

OPINION AND AWARD

In the Matter of Arbitration
Between
SEIU/District 1199
The Health Care and Social Services Union
And
The State of Ohio, Office of Collective Bargaining and the
Department of Rehabilitation and Correction
Regarding

Grievance # 28-01-20060418-02-12
Brenda Duenas

Date of Hearing
March 15, 2007

Date of Briefs
April 13, 2007

Date of Award
May 16, 2007

APPEARANCES:

FOR THE STATE:

Chris Lambert, Advocate
George Lopez, MAS I
Joe Trejo, O.C.B.
Peggy McFadden, Personnel Officer 2
Karen Shaver, Personnel Officer 3
Becky Fair, PA
Joe Michael Dubina, Regional Administrator
Allison Ball, Administrative Asst.

FOR THE UNION:

J. A. Tudas, Advocate & Organizer
Brenda Duenas, Grievant (by phone)

An arbitration hearing was conducted March 15, 2007, at the Offices of SEIU/District 1199, Columbus, Ohio before Panel Arbitrator N. Eugene Brundige.

The stipulated issue presented to the Arbitrator reads:

“Did the Adult Parole Authority, DPCS, ODRC, violate Article 30.02 of the 2003-2006 Collective Bargaining Agreement by promoting a bargaining unit member less senior than the Grievant? If so, what shall the remedy be?”

The parties further jointly stipulated the following as facts:

1. The grievance is properly before the arbitrator.
2. The grievant, Brenda Duenas, has been employed as a Parole Officer with the Adult Parole Authority since January 9, 1995.
3. Jill Herman has been employed as a Parole Officer with the Adult Parole Authority since February 28, 1997.
4. Jill Herman, Parole Officer, was the selected candidate for PCN 2200.0 posted 1/31/06.
5. The position at issue is Senior Parole Officer PCN 2200.0 posted statewide from 1/31/06 to 2/10/06.
6. The grievance involves the selection and filling of a bargaining unit position under Article 30.02 of the 2003-2006 collective bargaining agreement.

All parties were given full opportunity to examine and cross examine witnesses, present evidence, and arguments which they did competently and professionally.

Post hearing briefs were filed in a timely manner.

RELEVANT CONTRACT SECTIONS:

30.02 Awarding the Job (Transfers and Promotions and Demotions)

"Lateral transfer" is defined as employee requested movement to a posted vacancy which is in the same pay range as the classification the employee currently holds.

"Promotion" is the movement of an employee to a posted vacancy in a classification with a higher pay range. A higher pay range is defined as a pay range in which the first step or the last step has a higher pay rate than the first or last step of the pay range to which the employee is currently assigned.

"Demotion" is defined as the movement of an employee to a vacant position within a classification covered by the terms of this Agreement pursuant to the provisions set forth for the filling of a vacancy, to a lower pay range only within the employee's current agency. A lower pay range is defined as a pay range in which the first step has a lower rate of pay than the first step of the pay range to which the employee is currently assigned. Should the employee be selected for an inter-agency transfer to a position in a lower pay range than that currently held, the employee shall be placed in the step closest to but not to exceed the step currently held by the employee.

"Inter-Agency Transfer" is defined as an employee-requested movement to a posted vacancy in a different agency. Should the employee be selected for an inter-agency transfer to a position with a higher pay range than that currently held by the employee, the employee shall be placed in the step to guarantee an increase of approximately four percent (4%). Should the employee be selected for an inter-agency transfer to a position in the same pay range currently held by the employee, the employee shall be placed in the same step of the pay range. If the agency has a Memorandum of Understanding (MOU) regarding pay, it shall take precedence over this section.

Employees in classifications not covered by the terms of this Agreement may not be demoted into a classification covered by the terms of this Agreement without the agreement of the Union. This does not include employees in the unclassified service in classifications not covered by the terms this Agreement who may be placed into a position covered by the terms of the Agreement where such unclassified status is revoked consistent with civil service law.

Applications will be considered filed timely if they are received or postmarked no later than the closing date listed on the posting. 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.

The Employer may use proficiency testing and/or assessments to determine if an applicant meets minimum qualifications and, if applicable to rate applicants pursuant to this Section. Proficiency tests or other assessments shall be released only to a Union designee who is not an employee of the State of Ohio that will use a review process that assures maintenance of security and integrity of the test.

