in a relevant field, Ms. A's work

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[5] http://das.ohio.gov.hrd/ccmqconversion.html

experience substituted for her lack of education credentials. She, therefore, met minimum qualifications for the position.

Without going into unnecessary detail, the Arbitrator notes the record shows the Grievant also met the minimum qualifications for the posted position.

2. <u>Qualifications, Experience, Education, and Work Record</u>

Article 30.02 requires the Employer to review all eligible applications (i.e., those that meet minimum qualifications) to be

> **reviewed considering the following criteria: qualifications, experience, education, and work record.**

Without going into unnecessary detail, the Arbitrator notes the eligible candidates' qualifications, experience, and education <u>were</u> reviewed by the Employer.[6]

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[6] The Union finds fault with the methodology by which the ESP reviews qualifications, experience, and education. Indeed, this case highlights the fact that the ESP gives very little weight to educational background; i.e., a candidate's educational credentials are reviewed only as a threshold matter to see if the candidate meets minimum qualifications (and even there, experience can substitute completely for education). As Employer witness Ms. Coyle testified on cross-examination:

> Q. How many points did [the Grievant] get for having way above and beyond the minimum education?
>
> A. There's no points given for having more than the minimum education.

Indeed, in the instant matter, this very limited use of educational credentials led to a candidate with a relevant master's degree being passed over in favor of a candidate without a bachelor's

(continued...)

The Union contends the Employer did not review the candidates' "work record(s)." The Arbitrator agrees. Employer witness Mr. Glass testified on cross-examination:

> **Q. How do you factor in work record, as required in the contract?**
>
> **A. I don't know that I would. It's an ill-defined term.**
>
> **Q. What does work record count for?**
>
> **A. It depends on how you want to define work record. We don't take into account disciplinary actions. We look at job experience.**
>
> **Q. Do you conflate experience and work record?**
>
> **A. Yes, in practice.**

And Employer witness Ms. Coyle testified on cross-examination:

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[6](...continued)
degree or any other relevant educational credentials. As Arbitrator Brookins commented:

> Education is almost universally viewed as a plus for any conceivable position....At the very least, a formal education is likely to enhance an applicant's capacity for growth in any position.
>
> ...[A] college degree is undoubtedly one of the most traditional and time-honored symbols of educational achievement....

1199 (Ferguson) and Ohio Department of Corrections, Case No. 28-05-971028-0083-02-12, p. 14.

The Arbitrator is mindful, however, of her limited role. As long as the Employer has not violated the Agreement, the Arbitrator must accept the Employer's approach; the Arbitrator cannot substitute her judgment for the Employer's.

Q. Where do you address work record?

A. Work record is not part of the minimum qualifications. So I didn't look at it. I didn't do anything with the work record. If a candidate has a pending discipline, that would come into play. Work record counts only as a demerit; you get nothing from a good record.

Similarly, Employer witness Ms. Wilson testified:

Q. How does this instrument [the ESP] measure work record?

A. I don't think that's a consideration until the selection is made, and then it's up to the Human Resources Chief to decide if work record affects it.

In sum, the record shows the ESP does not take into account the contractual criterion of work record.[7] Accordingly, by its use of the ESP, the

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[7] The Employer contends the Union waived its rights to challenge the ESP itself by not having filed a grievance within 15 days "of the date on which the grievant knew or reasonably should have had knowledge of the event." Article 7.06 (Step 2). The Employer notes HR Letter 5, which addresses the ESP, is dated March 15, 2003.

The Employer concedes, however, that HR Letter 5 was never sent to the central Union office. (An Employer witness testified a "Chapter President" was "informed" and it "might have been mentioned at an APC [Agency Professional Committee meeting]." The Union pointed out it does not have Chapter Presidents.

Article 31.02 requires the Employer to:

> ...inform the Union thirty (30) days prior, where additions to or changes in work rules which ar employees in these bargaining units.

The Union introduced into the record as an example an Artic Medical Board Human Resources Manager:

Employer violated Article 30.02.[8]

3. Significantly More Qualified

Article 30.02 requires the Employer to select the most senior applicant

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[7](...continued)

January 31, 2006

President
SEIU/District 1199
1395 Dublin Rd.
Columbus, OH 43215

Re: Revised Work Rules (Employee Appearance and Grooming - Workspace)

Dear President:

Please find attached revised work rules pertaining to Employee Appearance and Grooming and Workspace.

The effective date of these rules will be March 31, 2006. All employees have been advised of these changes and will be given the updated Work Rules prior to their implementation.

If you have any questions or need additional information, please contact me at the telephone number of e-mail address noted below.

Whether or not the ESP can be accurately characterized as a "work rule," the Arbitrator finds the Employer has waived its timeliness argument because it did not put the Union on notice of HR Letter 5 or the ESP prior to their implementation. And given that the instant grievance was filed within 15 days of the non-selection, and that Article 30.02 gives the Union the right to "challenge the validity of the test or instrument as part of a non-selection grievance," the Arbitrator holds the grievance is timely, and the Union's instant challenges to the ESP are contractually permissible.

[8] See 1199 (Norris) and Department of Human Resources, Case No. 16-00-980515-0015-02-12 (1999), p. 8:

> ...[T]here is nothing in the Agreement which prohibits the Employer from giving greater weight to the qualifications component of the criteria so long as the other components of experience, education, *work record* and affirmative action are considered.

