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In the Matter of Arbitration Between OCSEA/AFSCME Local 11 and The State of Ohio, Rehabilitation Services Commission	Before: Harry Graham

Case Numbers: 29-04(11-23-04)-0745-01-14
29-04(11-23-04)-0748-01-14

APPEARANCES: For OCSEA/AFSCME Local 11:

Brenda Goheen
OCSEA/AFSCME Local 11
390 Worthington Rd.
Westerville, OH 43082-8331

For The State of Ohio:

John Kinkela
Office of Collective Bargaining
100 East Broad St., 18th Floor
Columbus, OH. 43215

INTRODUCTION: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post-hearing briefs were filed in this dispute. They were exchanged by the Arbitrator on August 3, 2006 and the record was closed.

ISSUE: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

Was the State's denial of a promotion to Disability Claims Specialist of Janice Wilson and Elizabeth Stewart, employees senior to the selected candidates, a violation of Article 17 and, if so, what shall the remedy be?

BACKGROUND: The parties agree upon the events giving rise to this proceeding. On September 27, 2004 the Employer posted for three Disability Claims Specialist positions. A test was administered on October 18, 2004 and the positions were filled on November 28, 2004. Among those taking the test were the Grievants, Janice Wilson and Elizabeth Stewart. Ms. Wilson carries a seniority score of 609 points. Ms. Stewart has 438 points. Neither was promoted. The Employer selected Beth Goldhardt and Jeffrey Nowlin to fill the vacancies. Ms. Goldhardt has a seniority score of 368 points. That of Mr. Nowlin is 348 points. All involved were classified as Disability Claim Adjudicator 3's when the selection was made.

A grievance protesting the non-selection of Ms. Wilson and Ms. Stewart was filed. It was processed through the procedure of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

POSITION OF THE UNION: At Article 17, Section 17.05 the Agreement specifies the manner in which employees in pay range 28 or higher are to be selected. The relevant language provides:

If the position is in a classification which is assigned

> to pay ranges twenty-eight (28) or higher, the job shall be awarded to the eligible bargaining unit employee on the basis of qualifications, experience and education. When these factors are substantially equal, State seniority shall be the determining factor.

I have considered a dispute of this nature in the past. In case No. 14-00(990106)-0002-01014 (1999), Edwards, grievant, I determined that in the circumstances of that dispute a "rough equality" would suffice given the greater seniority of the Grievant. In this situation the Union is of the view that there exists "rough equality" between the Grievants and the people selected for the vacancies by the State. As that is the case, the Union contends the positions must be awarded to the Grievants.

The Grievants are senior to those awarded the vacant positions. The question thus becomes, are they "substantially equal" to the people awarded the jobs? The Union concludes they are.

In arriving at that conclusion the Union asserts the Employer gave improper weight to considerations of "education" and "experience" in determining the qualifications of the applicants. When selecting amongst the applicants the Employer considered education and experience to be synonymous. They were treated as a single factor. That is improper according to the Union as both are specified in Section 17.05 of the Agreement. The Employer

awarded all candidates four (4) points for education and experience. That is incorrect in the Union's view. The State cannot properly consider education and experience as one factor. The Agreement specifies them separately. Experience may be measured by evaluations, discipline or the lack thereof and commendations. Similarly, education must be carefully considered, to distinguish between a Harvard graduate (!) and the recipient of a degree from an on-line university. By failing to do so in this situation the State has negated the terms of the Agreement according to the Union.

In this situation the State relied upon a test to determine qualifications. In Edwards I determined that the concept of "qualifications" included evaluations, discipline, education and experience. At arbitration the State asserted the test included education and experience. Not so according to the Union.

Section 17.06 of the Agreement deals with "Proficiency Instruments." It provides that the Employer may use a test to determine if an applicant meets minimum qualifications. Under 17.06 a test is not to be used to determine relative skills and ability. At arbitration testimony was received from Elaine Stewart, (not related to the Grievant, Elizabeth Stewart). She deals with the Human Resources function on

behalf of the Employer. She indicated that education and experience were properly measured and that skill and knowledge were also measured by the test. If that is the case, Section 17.06, not Section 17.05 governs this dispute. As the Union views this situation, when the State determined that employees scoring 77 and above were substantially equal it improperly limits consideration of seniority. It used the proficiency test in violation of the Agreement. That an applicant had a higher score on the test does not equate to an applicant with superior qualifications in the opinion of the Union.

In this situation the State awarded four (4) points for Education and Experience. The Union asserts this is improper. It discourages applicants from including all aspects of their experience on their applications. In fact, the two successful bidders, Ms. Goldhardt and Mr. Nowlin misrepresented their experience on their application forms according to the Union. Ms. Goldhardt indicated on her application that she was a DCA3 for approximately 15 years. The State maintains personnel records on a form known as an EHOC. Examination of Ms. Goldhardt's EHOC shows she was a DCA3 for approximately seven years. Similarly, Mr. Nowlin indicated he had been a DCA3 for about 14 years. In fact, he was a DCA3 for about 5.5 years according to his EHOC. The difference is so great as to

constitute a deliberate misrepresentation, not an error according to the Union. It asserts that such erroneous information should be stricken from the applications of Mr. Nowlin and Ms. Goldhardt.