The Employer and the Union agree, through each Agency Professional Committee to review and discuss the agency's EEO Strategic plan prior to submission to State EOD. Such plans shall include an employee diversity analysis. Job vacancies shall be awarded in the following sequential manner:

- A. The job shall first be awarded to a bargaining unit applicant working at the facility where the vacancy exists in accordance with the above criteria.
- B. If no selection is made from A above, the job shall be awarded to a bargaining unit applicant working in the agency where the vacancy exists in accordance with the above criteria.
- C. If no selection is made from B above, the job shall be awarded to an applicant working in the bargaining unit in accordance with the above criteria.
- D. If no selection is made from C above, the job may be awarded by hiring a new employee.

Within non-institutional agencies and within the Adult Parole Authority, step A above shall not apply.

This Agreement supersedes Ohio Civil Service Laws and Rules regarding eligibility lists for promotions.

Employees serving in a trial or probationary period shall not be permitted to bid on job vacancies. An employee who fails to complete the probationary period for a position shall be restricted from bidding on the same classification for one (1) year.

An employee shall be permitted to bid on a job vacancy while receiving disability leave benefits, but shall not be eligible to fill the vacancy unless the employee is available to participate in the selection process and available to assume the position on the designated start date.

BACKGROUND:

The Adult Parole Authority of the Ohio Department of Rehabilitation and Correction determined to fill a position of Senior Patrol Officer identified with a Position Control Number (PCN) of 2200.0. The position was posted statewide on January 31, 2006, and remained posted until February 10, 2006.

The Employer utilized its Senior Patrol Officer screening guide to evaluate each applicant considering four (4) criteria, "qualifications, experience, education and work record." The collective bargaining agreement requires that, "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 first three (3) sections of the process - A, B, and C - are scored by the Personnel Department based upon the applications of the candidates. Section D consists of an interview panel of four (4) persons who assign points to answers given to specific questions. The same questions are asked of each candidate.

All four (4) sections of the process are totaled.

Jill Herman was selected for the position in question. On the Employer's screening guide she received a total score of 72. Ms. Duenas was the more senior candidate and she received a total score of 63.

The Employer utilizes a scale which states that for a junior candidate to be judged "significantly more qualified" the junior employee must have at least two (2) more points per years of seniority difference.

According to the Employer's calculation there is a nine (9) point differential which justifies selecting the less senior employee. According to the Employer's guidelines anything more than a four (4) point difference would justify the selection.

There is agreement among the parties that both candidates meet the minimum qualifications for the position.

The Grievant and the Union believe Ms. Duenas should have been awarded the position.

A grievance was filed April 18, 2006, challenging the decision of the Employer. The statement of the grievance reads, "*Grievant was denied a promotion and promotion was granted to an employee with less seniority.*"

POSITION OF THE EMPLOYER:

The Employer notes for the record that the grievant Ms. Duenas is a dedicated employee and "there is no question that the grievant is an asset to the organization in her capacity as parole officer."¹

The Employer believes that the process utilized in selecting an applicant in this case "rationally measured criteria the Contract prescribes for all selections".²

¹ Employer's Post Hearing Brief, page 1.

The Employer relied on a previous case by Arbitrator Brookins which analyzed the selection process for determining "significantly more qualified" and found that it was an equitable means of deterring that question.³

The Employer believes it has met its burden and the selection of the junior candidate was not arbitrary, capricious, or discriminatory.

The Employer points out that the Union has challenged only specific parts of the selection process. Sections A and B of the process do not appear to be in dispute.

The grievant was awarded fifteen (15) points for her educational achievement (Section A) and the selected candidate was awarded twenty (20).

Both candidates received the maximum twenty (20) points for Work Record (Section B).

Section C (Experience) was challenged by the Grievant and Union. The Grievant's length of service to the Department was stipulated by the parties. The Grievant was properly credited with eleven (11) years one (1) month of service. Because the Grievant had training experience she received an additional two (2) points for a total of thirteen (13).

The selected candidate received eleven (11) points for her service with the Agency plus additional work related experience. She also received two (2) points for training.

The Employer argues that the calculation for experience was properly done for the selected candidate.

² IBID

³ *Ferguson*, OCB Award # 1358, 2/24/99

The Employer argues that the banking, retail sales, and legal-clerical work were not related to the position being filled and thus were rightly excluded from the selection process.