(Italics added.)

who meets minimum qualifications, unless a junior candidate who meets minimum qualifications is "significantly more qualified."

There is no question the Employer has satisfied itself, by means of its elaborate scoring process and ESP protocol, that Ms. A was significantly more qualified than the Grievant. In addition to satisfying itself, however, the Employer must satisfy the dictates of the Agreement.

Article 30.02 permits the Employer to select a junior employee who is "significantly more qualified" than a more senior employee. Article 30.02 permits the Union to "challenge the validity of the test or instrument as part of a non-selection grievance." The combination of these two clauses means there must be some sort of record of how the junior employee was significantly more qualified. It is insufficient for the Employer to share only its conclusion that the junior employee was significantly more qualified. Yet, in effect, that is what the Employer has done in the instant matter.

HR Letter 5 - Enhanced Selection Process for Non-Exempt Positions states in pertinent part:

> Scored Structured Interview. This assessment tool is composed of interview questions and can also include job sample exercises, job simulations and/or skills tests as long as each component is directly linked to the content of the approved position description. To make this link evident, each interview question must contain a "justification" section where the required skills, knowledge and/or

abilities supporting each question are identified on the interview. Each question has a value (point scale) and preset criteria (benchmarks) to serve as a reference for the interviewer rating the candidate. All interviewers MUST document the candidate's response that supports their rating for each question....

(Emphasis original.) Moreover, the "Interview Guidelines" each interviewer is given states in pertinent part:

> **Key points to the interview process**
>
> ...
>
> - **Documentation of the interview process is critical. The interview is a key component in the selection process and is generally a target for criticism if the final selection decision is contested. Not only is it important to ensure that every question is job-related, but the interview process – from taking notes on each interview question, to summarizing the results – must be clearly documented. Every panel member should take notes during the interview.**
>
> ...

(Emphasis original.)

The record clearly demonstrates the interviewers' documentation of the candidates' responses in their interviews is woefully inadequate. Some of the interviewers took few or no notes.

If the interviewers could remember the candidates' responses over the passage of time, perhaps the lack of documentation would not be so critical in determining compliance with the Agreement. But the interviewers' testimony demonstrated it is human nature to forget things over time. As interviewer Bonds testified on cross-examination:

> Q. You gave [the Grievant] a 6 and [Ms. A] an 8 on question 7. Can you explain why?
>
> A. Honestly, I can't remember. [The Grievant], according to this note, didn't really take care of the clarification issue. On [Ms. A's], even though I didn't dot it, I probably wrote the "very good" after she gave the thing about the clarification, but I'm not at all sure. An 8 is just a little better than a 6, and what I see in front of me, that's how I rated them.
>
> Q. Do you remember why you rated them differently?
>
> A. I could guess.
>
> Q. A year later, is it hard to remember the specifics?
>
> A. Absolutely.

Moreover, on multiple occasions, interviewers' notes that do exist show extremely similar answers by Ms. A and the Grievant to the same question, yet that interviewer scored the two answers extremely differently. For example, when interviewer McClure was cross-examined as to why she

gave Ms. A 8 points and the Grievant 5 points to very similar answers to question #2, she responded:

> "Site audit" [said by Ms. A] relates to quality assurance; "site visit" [said by the Grievant] doesn't convey that to me.

As the Union pointed out, disparate scores on such similar answers makes the interview element of the ESP arbitrary and capricious.

The Employer contends the interview has safeguards built in, including there being a panel of three interviewers, as well as a requirement that they discuss any widely disparate scoring. In addition to the interviewers' lack of memory about any discussions, the fact that the ESP weights the interview at 80% makes the validity of the interview absolutely critical in determining whether the Employer has complied with Article 30.02.

The obvious intent of Article 30.02 is to make the selection process more objective and more transparent. Given that the Employer has made its choice to weight the interview at 80%, it is incumbent on the Employer to have specific documentation of candidates' answers and how those answers coorelate to the scores given. Here, the sketchy notes taken by the reviewers, coupled with their sketchy memories of what the candidates said in their interviews, make it impossible to know if the scores were rational. Indeed, from the notes that do exist, many of the scores appear to be

irrational, arbitrary, and capricious.

The Arbitrator finds the interviewers' lack of documentation of the candidates' answers, combined with the interviewers' lack of recall, combined with disparate scores being given to similar answers by different candidates, renders the ESP, as well as the instant selection, arbitrary and capricious. As such, the Arbitrator finds the Employer has violated Article 30.02.

AWARD

For the reasons set out above, the grievance is granted.

1. The Employer is to pay the Grievant by April 30, 2006 the difference in pay for the four pay periods when she was denied the job until she received a like position.

2. The Employer shall cease and desist in the use of the ESP until it develops measures that specifically address the criteria listed in Article 30.02, and that ensure the validity of the process.

3. The Employer shall send a copy of the revised ESP and any related documents such as a revised HR Letter 5 to the Union's Ohio State Director at least 30 calendar days in advance of implementation of the revised ESP.

DATED: March 31, 2006

Susan Grody Ruben, Esq.
Arbitrator