Experience is an important factor for promotion to this position. The Grievants both have more experience than do the people promoted by the State. They should be considered superior to their co-workers on this count according to the Union.

Ms. Wilson has been involved in claims processing for 23 years. She has vast experience. She has been a DCA3 for 9 years and a DCA2 for 16 years. In contrast, Ms. Goldhardt has been a DCA3 for 8 years and a DCA2 for 7 years. Ms. Stewart has 17 combined years as a DCA 2 and 3. Mr. Nowlin has 5.5 years as a DCA3 and 8 years as a DCA2. (13.5 total years). The Grievants are superior to the selected applicants on the factor of qualifications and experience the Union asserts.

Finally, with reference to education, the Union acknowledges that those selected appear to be superior to the Grievants. However, that is not the criteria. They are at least "roughly equal." This makes them "substantially equal" when examining the records of all involved employees in totality. As that is the case, the Grievants should be promoted with back pay the Union contends.

POSITION OF THE EMPLOYER: The State points to the Agreement in support of its action in this matter. Section 17.05 indicates that a classification in pay ranges 1-7 and 23-27 is to be awarded to the qualified employee with the most State seniority unless the Agency can show that the junior employee is "demonstrably superior" to the senior employee. This particular position is in pay range 31. The selection procedure is different for people in pay ranges 8-12 and 28 and higher. The Agreement provides that for those positions:

> The job shall be awarded to an eligible bargaining unit employee on the basis of qualifications, experience and education. When these factors are substantially equal, State seniority shall be the determining factor.

There is a great deal of history in the Rehabilitation Services Commission over the matter of promotions. The RSC has developed an assessment device (test) with the assistance of the Testing Unit of the Department of Administrative Services and an outside consultant, Dr. Diana Clarke. The parties went to arbitration over the propriety of this instrument and in a consent award Arbitrator Nels Nelson found the test to be content valid.

The RSC has developed a selection procedure per the Collective Bargaining Agreement. It differentiates between the positions to pay ranges 27 and below and 28 and above. Specific to pay ranges 28 and above, it sets forth the manner in which the assessment tool (test) is to be used and how it

will be combined with the experience and education of each of the candidates to generate a score which will be used in selection. When the State posted for the positions and completed its preliminary selection process six (6) candidates were regarded as being "substantially equal." Included were Ms. Goldhardt and Mr. Nowlin. Also included was Stepanie Hupp-Miller. Ms. Hupp-Miller had secured the highest ranking among those considered to be "substantially equal." She was not awarded a position as both Ms. Goldhardt and Mr. Nowlin had greater seniority.

When the RSC determines to fill a position at pay range 28 or above it goes through an assessment procedure to evaluate the bidders. This includes a test, an interview and a written exercise. The scores on these are cumulated. Bidders also receive points for experience and education. Positions are then awarded to those bidders with the greatest number of points. When two or more candidates have the same number points the State considers them to be substantially equal and awards the position to the candidates with the most seniority. This process has been used four times for DCS positions and several other positions in pay range 28 and higher.

The State is aware that I was the Arbitrator in a dispute between the Union and the Department of Health. (Edwards,

1999, 2001). In Edwards I was dealing with the failure of the Employer to interview the Grievant. Edwards also involved consideration of the disciplinary record of the Grievant. Neither are factors in this situation. The State contends Edwards is not germane to this dispute.

At arbitration the Union asserted the selection process of the State was flawed as it did not give sufficient weight to education and experience. The State points to the Agreement and notes it does not restrict its manner of weighting education and experience. The Employer is not prohibited from using a valid testing instrument, interviews and a written exercise to select among candidates for vacancies. In this case, the State asserts its selection procedure is reasonable and should not be disturbed.

As the Employer view it, the position of the Union equates seniority with qualifications. That is not necessarily always the case. That Stewart and Wilson have been in their positions longer than Goldhardt and Nowlin does not, standing alone, make them more qualified for the vacancies. The Employer made a thorough evaluation of the candidates. Its process was applied to all bidders. Nowlin and Goldhardt were the senior "substantially equal" bidders.

When it evaluated the applications that of Ms. Stewart was deficient. It did not provide the detail shown in the

applications of Ms. Wilson, Ms. Goldhardt and Mr. Nowlin. The State does not have to search the records to fill-in applications completely. That is the obligation of the applicant.

The Union does not, and cannot, argue that the Grievants are substantially equal to Goldhardt and Nowlin on the factor of education. Both have Bachelor's degrees in psychology. As the State sees it, the Union is asserting the Grievants are superior to the successful bidders on the criteria of experience and qualifications. As that is the case, they should be awarded the positions according to the Union. In essence, the position of the Union contends greater time in a position equates to greater experience and thus, greater qualifications. That may not be the case. In any event, by the terms of Section 17.05 the State is free to act as it did it contends.