The Employer takes specific exception to the assertion by the Union that the experiences the Grievant listed at Star Bank, Famous Footwear, and First Virginia Bank should have counted.

The Employer also disagrees with the Union that the experience at a municipal court and two (2) law firms were related to the duties. The Employer believes these duties were clerical and administrative support in nature.

While acknowledging the Grievant performed some Senior Parole Office duties during her tenure, the Employer argues that these activities were included in the overall credit she received as a parole officer.

Management noted that the Grievant admitted under cross examination that she did not note on her application that her work at the Akron Municipal Court was an internship thus it concludes this experience cannot be considered.

The Employer argues that even if some of the experiences are counted they cannot make up the nine (9) point differential between the two candidates.

The Employer turned to a defense of Section D of the process - the qualification and selection interview.

The Employer believes it proved that it applied its process fairly and in a manner that was not discriminatory, arbitrary, or capricious. The Employer concludes that this shifts the burden to the Union to "prove otherwise."⁴

⁴ Management's Post Hearing Brief, page 9.

Management notes that the Union challenges the subjective nature of the interview process and argues that the Grievant was not treated unfairly.

The Employer offers its analysis of questions 1 and 2. This Arbitrator will not discuss those defenses in detail here due to the fact they will be discussed in the Opinion and Award section.

Finally the Employer notes the Union raised the issue that other selections of Senior Parole Officers have been inconsistently applied and argues that the Union has failed to prove any such cases.

The Employer concludes by arguing that the Union did not meet its burden in this case and asks that the grievance be denied in its entirety.

POSITION OF THE UNION:

The Union argues that the burden in this case lies with Management to prove that the selected candidate was "significantly more qualified." The Parties stipulated that both candidates meet the minimum qualifications and thus it is incumbent upon the Employer to demonstrate how the selected employee meets the "significantly more qualified" standard.

The Union believes the Grievant was scored incorrectly in the areas of experience and qualifications.

The Union notes that the Education section criteria does not permit credit for additional degrees and certificates and cites that lack of credit as a flaw in the process.

In spite of this concern the Union concedes that “education appears to have been scored correctly.”⁵

Likewise the Union does not dispute the calculation of the record/performance section wherein both candidates received the maximum twenty (20) points.

The Union then offers an analysis of the experience scoring section. After a careful review of the scoring of the selected candidate’s record the Union concludes “it appears that Herman’s score of thirteen (13) as shown on page 5 of JX-5 is correct per Management’s scoring instructions.”⁶

The Union notes that the scoring of the Grievant did not take into account her prior work experience when the scorer gave her eleven (11) points and two (2) additional as a trainer.

The Union notes that Personnel Officer McFadden testified that she did not consider the contents of the the Grievant’s resume attached to the application.

The Union argues that resumes should be considered noting that the DAS posting makes reference to resumes being optional, and noting that the bottom of the application makes reference to “applications/resumes received through the US Mail.”⁷

The Union points to the testimony of Personnel Officer McFadden who noted that credit “could have been given”⁸ for each of the jobs listed.

The Union offers its view of what the summary of points should be and incorporates that view into the following chart:

⁵ Union’s Post Hearing Brief, page 2.

⁶ Ibid.

⁷ Joint Exhibit 5.

⁸ Union’s Post Hearing Brief, page 3.

	Employer/Position	Full or part time	Dates	Point basis	Point years	Points	Carryover
1	Akron Municipal Court Bailiff assistant	Internship	May 1986-Aug 1986 (400 hours)	.5 points for internship greater than 200 hours	n/a	0.5	0
2	Buckingham, Doolittle & Burroughs Docket Clerk	Full time	Sept 1986-June 1987	1 point for each year of full time work and .5 point for fraction of a year greater than 6 mo.	6 mo.	0.5	3 months full time
3	Rosen & DeMartino Law library clerk and paralegal duties	Full time	June 1987-June 1988	1 point for each year of full time work and .5 point for fraction of a year greater than 6 mo.	1	1	1 month full time
4	First Virginia Bank Assistant Manager	Full time	July 1988-Nov 1991	1 point for each year of full time work and .5 point for fraction of a year greater than 6 mo.	3	3	4 months full time
5	Star Bank, Cleveland, Ohio-Operations Manager	Full time	Aug 1993-Dec 1994	1 point for each year of full time work and .5 point for fraction of a year greater than 6 mo.	1	1	4 months full time
6	APA Parole Officer	Full Time	Jan 1995-Feb 2006	1 point for each year of full time work and .5 point for fraction of a year greater than 6 mo.	11	11	0
7	Combining 2, 3, 4 & 5 carryover	Full Time	12 mo. Full time	1 point for each year of full time work and .5 point for fraction of a year greater than 6 mo.	1	1	0
Experience points						18	
Training points						2	
Total Experience points						20	

The Union discussion of Section D of the process (Qualifications) notes that three (3) of the four (4) members of the interview team are in the same chain of command (Ball and Dowdell report directly to Regional Administrator Joe Dubina.) Only Carolyn Reed, Parole Services Supervisor from Cleveland, was from a separate unit.

The Union notes that "the panel selected for this interview certainly opens the door for bias and favoritism."⁹

The Union also believes the panel violated the procedures and instructions established for the panels which states, "Each interviewer shall independently record the interviewee's responses, equate a score to each question and sign and date their form. Each member of the interview panel shall independently score the answer to each question."

The Union then offered its own analysis of the scoring of questions 1 and 2 of the structured interview.

The Union cites a decision rendered by Arbitrator Robert G. Stein wherein he discusses the criteria for determining "significantly more qualified."¹⁰

The Union believes the Employer has not met its burden in this case and requests that the grievance be granted.

The remedy requested is to award the Senior Parole Officer position in the Akron Regional Office to the Grievant and that she be awarded the pay difference for the period of time Ms. Herman has held the position.

DISCUSSION:

The burden of persuasion in promotion cases has been discussed by many arbitrators. Arbitrator Janet Gaunt succinctly stated the standard observed by many in a 1988 case when she stated:

⁹ Union Post Hearing Brief, page 5.

¹⁰ Case no.14-000-950712-0086-02-11.

"In promotion cases challenging action under "relative ability" clauses, union must establish that bypassed senior bargaining unit member was qualified to fill position in question, and then burden of proof shifts to employer to demonstrate that select applicant was substantially better in ability and performance." ¹¹

In this case the Parties have stipulated that the Grievant meets the minimum qualifications for the position. Thus, the threshold question has been answered. The burden to convince the Arbitrator that the junior employee is "significantly more qualified" lies with Management.

The Employer is to be commended for its efforts to provide a system that attempts to fairly determine the question of "significantly more qualified," for such determinations are always difficult because the lives and careers of individual employees are significantly impacted.

Such cases are very fact intensive and require that each case be examined to determine if each applicant is treated fairly and is given full credit for the contractual criteria.

The Collective Bargaining Agreement gives the Union the right to challenge any test or instrument utilized, but nothing in the record of this case indicates that the Union has elected to do so.

Based upon the fact that other arbitrators have reviewed the current departmental procedure and upheld it, and the reality that the Union has not challenged the instrument itself, the consideration in this Opinion will be limited to the application of the process in this specific case.

¹¹ Wapato School District, 91 LA 1156, Wapato School District, and Public School Employees of

There are two (2) basic issues in this case. The first relates to whether information on a resume must be considered by Management in assessing points for sections A, B, and C.

The second relates to the interview process (section D) specifically questions 1 and 2.

Management points to Section 30.02 where it states, "Applicants must clearly demonstrate ***on the application*** (emphasis added) how they possess the *minimum qualifications (emphasis added)* for the position. Failure to do so will result in the application being screened out and rendered ineligible for further consideration.

The process is clearly a bifurcated one. First, applications are screened to weed out those who do not meet minimum qualifications. A clear reading of the agreement shows that this is the focus of this section and this phrase.

After the initial minimum qualifications are determined the remaining applications are more carefully reviewed based upon the process utilized by the Agency.

Personnel Officer Shaver admitted on cross examination that she considered resumes as a part of her reviews. ✓

Absent clear direction to applicants that resume materials will not be considered, each applicant has a right to assume such material will be considered.

Personnel Officer McFadden admitted that she did not consider the contents of the resume of the Grievant. Thus, it is my determination that Management erred by not considering the material contained on the resume.

As an Arbitrator I hesitate to substitute my judgment as to which resume items should be counted and how much weight should be given. Instead I will merely rely on the

testimony of Personnel Officer McFadden as she stated under cross examination the points she would have awarded if she had considered the resume.

Ms. McFadden testified that she would have awarded .5 points for the Akron Municipal Court Internship if it had a duration of at least 200 hours. Ms. Duenas testified that the internship was for a period of 400 hours.