As the selection process concluded six (6) candidates met the standard set by the Employer. Neither Grievant was among them, though they were close behind. That does not make them "substantially equal." The Agreement permits the Employer to act as it did in this instance the State asserts. It established a reasonable procedure. It applied it evenhandedly. It promoted the senior bidders who were in the top group of qualifiers. Under such circumstances the

grievances must be denied the State contends.

DISCUSSION: At Section 17.05 the Agreement indicates that the Employer has discretion when selecting amongst applicants for positions in pay ranges 28 and higher. The Employer may determine whom to select based upon "qualifications, experience and education." Only when these factors are "substantially equal" does state seniority become the determining factor. This language permits the Employer to evaluate candidates taking into account the factors specified by the Agreement. The action of the Employer must be in good faith, it must be reasonable, it must be free of the taint of discrimination or favoritism. If it meets these tests, it should be given deference by the Arbitrator.

The selection procedure used by the Employer for these positions has been the subject of intense scrutiny and development. As shown by Management Exhibit 1 Arbitrator Nels Nelson issued a Consent Award invovling these parties in 2001. In that award Arbitrator Nelson indicated that "The parties agree that tests for the DCA 3 and DCS are content valid." He also indicated that the consultants utilized by the Union and the State had agreed that "these tests shall be construed reliable and predictable." The test element of the selection process must be considered to meet the contractual requirement of determining the factors of "qualifications,

experience and education" found in Section 17.05.

Section 17.05 also provides that "Interviews may be scheduled at the discretion of the Agency." The Employer is explicitly permitted to interview candidates for promotion. Of course, it would be naive to assert an interview is an objective measure. It is subjective. The element of subjectivity was reduced by the manner in which the Employer utilized the interview. Three interviewers were involved. Each scored each applicant independently. The scores were averaged to arrive at the interview score of individual applicants. By using the interview process the Employer did not violate the Agreement.

Per Section 17.05 education and experience are elements of the selection process. The Employer developed a ranking of education. Points were given based upon the level of education possessed by a bidder and/or the amount of experience of a bidder. Greater education, eg. Masters degree, and more experience, eg. 6 or more years of experience, translated into more points. A person meeting those criteria would receive 4 points. Lesser points were allocated based upon lower levels of education and experience. The scale assigned by the Employer to education and experience is not arbitrary. It assigns more points for greater levels of education and experience. This is entirely

rational and free from bias.

In this situation all applicants were required to take a test. In point of fact, the test had been given previously and had been taken by some applicants in the past. Applicants were awarded the higher of the two scores they had attained. The action of the Employer was exceptionally generous to applicants. It was more than fair.

The language in Section 17.05 dealing with selection for positions in pay range 28 and above does not prohibit the Employer from acting as it did in this situation. Its evaluation process was reasonable. It cannot be determined that it was tainted with favoritism or discrimination. It was not administered with hostility to the grievants. In all respects, its use was permitted by the Agreement.

Included in the voluminous exhibits submitted in this proceeding is Joint Exhibit 5. It is a table setting forth the scores of the applicants for the Disability Claims Specialist position. A slightly different version is included in Employer Exhibit 2. Examining either Exhibit shows that Goldhardt and Nowlin are superior to Wilson and Stewart. Thus, referencing the attachment to Employer Exhibit 2, Goldhardt has a total score of 112. Nowlin's score is 110. The analogous scores for Wilson and Stewart are 99.5 and 102. The record shows that the selected candidates were superior

to the Grievants in the assessment and testing process. It cannot be concluded that the evaluation process adopted by the Employer violated the Agreement in any manner.

This dispute is unlike Edwards (1999, 2001) decided by me. In Edwards an important reason the Employer rejected the Grievant was her disciplinary history. Additionally, the Employer had restricted the number of applicants it would interview. I determined these flaws in the application procedure were serious enough to warrant setting aside the selection of the successful bidder. Those factors are not present in this situation. Edwards is not controlling.

In its post-hearing brief the Union asserted that Ms. Goldhardt and Mr. Nowlin had made substantial errors on their applications. As the Union reads the applications, Ms. Goldhardt shows she has been a Disability Claims Adjuster 3 since 8/13/90. Her official State personnel record, the EHOC, shows she became a DCA3 on 1/4/98. Mr. Nowlin's application and EHOC show the same sort of discrepancy according to the Union. On his application Mr. Nowlin showed he was a DCA3 from 5/91. His EHOC shows that he assumed that post on 8/9/99. It is not clear that the discrepancy asserted by the Union exists in fact. The application form is susceptible of interpretation. Thus, the top line of the "Experience" section calls for indicating the "Employer." Reading to the

right the column requires the applicant specify "From" and "To." Mr. Nowlin indicated in the ""From" section 5/91 which his EHOC shows as his date of hire with the Rehabilitation Services Commission. Similarly, Ms. Goldhardt shows in the "From" section 8/13/90 which was her date of hire per her EHOC. A reasonable interpretation of the information requested on the form is that it requires the date of hire, not the date of accession to the position held. It cannot be shown that Mr. Nowlin or Ms. Goldhardt falsified their applications.

AWARD: Both grievances are denied.

Signed and dated this 28th day of August, 2006 at Solon, OH.

Harry Graham

Harry Graham
Arbitrator