Likewise she testified that she would have awarded .5 points for the work with Buckingham, Doolittle, and Burroughs with a three (3) month carryover.

Ms. McFadden was less sure she would have counted the one (1) year experience with Rosen and DeMartino law firm. She said she would have discussed that entry with her supervisor. I will not include any points for this entry.

Ms. McFadden would have awarded three (3) points for First Virginia Bank with a four (4) month carryover, and one (1) point for the Star Bank entry with a four (4) month carryover.

By my calculation an appropriate score for Ms. Duenas would be sixteen (16) points with a twelve (12) month carryover. Ms. Duenas states seniority was eleven (11) years plus a one (1) month carryover. Thus the score for Experience would be seventeen (17) plus the two (2) points for training for a total of nineteen (19). ✓

The second issue relates to the Interview section of the process.

Management argues that there is some type of a "shifting burden" which requires the Union to prove how the interview process was arbitrary or capricious. I disagree. The more subjective nature of the interview process, and

this particular process in particular, leaves the burden still with Management to persuade.

I take note of the Union's point regarding the composition of the screening panel regarding the possibility of subjectivity due to the composition of the panel. While the point is well taken, great deference is given to Management to make its own determination regarding management processes.

The risk for Management is that such appointments invite greater scrutiny of the actions taken by that panel.

The question of compliance with internal departmental policy is a different one. Joint Exhibit 4 states the requirements for panels. Section D states:

"The same job related questions shall be asked of each applicant interviewed and the responses recorded and scored as objectively as possible. Each interviewer shall independently record the interviewee's responses, equate a score to each question and sign and date their form. Each member of the interview panel shall independently score the answer to each question. At the conclusion of the interview, the members of the panel shall discuss the interviewee's responses and come to a consensus recording the score for each question on the screening criteria. Twenty – (20) is the maximum number of points allowed."

The testimony of Mr. Dubina does not clearly indicate that each interviewer independently recorded the responses and signed and dated their respective forms. Instead his testimony and a review of the response sheets of each panel member would indicate that agreement was reached **before** any scores were recorded.

This would appear to fail to comply with the instructions provided by the Agency to interviewing panels.

Instead, based upon Joint Exhibits 8 and 9, it appears that the panel members each took notes, then discussed their impressions and all recorded the same number responses. The part that is missing is the independent numbers assignment of each question prior to seeking a consensus recommendation. ✓

If these conclusions are correct, such action appears to not comply with the independent decision making required by Section D of the instructions.

In the instant case it does not appear to be necessary for the Arbitrator to further analyze questions 1 or 2. In so doing I render no judgment regarding whether the interview panel process in this case fulfills the requirements of the Collective Bargaining Agreement.

In summary, even allowing the interview numbers to stand, if the calculations had been properly done, the Grievant and the selected candidate would compare as follows:

	Jill Herman	Brenda Duenas
Education	20	15
Work Record	20	20
Experience	13	19
Qualifications	19	15
TOTAL	72	70

The totals clearly do not comply with the Agency's two (2) point per year standard.

In a broader sense I take seriously the words of Arbitrator Stein in Case No. 14-000-950712-0086-02-11 when he said:

"In order to justify the promotion of a junior employee over a senior employee, the margin of difference must be discernible. Some arbitrators give latitude to management to choose the more junior employee except on cases where the margin is diminutive. This type of reasoning would be persuasive if Article 30.02 was a typical relative ability clause. However, Article 30.02 is not typical, it requires the employer to meet a higher standard of significantly more qualified. Significantly more qualified means the junior employee must be superior, based on clear and convincing qualifications. A junior employee who may be marginally superior is not sufficient given the requirement of 30.02. The burden is on the Employer to demonstrate in a reasonable and sound way that the junior employee is superior."

In this case the Employer has simply not met the burden of convincing a neutral party that the junior employee is significantly more qualified than the Grievant even using its own process.

AWARD:

The grievance is granted.

Grievant shall be awarded the position of Senior Parole Officer in the Akron Regional Office.

The Grievant shall receive the difference in pay between her current salary and the salary she would have received as a Senior Parole Officer. Such back pay shall be from the time Ms. Herman was awarded the position.

Issued at London, Ohio this 16th day of May, 2007.


N. Eugene Brundige, Arbitrator